

PART II

International University College of Turin

Independent Policy Report

Independent Policy Report

Working Group on Legal Standards

International University College (Turin)
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PART II

BEYOND THE END OF HISTORY, ASSERTING THE PRIMACY OF THE LAW OVER ECONOMIC POWER

Abstract

The UN offers the basic institutional structure to negotiate a Global Economic Constitutional Treaty, and has jurisdiction to do so. The General Assembly is the most legitimate body currently available to initiate the process, although as an institution the UN lacks independence, since the US exercises ultimate control through economic pressures. The initiative for a process leading to global and legitimized economic and financial legality should be placed within the Economic and Social Council. To be capable of governing the global financial system the law should be sovereign. Sovereign law is a political artifact not a technology. The nature of global law as a space without territory must be fully appreciated before attempting to use it as a solution to the financial crisis. The law must gain control of the global space. This is the most important political challenge of our era. There is an apparent tension between legitimacy and effectiveness that can be overcome only by limiting professionalism in favor of politics. Accordingly, the mere substantive dichotomy “standards versus rules” cannot theoretically support the necessity to tackle the crisis by means of the law. Rather, attention should be paid to institutional arrangements. Standards (or “principles”) are highly generic normative propositions, while rules are specific. The choice among standards and rules entails important implications on both interpretation and enforcement. Legal standards should only be adopted with a medium-long-term vision capable of considering a highly pluralistic enforcement and institutional framework. This scenario requires sustained investment in a legal and financial culture up to the task. “Hard law” should be preferred to “soft law” in developing a legal structure capable to govern the market. It is useless to create new rules or standards unless the issue of their effective enforcement is fully appreciated and steps are moved to guarantee it. The most urgent issue is returning privatized global rules and soft-law processes under public control. The judicial function, even within the set limits of jurisdiction, can help in the global effort to develop established principles of fundamental liability and justice. A cosmopolitan exercise of coordinated judicial authority might facilitate this function. Ex-post models of

accountability for financial damages may be scarcely effective and difficult to organize. The desirable gradual reduction in dangerous financial innovation can only be introduced with an effective ex-ante decentralized public-minded gate-keeping control. Fixing the economic and power unbalance between the regulator and the regulated is a priority for any legal project aiming at effectiveness. Consideration should be given to the possible development of a “global financial misconduct intelligence prosecution and police authority” as a first common effort towards the development of a global class of public-minded civil servants.

2.1 The United Nations offers the basic institutional structure to negotiate a Global Economic Constitutional Treaty. It has jurisdiction to do so. The General Assembly, comprised of 192 States, is the most legitimate body currently available to initiate the process.

Due to post-World War II origins, the main purpose of the UN is to “to maintain international peace and security”, but we cannot overlook article 1.3 of the Charter, which states that one of the goals is “to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character”. The broad nature of the second “mission” appears extremely important in the current situation of global economic and financial meltdown that undoubtedly represents an economic, social, cultural, and humanitarian problem.

Article 13.1 of the Charter identifies the General Assembly of the UN as the body in charge to “initiate studies and make recommendations for the purpose of: **a.** promoting international co-operation in the political field and encouraging the progressive development of international law and its codification; **b.** promoting international co-operation in the economic, social, cultural, educational, and health fields”. The body where all the member states are represented, and where the vote of every country counts the same, could be the place to discuss a new international legal system of the financial markets and a new model of globalization, and it could encourage the creation of a new treaty of adoption of a Global Economic Constitution.

One must recall that the General Assembly does not have autonomous legislative power and its recommendations are not binding. Politics will therefore be the key to their implementation. According to article 18 of the Charter, a majority vote of the present and voting members would be sufficient to adopt in the domain of the economic order a declaration of principles like the 1948

Universal Declaration of Human Rights. To be sure, the issues of effective implementation would remain.

2.2 The United States have Ultimate Control over the UN and they exercise it through economic pressures. Thus, as an institution the United Nations lacks independence.

The paradox of the current situation and the real obstacles that need to be overcome are better shown if one compares the global budget of all the UN's system (estimated in \$20 billion), or the UN's current annual regular budget (represented by mandatory contributions covering UN activities, staff and basic infrastructure at the UN headquarter), which has been recently reduced to \$1.8 billion after several cuts, with the trillions that have been injected in private corporations bailout programs or toxic assets shopping.

The UN, its General Assembly and its specialized economic institutions could represent the perfect platform to implement public, democratic, and universal policies; yet, a reclassification of their power would be crucial to that effect. It is critical to reform the relationship between bodies such as ECOSOC/UNCTAD and the major powers in global politics and economy – allegedly, the Security Council, and the Bretton Woods Institutions (as well as the WTO).

There is one country which has played a fundamental role in establishing, building and shaping the UN: the United States. This dominant position stems from various factors: first of all the UN was originally the idea of US President Franklin Delano Roosevelt. It was also Roosevelt who suggested granting the veto power to the permanent members of the Security Council, while the US Senate and the US House of Representatives requested by unanimous votes to establish the UN headquarters in the US, and therefore were placed in New York thanks to a donation from John D. Rockefeller Jr.

The UN does not have independent financial sources, but they have to count on dues and donations by the member states. According to the contributive mechanism, every country has to participate to the UN budget. The US is the first contributor, with a share of around 22% of the annual budget that in fact should be higher since they account for about 30% of the global economy, but in 1995 the US unilaterally decided to limit its contributions. Being the highest contributor, the US can use money as a threat, which is exactly what it has done in the last decades as a reaction against the increased importance of the global South.

In fact, for many institutions like the Heritage Foundation, the UN had become the main vehicle to bring about a New International Economic Order (NIEO) that would replace the centrality of the United States and of their development models. Thus, taking advantage of the 1980s debt crisis of many developing countries, and of the structural adjustment programs of the World

Bank and of the International Monetary Fund, the United States managed to exercise strong pressure over the UN, which, for example, resulted in the dismantling of the UN Center on Transnational Corporations, which had repeatedly accused multinational corporations of the exploitation of people and natural resources; the abolition of the post of Director General for International Economic Cooperation and Development; the rejection of the program of debt forgiveness proposed during UNCTAD V in Belgrade.

Until now, the US economic power has been used to reduce the political discretion of the UN and impose some specific reforms invariably moving in the direction of curtailing UN power, personnel, and public information expenses by reduction of their budget. As of 1995, when UN officials advocated global taxes to address funding problems created by the huge amounts overdue by the US, the US Congress passed a law stipulating that the US would not pay its dues if global taxes were discussed in any UN venue.

The US is not solely responsible for keeping the UN under economic conditionality. Five other states were behind in their payments in fall of 2005 – Spain, Japan, China, Korea and Brazil - with global states' arrears amounting to 62% of the assessed budget. While some countries simply postponed the payment, others tried to use the economic contribution to achieve political aims, as to obtain a permanent seat in the Security Council. The first consequence of the huge UN credit toward rich countries is the reduction of activity, as demonstrated by the fact that during the two biennia 2004-2005 and 2006-2007, a fundamental branch of the UN, the United Nations Development Program (UNDP) was only able to perform about 20% of its total programmed activities without specific donor requirement. The current meltdown now risks imposing even more severe restrictions, which will ultimately threaten the achievement of the important Millennium Development Goals (MDGs).

2.3 Despite their lack of independence and democracy, the UN is in a comparatively better position to define the basic process leading to a global economic constitutional treaty.

The world is looking for an alternative, with international financial institutions such as the WB and IMF lacking political legitimacy and facing longtime criticism on their conditionality approaches with developing countries and on their general macroeconomic policies which are in part responsible for the current global economic crisis. Such institutions cannot be again the global financial regulators without significant change.

In this scenario, only the UN can guarantee universal participation and acceptance, since they provide the only forum where all states have a say, and - unlike the WB and IMF - a range of more transparent and accountable specialized economic institutions such as the Economic and Social Council (ECOSOC) and

the United Nations Conference on Trade and Development (UNCTAD), or the new “Global Economic Council” suggested by Josef Stiglitz’s UN advisory panel.

2.4 Both on the financial crisis and on the environmental issue the UN has proved long-sighted in its recent policy-making attempts. Its leadership in the search of a global economic and financial legality should be politically supported both by States and by civil society.

In its 2005 *World Economic and Social Survey*, the UN seemed to be the only “mainstream” international institution to warn against international capital flows. The 2005 report states that while standard economic theory argues that international private capital flows will make a major contribution to development to the extent that such capital will flow from capital-abundant developed countries to capital-scarce developing countries, “in recent years, reality has contradicted (...) this standard theory (...). For the last seven years, developing countries have transferred large amount of resources to developed countries. In addition to this, private capital flows to developing countries are highly concentrated in a group of large middle-income countries and are particularly insufficient for low-income and small countries.”

More importantly, the UN report does not hide the fact that such capital flows have undoubtedly increased risks for financial crisis in both developing and developed countries: “private capital flows to developing countries have been highly volatile and reversible; as a consequence, they have been a major factor in causing developmentally costly currency and financial crises. Rather than smooth domestic expenditure, private capital flows seem to have contributed to making it more volatile.” Moreover, the global stimulus package should bring no new debt, nor should conditions be attached to grants for developing countries: “Indeed, the package should enhance their ability to choose from a range of policy options including capital controls (which should be “re-legitimized” as essential crisis prevention and mitigation tools) and various counter-cyclical measures (...). This stimulus could also include debt relief from arrears accumulated over the previous decades.”

Another positive aspect of UN institutions is their advocacy and implementation of green plans for several years. A very good example is the most recent report by the United Nations Environment Program (UNEP), which suggests that investments could revive the current downturn of the world economy and aid in fighting poverty, decreasing unemployment, and of course brawling climate change. The 2009 *Global Green New Deal* report suggests a total of \$750 billion investment in “more energy efficient buildings, renewable energies, better transport, improved agriculture and measures to safeguard nature - - such as fresh water, forests or coral reefs”. The report suggests taxing oil as a source for this investment. Countries of the Organization for Economic

Cooperation and Development (OECD), which are considered wealthy nations, consume approximately 20 billion barrels a year: any taxing on such countries would go unnoticed, especially after oil prices went from \$140 in 2008 to the current price of \$40 a barrel. If one were to put a five-year levy in OECD countries of \$5 a barrel, one would generate \$100 billion per year. This translates into roughly 3 cents per liter. The report emphasizes that even with all the “Environment Talk” by international institutions almost \$220 billion is spent annually on agricultural subsidies while in return a marginal amount is going to reforestation. Moreover, the same amount of public investment is channeled to fossil fuel energy, while in return 2 billion people globally do not have electricity, oil or gas to cook food and provide heat and light.

Publications by UNEP are concentrating on the viability and feasibility of green investment, underlining its employment benefits. Last year, the comprehensive joint report *Green Jobs: Towards Decent Work in a Sustainable, Low-Carbon World* established that there are new jobs created in many sectors of global economies in both developing and developed countries because of the changing patterns of employment and investment that have resulted from efforts to reduce climate change.

2.5 The initiative for a process leading to global and legitimized economic and financial legality should be placed within the Economic and Social Council.

The United Nations Economic and Social Council (ECOSOC) was originally created 63 years ago as a mechanism for global economic and financial policy-making. ECOSOC was founded as the principal organ to coordinate economic, social, and related work of 14 UN specialized agencies, functional commissions and 5 regional commissions. The UN Charter in more than one article (mainly articles 57 and 63) specifies that specialized institutions such as the WB and IMF “shall be brought into relationship with the UN by entering into agreements to define the terms of the relationship, and that ECOSOC may coordinate the activities of the specialized agencies through consultation with and recommendations to such agencies.”, as recently restated in the 2009 *Strengthening the Relationship between ECOSOC and the Bretton Woods Institutions* report.

It is within ECOSOC that a first proposal to review the institutions of the global economy should be advanced, and then presented for debate at the General Assembly. While the UN Charter makes it clear that decisions taken by ECOSOC are not binding either on member states, or even on the specialized agencies of the United Nations System, nobody would dispute a specially granted (and funded) initiative role.

2.6 To be capable of governing the global financial system the law should be sovereign. Sovereign law is a political artifact not a technology.

Urgent fundamental measures such as cancelling the debt or returning to some external standards for currency “only” require some political resolve ultimately by the hegemonic power. To the contrary, a longer-term strategy aimed at developing more stable forms of legal accountability for economic and financial transactions must also face highly complex technical issues. Nevertheless, the technical nature of the legal discourse should not obfuscate the intimate relationship between law and the exercise of political sovereignty.

Very simply stated, any transnational legal regime requires some surrender of sovereignty. Consequently, what is at stake is there is first the political resolve to surrender such sovereignty. Secondly, the issue arises as to what kind of institutional structure is needed to make the best use of such sovereignty surrender.

Significant surrender of sovereignty is not an exception at the end of history. Much of the political transformations that have occurred in the last thirty years can be read as the rise of a corporate power strong enough to dominate even the political structure of the most powerful states. However the kind of surrender we need now must be in favor of some “public” entity capable to produce “law” (legal standards capable of controlling powerful global private and public actors) and which is itself ordered by “law”, in order to be legitimate and consequently effective. What is indispensable for any serious attempt to tackle the crisis is a demise of state sovereignty that does not work as “anti-law” like that of state power in front of the corporation. The demise of state sovereignty we need must be in favor of a public legislator capable to restore the force of law as a limiting device of unrestricted power whether public (like sovereign funds) or corporate.

While there are a variety of technical possibilities to exercise the amount of sovereignty actually ceded by sovereign states in favor of re-structuring a system of global building legality, there is no escaping the fact that such release of sovereignty should be real and that a system must be created to make it permanent. Any possibility of a unilateral exit strategy such as that of the US from the gold standard would make the system utterly useless. Any project of “global standards” that remains merely technical and which is not supported by tremendous political resolve and strengths would only be an unsustainable loss of time and a procrastination of the many urgent problems that humankind has to face. If such political resolve is reached we would then be in front of a process of global legal integration which might have a variety of degrees of depths, from a global economic constitution to the grant of jurisdiction of a court, to more nuanced and creative ideas to make a decentralized system of legitimate “people’s rule of law” emerge (see *infra*). Yet, we believe, the show of political resolve

from the G8 should start from the two fundamental priorities previously outlined (external currency standard and cancellation of the debt).

In the last thirty years the connection between law and political sovereignty has been the object of a sustained attack aimed at the production of an idea of law that is technological rather than political. While it would be beyond the possibilities and the scope of this report to discuss the many strategies and the reasons behind this intellectual transformation, it is crucial here to make absolutely clear that the only kind of law that might serve some useful function in controlling a runaway financial system is one endowed with some global sovereign power that by essence must be political.

2.7 The nature of global law as a space without territory must be fully appreciated before attempting to use it as a solution to the financial crisis.

Global law is a very unfamiliar entity for the traditional jurist. Its peculiarity is not only that the whole world is its territory and that this very territory is “owned” by local political sovereigns each one carrying on local selfish interests. In fact the space of global law goes well beyond the global territory and moves into a non material space. In a sense its relationship with the “real law” is like that of finance with the “real economy”. It is not just a physical contested and limited territory. It is a new imagined space. But this new imagined space communicates with the real one and determines its fate.

As in the past with the sea, today’s mainstream constructs this imagined space as infinite. Its dimension is determined only by the possibilities of innovation and by the courage of the mariner. The so called economics of innovation, with its deep faith in individual creativity sets the paradigm of this optimistic belief. Be it “financial innovation” so much responsible for the global meltdown, be it “technological innovation” to produce energy, responsible thus far for putting into communication the food market and the energy market, the West seems to believe today in an unbounded future of growth and progress.

This different relationship between humans and the physical limits of the territory is the paradigm of global law: the law is not thought as stemming from sovereignty but rather from circulation.

The history of law offers an example of such a space, widely believed as non territorial and unlimited. The sea is an infinite space beyond sovereign control, an infinite space that allows every form of self-interested activity. A space of no obligation. A space of piracy and plunder. It comes at no surprise that the metaphor of piracy characterized the legal discussion of the global space “par excellence”, the Internet.

Thinking global law is a challenge for the legal thought. The latter loses its traditional bearings, its tools allowing it to represent the law. It is in fact

tempted by simply and purely projecting the idea of legal system through which we have been accustomed to learn the law. After Kelsen and Max Weber, the law acquired its rationality as a system of rules, as rules are embedded within one another according to an order lying over a Grundnorm, at the same time foundation and hierarchical principle. Or, this is precisely what we must give up when approaching this global law, i.d. legal exchanges not organised by any system.

Differently from internal and international laws, global law does not possess a vocation to be a system. It cannot be thought as the internal law, and this makes us uneasy. To understand global law we should not depart, as we do for national law, from a “system”, trying to master the rules’ hierarchy, the Kelsenian pyramid. This is not a temporary imperfection, rather being one of the essential elements of global law.

2.8 The law must gain control of the global space. This is the most important political challenge of our era. There is an apparent tension between legitimacy and effectiveness that can be overcome only by limiting professionalism in favor of politics.

The issue is how to transform this space of piracy, which includes the space opened up by financial innovation, into a space controlled by the law. This is the main challenge for any attempt to use the law including the current hypothesis of global legal standards. As with pirates, the central issue of global law is that of effectiveness of control. It is a prerequisite of control to be able to trace, and to block the pirates in the seemingly unlimited space. Like for pirates, any legal enforcement strategy requires a solid base, such as a port, to be at all effective. And this is the key issue of the relationship between global law and local territorial enforcement that puts the physical limits of space once again at the center of the stage.

Formal organizations seem too ineffective to face the world’s economic needs, and the more an international organization is legitimate (formal, transparent, accountable, based on cooperation among sovereign member-States), the less it can be effective; and the more it is effective (informal, flexible, fast, non-accountable, based on multiple, non-State actors), the less it can be legitimate. It is not a paradox, it is a quasi-necessity. The international environment has not found thus far its way to self-institutionalize, other maybe than by uncritical surrender of power to business-dominated organizations such as the WTO.

In such a scenario Global rules cannot be framed in a command-and-control scheme, but rather according to the incentives/disincentives dichotomy. Sanctions change their nature: less of judicial (and then also ethical) ones, more market-like –i.e. using both comparison (ranking, classification) and reputation

(naming and shaming, whistle blowing) as forms of soft law. Both these systems have in common the idea of sanctions refusing political and legal discretion in the enforcement: they must be both objective and automatic.

The users of this global law are not human beings, taken in their whole self, having aspirations and passions, made of interest and altruism, who are both the makers and the subjects of the law. Rather, the users are “professionals”, and only their business activity is affected by this law. They are more expected to behave as rational actors, and global law is evaluated positively as long as it facilitates their rational activity.

Global law, in the mainstream vision, should facilitate professional communities, this is why it must be self-imposed, self-created, self serving. Globalization of law is a return to medieval-like “communities”, professional or partial ones (and not total, all-encompassing as the *Gemeinschaft*). The life of those communities of professionals is in contrast to the self-calling “international community” which perhaps does not exist and which must now take responsibility for the global economic constitution-making process.

The political will seems odd within these circles, since it is perceived as an impurity in relation to the objective laws of the economy, which shall regulate the exchanges. The restructuring of the relations between economics and politics is then at the core of the solution of the crisis. Only the restructuring of such relationships can produce an effective decentralized and highly pluralistic people’s rule of law.

Such a focus on political effectiveness is in contrast with the idea of universal law, which suffers from the contrary problem, as it is very thick in values but practically does not have institutional strengths. It may enjoy legitimate institutions – such as the International Criminal Court but its effectiveness is a problem. Universal law certainly has a mouth but a mouth with no teeth, speaking a lot but unable to bite.

2.9 At the global level the current dominant vision of the law has denied its political nature and frozen its capacity to work as an effective limit to exploitive growth.

Today the dominant vision of the law is the one created in the global “context of production” of legal ideology, i.e. the law schools and economics departments of the top Western, especially US universities. Here, the prevailing vision of the relationship between law and the economic system has been progressively subverted since the seventies of the last century. In a dramatic break with previous jurisprudence, law should not control but rather facilitate “the market” - an abstraction that nevertheless was capable of grounding the powerful ideology of the end of history.

The new globally dominant intellectual movement known as “law & economics” substituted an ambiguous notion of efficiency for that of justice. It also substituted a vision of law as a system of incentives for that of a system of binding norms (carrot rather than stick). By so doing, economics - the dominant social science - was able to colonize legal thinking by seducing it with its highly sophisticated mathematical models, which made any traditional approach look irremediably obsolete.

Beginning in the 1990s, by a systematic organizational effort, such vision obtained a significant following even outside of the United States, and became the dominant approach of the International Financial Institutions, thus gaining a major policy impact. The Bretton Woods Institutions were in fact eager to adopt a vision of law as a form of neutral social engineering. The abandoning of the previous notion of an intimate connection between law and the political system allowed them to reach a level of political intervention that was banned by their original bylaws (and by Cold War equilibrium).

Ultimately, the result was the production of an idea of law which shares the universalism typical of economic theory (which is the same when studied in New York or in Bombay), and which is evaluated according to its capacity to prove “market friendly”. A “one fits all” ideal type of efficient law whose role is that to “mimic” what an “efficient market” would do in the absence of obstacles to private transactions.

The impact of this conception gaining global mainstream status was the promotion of a seemingly neutral and technical legal apparatus capable to promote exploitive economic growth, often included as conditionality to obtaining grants and loans from the international financial institutions. According to this vision, an “efficient” legal system should facilitate rather than restrict “the market” (i.e. the expansion of the private sector aimed at the commodification of every aspect of social experience). Also, a concrete market in a given context should not necessarily be evaluated in terms of coherence with the values contained in the legal system. To the contrary, it is the legal system’s values that are challenged and demoted as “inefficient” whenever not coherent with a simplistic and universalistic micro-economic vision of “the market”.

This vision is very problematic and its ultimate result is to promote a legal system that does not bite. This vision is also the vehicle to allow a variety of ideological features and concrete policies (downsizing, outsourcing, flexibility, inefficiency of the public sector, incentive-based CEO compensation schemes, market-friendly tort reform, competition between legal orders, efficiency of soft law, and many others) to gain scientific status and be placed beyond critical discussion. We submit here that these policies are to a quite significant extent responsible for the failure of legal institutions to control the markets and to prevent the predatory economic behavior which was responsible for the crisis.

The very idea of legal standards as proposed today needs to be disentangled from an academic tradition - Law & Economics - whose Chicago-based mainstream contributed from the legal side to maintain the ill-conceived idea that “the market” (whatever this generalization means) is almost always capable to cure itself.

Short-term transaction-based efficiency cannot be a value for a long term sustainable plan to preserve human civilizations, being entirely grounded in western-centric assumptions and in the value of competition and economic performance. Every efficiency standard always makes whoever is willing to pay more prevail in the competition to control and exploit scarce resources. Clearly, willingness to pay is connected to the possibility to do so, with the consequence that it always sides with the stronger economic interest. Thus, the legal system becomes the mere technical backbone of a science of short-term exploitation rather than a complex and culturally specific device by which discrete human societies make their political will binding.

In the struggle to protect civil society from final commodification, such dominant vision of the law should be abandoned.

2.10 The mere substantive dichotomy “standards versus rules” cannot theoretically support the necessity to tackle the crisis by means of the law. Rather, attention should be paid to institutional arrangements.

The notion of “legal standards” is tributary of the jurisprudential approach discussed above. It implies an idea of a legal system that is either unwilling or incapable to make a clear decision of what is to be done in a given concrete-fact situation. Example of a rule is: speed limit, 50 mph. Example of a standard is: drive reasonably.

The idea that legal standards should be used to cope with the financial crisis implies that rules are not necessary or adequate. Nevertheless, one should consider that standards and rules are not substitutes for each other, but complements that reformers should be able to deploy in order to fine-tune legal systems: no legal structure can be based on a single kind of legal tool only. While a standard of good faith can be occasionally sufficient to avoid unconscionable practices (packaging high-risk derivatives as safe saving instruments is done only in bad faith) in certain fact situations clear rules are required (e.g., minimum capitalization requirements). Moreover, certainly standards but to a lesser extent also rules are mere words in need of “institutional interpretation”, which implies the need to discuss which institutions, themselves located at a number of levels, should apply them.

2.11 Standards (or “principles”) are highly generic normative propositions, while rules are specific. The choice among standards and rules entails important implications on both interpretation and enforcement.

According to the basic and most diffused jurisprudential distinction between rules and standards, rules are very specific normative propositions, applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision. In case of contrast between two opposite rules governing the same set of fact, one should prevail and the other yield. It is the hierarchical (or power) relationship between the producers of the rules that would decide which one prevails. “Principles” (or “standards”), on the other hand, are highly generic normative propositions, applicable in a more-or-less fashion. They have a dimension that rules do not – the dimension of weight or importance: when principles collide, one who must resolve the conflict has to take into account the relative weight of each. Rules do not have such dimension. Of course, they may tolerate exceptions.

These features of standards and rules entail some important implications with regard to both interpretation and enforcement. Since interpretation is more discretionary for standards than for rules, the former must be interpreted by decision makers endowed with legitimacy for their discretion. Moreover, standards have limited binding power unless they are accompanied by enforcement mechanisms sharing a common culture.

For example, European Community Law Directives set uniform community-wide standards that the member states are free to implement according to their national legal style. Uniformity proved difficult to achieve because of discretionary interpretation in different national legal cultures. It took the relentless (and questionable from the point of view of legitimacy) effort of the European Court of Justice to transform directives into directly applicable rules capable of reaching the desired degree of uniformity. Of course, in Europe this process of interpretive transformation from “standards” to rules did not happen in a vacuum but it was accompanied by quite a substantive effort to create some traits of a common legal culture.

Thus, institutional arrangements such as judicial (or non-judicial) enforcement mechanisms are crucial in order to obtain some interpretive unity and an acceptable degree of effectiveness for legal standards.

2.12 Legal standards should only be adopted with a medium-long-term vision capable of considering a highly pluralistic enforcement and institutional framework. This scenario requires sustained investment in a legal and financial culture up to the task.

The adoption of legal tools for policy reform, and specifically for helping in the solution of the financial crisis, are likely to display even more serious problems than those generated by the plurality of legal experiences in Europe. The deep legal diversity that exists in the world must be considered and respected in the process of drafting (and even further along the line in that of searching for effective enforcement) in order to set a point of discontinuity with the ethnocentrism and the single thought that so far has characterized the relationship between the local and the global dimension. In fact, effectiveness and implementation are highly context-dependent, which the systems of monitoring should take into consideration. Moreover, global finance is highly sophisticated and difficult to access even for legal culture, so that there will be a need to deploy (and even earlier to educate) a global class of officials trained in both law and finance.

The institutional framework in which such standards are supposed to operate, both at a national and a transnational level, should be carefully taken into consideration when planning their adoption. A mere set of legal standards unaccompanied by an institutional apparatus capable to begin the process to transform them into sound rules for the concrete issues may have some symbolic meaning in the very short term but no effect in the medium-long term. The adoption of legal standards should then be accompanied by a global agreement on which courts or agencies endowed with strong and penetrating supervisory powers should implement them. A strong process of judicial cooperation at the international level should also be favored, which might imply some form of culturally sensitive legal harmonization.

2.13 “Hard law” should be preferred to “soft law” in developing a legal structure capable to govern the market.

To keep the economy under control, law cannot be soft. Either the law is hard, keeping economic transaction under control (and potentially making them soft, acceptable and civilizing), or the economic relationship is hard and keeps soft law under its thumb, determining its form as well as its substance. Soft approaches, whose only power (if at all) is moral suasion, are functional to a legal and economic order in which the market governs the law rather than the other way around. In such an economic order, and under the shield of soft legality, aggressive and opportunistic market actors succeed in externalizing costs to society rather than facing the real cost of their market activity. Thus, in order to be

successful, public legal institutions competing with strong economic actors need to be strong and highly effective. The stronger the actors, the stronger the institutions must be if individual or corporate short-term self interest is to be channeled or plainly limited for the welfare of everybody and in the long-term interest of human civilization. The challenge is how to make this hard law legitimate and truly cosmopolitan.

The “hard law v. soft law” dilemma does not coincide with the “standards v. rules” one. Standards and rules are only “words in need of institutional interpretation”, which can be regarded as both “hard” or “soft” law depending on institutional arrangements which surround them (for instance, standards are often included in hard codes). What really matters are the institutional structure and the political processes rather than legal tools per se.

2.14 It is useless to create new rules or standards unless the issue of their effective enforcement is fully appreciated and steps are moved to guarantee it. The most urgent issue is returning privatized global rules and soft-law processes under public control.

It is useless to add grandiose declarations or universal principles as not only are they ineffective and often remain dead letter, but also as our existing legal panoply is already coherent. Care shall equally be taken when considering the creation of new instances (whether being international or supranational courts or institutions) which could add even new disorder to the existing system and increase its complexity outside of an overall legitimate general redesign of the system which could only be the product of a quasi-constitution-making effort. For the time being it seems more effective to have the plurality of systems already in place (national, international ones) work better, rather than continuing with the proliferation of systems and rules.

In the past 20 years the economic world has required more liberty, lesser controls, and a right to self-regulation. Political institutions under the pressure of the increasing power of economic actors, have often accepted veritable transfers of sovereignty. All this has provoked a deep “privatization” not only of many sectors of economic life but also of law-making pertaining to those sectors. Real bubbles are impermeable with respect to any institutional control (whether judiciary or political). This phenomenon is very important in the financial domain, and there is the risk of it expanding into other domains of crucial importance for contemporary society such as the one of intellectual property. For some time this process has certainly generated a great economic performance, however, in the long term this system faces destabilization as shown by the current situation. The lack of public controls becomes dysfunctional to the very economic system.

Consequently, the first aim to be pursued is to re-attract these quasi self-regulated spaces within the institutional (national or international) framework of the law.

2.15 The judicial function, even within the set limits of jurisdiction, can help in the global effort to develop established principles of fundamental liability and justice. A cosmopolitan exercise of coordinated judicial authority might facilitate this function.

Global law is very powerful, unnoticeably breeding in its own invisibility: very often it is about very technical, grey rules, not secret but so unattractive that few dare – including amongst the jurists – analyze them. Opacity and lack of transparency, like professionalism, are controlling process granting unrestricted power to strong economic actors. Hence, the importance of establishing conditions that make it possible to question privatized legal standards and professionalized rules of the game; to force the open and clear formulation of otherwise inaccessible rules, ascertaining their substance, writing down their content, and hounding them out of their technical shelter. All of this requires putting enforcement back in the hands of the people through judicial and non-judicial means.

Global law as it currently stands must be challengeable before public courts, any public court available. This is a crucial condition, as there is more than an abstract risk of “justice” itself sharing the logic of privatization typical of the global economy. The unfolding of a ‘global market of judicial services is already a reality, transforming law into a commodity like any other, a mere source of satisfaction for the profit motive. One should beware of proposals attempting to transfer the function of justice to the private sector by means of indiscriminate extension of international arbitration and the related liberal regime of circulation of awards. Globalization changes the nature of justice: if it remains a public good within the frontiers of a State, it becomes a private good in the new “invented space” due to the establishment of a real competitive market for private commercial disputes’ resolution.

The legal monopoly of the State (and of political legitimacy) – its *jurisdictio* as much as its *imperium* – is dramatically restricted as the economic actors become masters of their own normative frontiers. It is then essential that the different judicial instances remain accessible for the citizen of the world in order to help developing from the bottom up principles of justice acceptable to all human kind.

It thus becomes crucial to provide access to all stakeholders, opening some forum for (economically subsidized) litigation to anybody potentially affected by acts or decisions triggering the justice motive of the civil plaintiff to react and struggle. Courts must be wide open, granting a path against injustice to everyone’s

resolve. Too much justice is always better than too little justice especially when sustained quantitative development is not seen as a value in itself. In the invented space of globalization this corresponds to a new use of the law open not only to the parties but to general stakeholders perhaps under liberal rules of *amici curiae* as it is already the case for important cases of global competition law.

Despite obvious limits in a potential redistributive function, and despite being itself open to the excessive risks of over-professionalizing, and thus of Western hegemony, open jurisdiction displays some cosmopolitan features, being more likely to circulate across frontiers and especially being a partially empty power, i.e. it is filled with the arguments submitted to it. Unlike the executive power, it does not set its own agenda which does not mean it is empty of political bite but perhaps only that the political content of its decisions cuts across political preferences.

Such an expansion of public courts' accessibility to entertain global issues might eventually produce some collective elaboration, resulting from the work of several courts scattered around the globe who concur in defining rules and principles of global decency that reflect all decisions previously taken. This phenomenon, known as "the judges' dialogue", has been visible for several years and while certainly by itself it reflects the class and professional biases of judges, it might nonetheless introduce at least a degree of legal cosmopolitanism if the dialogue is not restricted to Western courts and perhaps even a forum of global legal resistance against the excesses of global capital.

2.16 Ex-post models of accountability for financial damages may be scarcely effective and difficult to organize.

No matter how a legal regime is produced and no matter its content, the issue of effectiveness must be approached. Here a tension immediately originates. On the one hand, a legal regime capable to assert control over our runaway global financial capitalism must be "global" in its reach because transnational economic actors cannot be controlled by means of a "national regime". On the other hand, a global top-down enforcement system is very difficult to conceive, potentially ineffective because of an overreaching global jurisdiction, and bound to reflect dominating value judgments, i.e. those shared only by the powerful policy-makers and their allied corporate lawyers. Too often international law simply fails to constrain the powerful (states as well as corporations) largely because of enforcement systems. We face either the lack of effective courts of international law (there are no such courts in the domain of transnational financial activity) or a failure of the chain of transmission of international law from its sources to the national courts as agencies of enforcement.

True, in abstract one could imagine setting up such a global court system with a broad jurisdictional reach, endowed with some special enforcement

mechanisms and perhaps even with sufficient power to maintain jurisdiction over corporate actors. We submit in this Report that the problems that setting up such a system would pose are staggering, to the point of making it utterly unrealistic. To begin with, the setting up of such a system would share all the problems already experienced with the International Criminal Court. The cession of sovereignty and of control of such a system would certainly encourage the stronger global political actors to boycott its functioning. Secondly, even if an agreement would be reached by the strong political actors, a global court system would face tremendous problems created by the Western professional domination over international law, structurally incapable of recognizing the interests of the weaker actors. The very adversarial structure of adjudication understood as a zero-sum game with one winner and one loser is at the basis of some legal experiences but not of others. Moreover, the alternative to adjudication that has emerged in the international legal practice, the so called *Alternative Dispute Resolution* or *International Dispute Settlement*, displays well identified problems in unbalance of power settings. On top of this, it is very difficult to have a new, more responsible conception of the law emerge from an international body of adjudication or from global rules and principles adjudicated by national courts of law. The usual issues of technical and linguistic diversity would most probably defeat any effectiveness of such standards in practice. Thus, international law for deep structural reasons seems irremediably bound to remain detached from the real life of the people, exposed to reflect the desires of the stronger actors that can afford to hire the skilled legal professionals capable of litigating at this level.

There is another important basic question that a traditional court-based approach to legal enforcement is incapable of solving. Almost invariably in any one of the cyclical financial crisis that seem to affect the expansion of global capitalism, the cages are locked when the animal has already escaped. Courts can react when the damage is already done and most often a non-judgment proof defendant is very difficult to find at that point. Bankruptcy is usually never the solution, being politically unfeasible in many cases (the famous “too big to fail” idea), especially when what follows bankruptcy is widespread unemployment or when a whole state economy is involved. This state of affairs produces tremendous incentives to transfers of public money to the private financial sector in a crisis situation, which in turn is an incentive to crisis-generating behaviors by the corporate management. In other words, courts structurally represent an “ex-post” solution, a liability rule protection that has proved too weak over and over again. Ex-post strong actors can bribe themselves out, almost invariably paying a fraction of the damage they have produced (G. Calabresi and D. Melamed, *Property Rules, Liability Rules, Inalienability*). Thus ex-ante regulation and the logic of authorization for potentially harmful activities are essential to avoid rather than to cure financial disasters.

2.17 Command and Control regulation at the global level may be both ineffective and politically very difficult to implement.

Command and control regulation is extremely problematic at the global level. It is in fact the ultimate example of a top-down political intervention badly in need of legitimacy to be at all effective. In the absence of politically accountable bodies such a regulation is unlikely to emerge, and if it emerges at all its effectiveness is likely to be minimal (think about the many international declarations on substantive rights, which are routinely entered upon but very poorly respected). True, the current “financial emergency” might offer us a “state of exception” capable of producing some global sovereignty, and perhaps the need to cure the global market unbalance (redistribution, balance of trade etc.) might offer some guideline. Nevertheless, technical problems of such a regulatory model persist. Direct command and control regulation would require the development of a global bureaucracy to monitor it, which is a desirable long-time target in the process of a revamped globalization - but very hard to imagine as feasible at this point.

Some might indicate the variety of “open systems of coordination” explored at EU level as an alternative to global command and control regulation. These methods, despite having originated some hopes in the scholarly community because of the added value of “flexibility”, are nevertheless highly at risk of being abused by strong actors. Moreover, the dialogue between very different state-based bureaucracies, already very difficult in Europe, is very hard to imagine at an even broader scale. The very notion of flexibility has to be explored in concrete power settings, and it seems that actual political accountability requires a simplification in decision-making authority rather than a proliferation of regulatory bodies. Thus, while on the one hand the open system of coordination is not centralized enough and disperses responsibility, on the other hand it is not decentralized enough to “spontaneously” reflect the sense of justice of the people and thus be legitimate.

To look for more alternatives capable of implementing an ex-ante control of the financial activity, one should first understand that in the real life of the law legitimacy does not only stem from an electoral process. In many settings today, and generally speaking in the domain of private law, the most important source of law is the “laboratory” of the life experience, the aggregate of relationships that economic actors formalize among themselves producing customs and binding institutional arrangements. This customary law is behind the development of commercial law from the middle ages, and even today a transnational *lex mercatoria* is produced outside of any top-down intervention of the political authority. There is no question that this spontaneous legal order is legitimate and as such corresponds to the broad idea of justice of the economic actors involved. In other words, legitimacy stems from decentralization, from the relational way in which individuals and groups relate to each other in a pattern of trading that in

relatively equal power settings is capable of mediating between alternative visions of justice. Such standards of local decentralized justice should be enforced by a bottom-up approach whose effectiveness lies in its diffusion and coherence with the needs and perceptions of the people in the communities. We have called this model the “people’s rule of law”, a system of effective control on individual economic activity that reflects social justice. To reduce the potential catastrophic impact of individual’s financial creativity on the sense of social justice (for example to avoid gambling with retirement assets or people’s savings), one need to find an effective professional and decentralized ex-ante control of the legal acceptability of each proposed financial scheme.

2.18 The desirable gradual reduction in dangerous financial innovation can only be introduced with an effective ex-ante decentralized public-minded gate-keeping control.

Since financial creativity at the end of history has created too many tools useful only to those of the winning part of economic betting and speculation, it is now the time of a drastic reduction of the size of the economics of illusions. It is necessary to study a form of control over financial innovation that cannot be considered any more something desirable per se. Critics will say that such a control is at risk of stiffening financial and economic creativity with an impact on efficiency that the modern world cannot afford. Indeed such a critique is based in the mainstream, and any long-term vision of sustainability must now reject these arguments.

While it would be much beyond the domain of this Report to define the boundaries between acceptable and unacceptable financial practices, we can certainly point at a method - historically successful in many jurisdictions - which could be deployed to obtain some guarantees of security through ex-ante gate keeping. Since private signals such as those provided by rating agencies and accounting firms constitute a form of soft law that is very weak in the face of risks of a conflict of interest, and since the construction of a hierarchical system of commands and controls seems practically impossible to be organized, a mixed system seems to be what will better serve the current needs. Effective decentralized long-term controls over the legality of real-estate transactions have been obtained in certain jurisdictions more than in others by the presence of a millenniums old institution, the Latin Notary. It seems that such an ex-ante impartial and accurate legal control can be considered a global “best practice” potentially capable of guaranteeing security and coherence of economic behaviors with the variable local interpretations of a fair and sustainable global financial system.

2.19 In an attempt to re-establish a decentralized public control over private activity, the Latin Notary, a mixed public/private institution, serves the needs of a mixed society such as the global one.

In a broad functional perspective, the Latin Notary serves the aggregate function of one judge and two attorneys. Its institutional posture is always *ex ante*, since it serves the need of avoiding rather than curing economic losses. In a sense, its role is that of a legally trained “gatekeeper” with a discretionary power to decide the legal acceptability of a given legal form within a process of careful interpretation of the law. This process of interpretation happening *ex ante* with the active participation of the parties to the transaction is not different from that exercised by a judge *ex post*. However, while the interpretation *ex post* is carried on within the adversary conditions of a pathological situation, the Notary *ex ante* interprets the law outside of the tension of the conflict assisting in the development of a people’s rule of law. In certain legal systems the Notary’s presence is not limited to the law of succession or of real estate planning; rather, it is present in corporate law, exercising a role of control in the interest of stake-holders that is often resented by Anglo-American attorneys.

The Notary is a mixed official. On the one hand, the Notary is a public officer endowed with power stemming from the State (but it could stem from an *infra* or *super-state* political entity). On the other hand, the Notary is a private professional with a non-hierarchical independent function. In transactions that require the presence of the Notary, this figure performs a double role. On the one hand, being independent and neutral, the Notary makes sure that the interests of the weaker party are protected and that there has been full understanding of the nature and consequences of the legal transaction entered upon (this would have been very useful in matters such as long-term adjustable sub-prime mortgages that share such a major responsibility for the current crisis). On the other hand, the Notary is a producer of public goods in the form of legal rules and standards incidentally stemming from the function of checking compatibility and incremental interpretation of the law. Because of its decentralized posture, very close to the bottom-up relational production of law, the Notary is in a very favorable position to interpret the needs of justice of society and of the parties to the transaction. The Notary serves in a dialogical dynamic with the parties involved in the transaction checking their private interest with the public interest represented by the respect of legal standards, thus helping to nurture what we have called in this Report the “people’s rule of law”. Being a public official, the Notary might perform an important role in tax enforcement thus generating significant income to the political institutions that deploy this figure.

2.20 The bottom-up production of people's rule of law could be facilitated by a globally organized professional group of easily accessible lawyers.

The institution of the Notary, which is currently diffused and known in many countries, from Europe to Latin America to China to many African countries, has been the target of tremendous ideological critiques at the “end of history”, having been considered the product of a guild-minded mentality at odds with the development of an efficient market. No wonder that this form of control is resented by the strong financial institutions, allergic as they are to any form of effective “gate keeping”. There is no business here in advocating any of the current variations in the organization of the Notary. Reforms might be in order to make such a profession serve the global needs. In certain systems, it might be necessary to look for functional substitutes. However, such a professional group, already organized at the international level, could be a feasible avenue of ex-ante enforcement of global legal standards, capable of assisting in the evolution of an effective system of control that is legitimate from the perspective of a people's rule of law.

In the production of a “public good”, such as legal structures reflecting the sense of justice of the people, it seems easier to train an international group of already existing professionals to obtain a diffused ex ante control, rather than implementing a new system of global courts attempting to cure the damage ex post. Moreover, the channels of professional communication between the self-interested professional members of such global guild accompanied by a long experience in organizing and maintaining a record of private transactions (perhaps in electronic form) can be very useful in the definition and organization of global systems of recording of financial transactions simply too difficult to obtain from the top down within reasonable time by a global public bureaucracy.

The global training of a selected number of professionals functioning on the model of the Latin Notary with the aim of introducing an ex-ante control of feasibility to a number of economic transactions might be a sound way to “slow down” financial markets and to keep them alive and prestigious only when effectively performing a desirable social function. It would also be a way to do so that respects local variations in legal sensitivity and could be organized in a relatively slow time with an eye to the long-term security of transactions.

2.21 Fixing the economic and power unbalance between the regulator and the regulated is a priority for any legal project aiming at effectiveness.

The problem of the strong comparative position of global private actors over the large majority of States is very serious. Even if global standards or rules were

enacted aimed at limiting predatory behavior, their capacity of being enforced could be seriously undermined by the current subverted relationship of power between the private and the public sector. The corruptive nature of the financial capital over the political process is well documented in the literature both in “advanced” democracies and a fortiori in weaker political settings.

Moreover, the amount of state-based shelter needed by predatory financial activity is rather minimal because of the technological mobility of capital and of the de-territorialized nature of financial activity. In this perspective, the issue of “fiscal paradises” but more generally of “banking secret” is extremely serious and might make any legal attempt to react against the most egregious predatory practices extremely difficult for the very simple reason that these practices are most often “perfectly legal”.

Even these few lines should be sufficient to see the difficulty in coping with the issue of the legality of financial predatory activity. Very soon we reach a whole aggregate of deeply entrenched issues in which the law is actually the problem much more than the solution. The construction of globally defined and authentically legitimate legal standards of acceptability of financial behavior thus introduces us to the extremely difficult issue of the boundary between legality and illegality, and in particular of which authority should ascertain this boundary, and when and with what power to act.

While in the previous paragraphs we have suggested the need to make use of a highly decentralized and locally rooted system to make the boundary between legal and illegal financial activity rooted in a people’s rule of law, the enforcement of such a boundary cannot be left to national authorities that are either too weak or too corrupt to effectively monitor predatory activity. True, it is naïve to think such a boundary as a clear-cut black-and-white divide between legitimate and illegitimate financial activities. Also, it would also be unrealistic to think that one authority could be charged with its ascertainment. The distinction between acceptable and unacceptable behavior is a cultural long-term project that requires the involvement of many actors (and a very strong role of education) in a complex relationship with each other. Regardless of all this, it is indubitable that effective enforcement requires a quite significant financial effort. The law does not work if it is not endowed with resources that make it stronger than those that it has to regulate.

From this perspective, in harvesting human experience, we can learn from quite a large number of past mistakes: in the United States, for example, the agencies of enforcement have traditionally been significantly under-funded. The strategy of creating an agency and then granting it an insufficient endowment serves the political purpose of showing some public mindedness but at the same time granting safe havens to the private crony interests that the newly created agencies should regulate. The most recent episode of such a strategy in the US,

following the Enron scandal, has been the Accounting Profession Oversight Board introduced by the Sarbanes Oxley Act, presented as a radical solution to the problems of conflict of interests and then endowed with a budget comparable to that of a small-size academic law school. Similarly, chronic under-funding and understaffing has affected the SEC through its lifespan.

2.22 Consideration should be given to the possible development of a “global financial misconduct intelligence prosecution and police authority” as a first common effort towards the development of a global class of public-minded civil servants.

From the previous analysis a few consequences follow. First, a sustained international economic effort should be entered into in order to revamp the public sector as a regulator and enforcer, as opposed to the private sector that should not be allowed to regulate or to enforce. The separation between the private and public sector should be regained to the extent that is necessary to avoid the endemic conflicts of interest that characterized predatory capitalism. While this certainly involves the strengthening of public authority on such highly dangerous private corporations such as those running the stock exchanges, it should perhaps involve forms of international control over such major centers of global financial activity such as the main stock exchanges, whose reach is certainly global and whose current regulation is to say the least highly unsatisfactory. To be sure, the tools to control speculation are extremely weak without such kind of public control. More generally, the current almost complete lack of control over crucial global actors such as the rating agencies, whose work as unaccountable “soft” legislators and gatekeepers determining much economic behavior in the current financial setting is highly questionable.

Such a revamping of the public sector should be guaranteed at the international level with systems of selection of global, independent, highly prestigious and qualified civil servants recruited on the basis of capacity and geographical representation. The presence of such public-minded civil servants shielded from corruption is an historical best practice from Imperial China to France to Japan. Again, such a project requires some long-term global investment in systems of legal and financial education capable of creating such a global class of public-minded lawyers/economists to be inserted in the regulatory and controlling authorities of all systems. The revamping of the public sector is perhaps the most expensive but also the most promising long-term strategy for any global model of sustainable development.

Only once the public sector is revamped can it be used as a system of proactive and reliable execution of a long-term plan of financial sustainability which, as we have seen in the Introduction to this Report, cannot be seriously conceived outside of a global plan of economic redistribution. Any such plan

cannot be carried out without sufficient institutional strength and human capital to overcome the likely tremendous resistance from the strong economic actors. This is why serious plans of public money interventions in the economy cannot be outsourced to private law firms or investment banks without being defeated by the structural conflict of interest.

A global class of public servants is also required for the more immediate task of struggling against global financial predatory behavior. Just as international taskforces of soldiers under UN responsibility are sometimes used and sent to take care of international emergencies (this parallel does not imply that such model of intervention is deemed here useful, let alone desirable), the establishment of an international class of enforcers of the global financial legal order it may be immediately necessary. Such a global financial police force or prosecutorial authority should be endowed with great power of investigation, discovery of documents, files and other information (including power of deposition). Such a power is essential not only for the ex-post investigation of discrete events, but also, which is most important for an effective global legal order, of ex-ante intelligence of extremely sophisticated schemes.