

## I-1.16 : The G-20 and Global Economic Regulation: Fueling the Progressive Development of International Law?

Friday 1 October 2010, by Lawrence Eaker, professor

### I. Introduction

I would suspect that most regulatory law practitioners—whether they represent government or private interests—feel as if the tidewaters of global regulation have slowly but surely risen within the past few years. Those involved in the fields of competition, environmental or financial law must feel as if the global regulatory waters have reached up to their knees. Pushed along by ever-increasing globalization, and further fueled by the current global economic crisis, few practitioners would doubt that a period of rapid development of global economic regulation is clearly upon us. The recent decision by the Basel Committee on Banking Supervision (“BCBS”) pertaining to capital requirements, referred to as “Basel III,”<sup>1</sup> is just the most recent example of what some practitioners and legal scholars would qualify as the “full speed ahead” attitude of the “admirals” of global economic regulation. Even without further crisis from now until November, global economic regulation is likely to take a great leap forward during the upcoming Group of 20 (“G-20”) Summit meeting in Seoul and continue to expand under the 2011 French presidency of the G-20.<sup>2</sup> Thus, this article posits that the tide of global economic regulation is just now starting to flow and that, in fact, the tidewaters are very likely to quickly rise over the next few years—especially when considering the probable strengthening of the G-20 Summit system. The causation is already present—a “discontinuity” in global economic regulation is upon us. The legal profession needs to be prepared for a wave of serious global legal regime-building over the coming decades. Therefore, the purpose of this article is to provide the regulatory practitioner with an analytical framework for the better appreciation of this expanding global economic regulatory regime and just where this is likely to take us in the progressive development of international law. For purposes of this article, the concept of “global economic regulation” will be broadly understood to include many different fields and bodies (such as, *inter alia*, trade and investment, competition/antitrust, environmental, and financial matters) and will encompass international authorities acting within supervisory (*ex ante*) and enforcement (*ex post*) roles.<sup>3</sup>

### II. The Causes Behind this Expanding Global Legal Regime: Globalization & Increasing Financial Instability

In 1968, the famous “management guru” Peter F. Drucker (who held a doctorate in law from the University of Frankfurt), staked out his position that the world was then experiencing an “age of discontinuity”; an age defined by Drucker as one undergoing a tectonic shift in society that slowly but surely leads to a major break from its existing social, economic and political moorings. In his case, Drucker foretold of a new “Knowledge Society” wherein worker knowledge—enhanced by the newly developing information technology sector (at that time, heavy mainframe computers)—would be the most valuable and essential of assets for economic progress. Drucker went on to say that as a result of the global spread of this new Knowledge Society, the then “International Economy” would necessarily morph into a new “World Economy” fed by the new “Global Shopping Center.”<sup>4</sup> It is staggering to think just how much our current globalizing world reflects this “Drucker World Model,” especially when considering that the world of Drucker in 1968 did not appear to be very globalized at all compared to our current globalization wave.

Consider this: In Drucker’s world of 1968 world GDP was approximately \$3 trillion; by 1990 world GDP totaled around \$22 trillion; whereas, in 2008 it stood at a whopping \$60.5 trillion. World merchandise trade totaled around \$243 billion in Drucker’s 1968; it was approximately \$3.5 trillion in 1990; compared to around \$16 trillion in 2008. The total stock of worldwide foreign direct investment was valued at around \$2 trillion in 1990;

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<sup>1</sup> See generally International Regulatory Framework for Banks (Basel III), <http://www.bis.org/bcbs/basel3>.

<sup>2</sup> Concerning planning for the upcoming G-20 Summit in Seoul and subsequent meetings of Deputies and Heads of State/Government, see the official G-20 website, <http://www.g20.org>; concerning the G-20 Seoul Summit meeting agenda, see *infra* note 19.

<sup>3</sup> For an analysis of the “purist” definition and confines of regulatory law, see M.-A. Frisson-Roche, Protecting Public Health, Controlling Healthcare Expenditure, General Antitrust Law and Sectorial Regulatory Law, *Petites Affiches*, May 2010, n° 90, p. 27-33.

<sup>4</sup> Peter F. Drucker, *The Age of Discontinuity : Guidelines to Our Changing Society* (1968).

compared to a total stock of approximately \$15 trillion in 2008.<sup>5</sup> Cross-border holdings of securities, or aggregate world portfolio investment, has ballooned from “only” around \$6 trillion in 1997 to approximately \$31 trillion in 2008.<sup>6</sup> The total assets of Sovereign Wealth Funds have grown from around \$400 billion in 2005 to over \$3 trillion in 2008, larger than the foreign reserves of any nation-state.<sup>7</sup> Finally, the foreign exchange markets have literally exploded in size, from daily global turnover of around \$1.5 trillion in 1998 to approximately \$4 trillion in 2010, in order to grease the wheels of this globalizing economic machine.<sup>8</sup>

As made evident by these figures, this current wave of globalization has only further tightened the binds of interdependency between the earth’s peoples, multinational enterprises, and nation-states. The result is clear; rapidly increasing cross-border activity is causing the creation of an ever-increasing number of global economic regulatory systems (and, one might argue, sophisticated regulatory regimes). And that is now the “normal” flow of global regulatory development. Our current and, it appears at this writing, long-lasting financial/economic crisis is precipitating an almost “breathless” rush toward the design of even more sweeping and intensive global economic regulatory regimes. As the saying goes, “there’s nothing like seeing the hangman’s noose to focus one’s attention.” And the “hangman’s noose” is plainly visible to many regulatory experts—not to mention the ordinary citizens on the ground generating these disturbing statistics. By way of example, many find it extremely disturbing that certain “rich” developed countries (including Baltic nations and nations such as Iceland and Ireland) have suffered declines in their respective GDP’s since the beginning of the crisis in early 2008 that rival those experienced during some years of the Great Depression.<sup>9</sup> And, on the global level, the regulatory experts must consider the fact that global trade<sup>10</sup> and foreign direct investment<sup>11</sup> actually declined during 2009 for the first time since World War II.

In addition to these economic discontinuities, the makeup of global economic growth has been radically transformed during this current globalization phase. Who is selling what to whom, and of course for how much, is becoming of great importance. Thus, global regulators must consider that recent growth projections for the “Emerging Economies” of Brazil, Russia, India and China, or the so-called BRICS, show them collectively matching the original G-7’s aggregate share of global GDP by 2040.<sup>12</sup> This interlocking nature of the world economy, coupled with the increasing role of the Emerging Economies therein (many of which do not necessarily base their economic models on those of the West),<sup>13</sup> is only adding fuel to the current financial crisis. All of this has led us straight into a full-blown systemic crisis, one wherein the economic disruptions of one nation can lead us to a worldwide economic crisis if not systemically controlled in adequate fashion. Accordingly, the global economic regulatory architecture is about to undergo a major transformation. For those involved in such matters, the question that is then posed is whether or not this transformation of the global economic regulatory regime will be in line with one’s perception of the progressive development of international law?

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<sup>5</sup> These particular “globalization” figures (and many more) are provided by the United Nations Conference on Trade and Development (UNCTAD) in their Handbook of Statistics 2009, <http://www.unctad.org>.

<sup>6</sup> World portfolio investment figures are available from the International Monetary Fund’s CPIS Database, <http://www.imf.org/external/np/sta/pi/datarsl>.

<sup>7</sup> National Intelligence Council, Global Trends 2025: A Transformed World, November 2008, p. 7-8, [http://www.dni.gov/nic/NIC\\_2025\\_project.html](http://www.dni.gov/nic/NIC_2025_project.html) [hereinafter NIC, Global Trends 2025 Report].

<sup>8</sup> Bank for International Settlements, Triennial Central Bank Survey of Foreign Exchange and Derivatives Market Activity in April 2010, September 2010, <http://www.bis.org/publ/rpfx10>.

<sup>9</sup> Concerning Baltic countries, the GDP declines from their “peaks” in 2007 to their “lows” in 2009 come in at approximately -26% for Latvia, -20% for Estonia, and -18% for Lithuania. For Iceland, the decline was approximately -16%, while Ireland suffered a decline in GDP of around -14%. See Floyd Norris, Recession Hit Harder Outside U.S., International Herald Tribune, September 18, 2010, p. 12 (citing figures from Haver Analytics).

<sup>10</sup> Concerning recent declines in world trade, see generally World Trade Organization, World Trade Report 2010, [http://www.wto.org/english/res\\_e/publications\\_e/wtr10\\_e.htm](http://www.wto.org/english/res_e/publications_e/wtr10_e.htm).

<sup>11</sup> Concerning recent declines in world investment, see generally United Nations Conference on Trade and Development, World Investment Report 2010, <http://www.unctad.org/Template/Page.asp?intItemID=1465>.

<sup>12</sup> NIC, Global Trends 2025 Report, *supra* note 7 at p. 7.

<sup>13</sup> For a discussion of the emerging power of the “State Capitalism Model” of economic development, see generally *id.* at p. 8-9.

### III. A Case Example: The G-20 Summit “System” & Global Economic Regulation

From an informal meeting of finance officials of five nations at the White House in 1973, to today’s G-20 first established in 1999 following the 1997 Asian financial crisis, the world has witnessed the piecemeal development of a still informal--yet increasingly influential--forum for discussing global economic issues and designing the architecture of international financial regulation. This rather chaotic development has included the establishment of a G-7, G-8, G-22 and even G-33 over the past 37 years.<sup>14</sup> The now mandated yearly summits of heads of state/government and regular meetings of the finance ministers and central bank governors of these 19 nations plus the European Union provide a unique and important opportunity for nations with a “significant” impact upon the world economy to further enhance international cooperation to generate strong, sustainable and balanced growth.<sup>15</sup> It appears to be this particular G-20 Summit system that has (at least at this moment in time) captured the popular imagination and quite possibly reached the highest level of institutional legitimacy concerning global economic regulation—if “institution” is the right term for what is still an informal gathering of some of the world’s leaders without even a charter to guide them, permanent secretariat, or rule-making capacity.

Therefore, for purposes of our analysis of regime building, let us list some of the most substantial agenda items that will most likely be placed before the heads of state/government at the Korean G-20 Summit meeting scheduled for November 11<sup>th</sup> through 12<sup>th</sup> in Seoul (beyond continuing commitments to coordinate fiscal policies so as to “ensure ongoing global economic recovery”):

> First of all, and possibly the most pressing agenda item, the G-20 members are committed to act upon the recent package of changes to the Basel Committee on Banking Supervision’s (“BCBS”) banking capital and leverage ratio framework, or so-called “Basel III.”<sup>16</sup>

> Second, the G-20 will examine and, if possible, reach some consensus upon the coordinated regulation of so-called “systemically important financial institutions”—those institutions considered to be “too big to fail” such that when they do fail these institutions present a real and present danger not only to individual domestic economies but even to the entire world economy. Both the BCBS and the Financial Stability Board (the “FSB,” which was transformed from the Financial Stability Forum into the new FSB by decision of the G-20 London Summit in April 2009)<sup>17</sup> will be present in Seoul to move this important agenda item along, including a decision on the creation of a possible resolution framework and international authority to supervise such.

> Third, the G-20 will seek to introduce consistent and effective regulation over hedge funds, credit rating agencies, and over-the-counter derivatives markets--building upon the recent regulatory efforts of the U.S., EU and Japan.

> Fourth, the G-20 will be faced with the task of increasing and strengthening the global supervision of financial institutions to ensure that the new rules of the game are enforced in a uniform and efficient manner (most importantly, to avoid “regulatory arbitrage”), building upon the concept of “Supervisory Colleges” established within the FSB framework.

> Fifth, the G-20 will face the issue of strengthening international accounting standards following recent progress in convergence efforts within the International Accounting Standards Board and the U.S. Financial Accounting Standards Board.

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<sup>14</sup> For a brief history of the development of the government economic summit system, *see generally* the official website of the G-20, *supra* note 2.

<sup>15</sup> The G-20 membership includes the following 19 nations, plus the European Union (Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Mexico, Republic of Korea, Russia, Saudi Arabia, South Africa, Turkey, United Kingdom, and the United States of America). *See generally* the official website of the G-20, *supra* note 2.

<sup>16</sup> *Supra* note 1.

<sup>17</sup> For a presentation of the history, membership and role of the Financial Stability Board, *see generally* the official website of the FSB, <http://www.financialstabilityboard.org>.

> Sixth, the G-20 leaders hope to reach consensus upon the highly contentious issue of transforming the governance of the International Monetary Fund (“IMF”). The American’s have recently placed this touchy subject front and center with their stated position that the Europeans are at present overrepresented relative to the size of their economies and that European members need to step forward (or would that be backward?) in order for the IMF to meet its recently established goal or shifting at least 5% of the voting power within the IMF to developing and emerging economies.<sup>18</sup>

> Finally, amongst other pressing issues,<sup>19</sup> the G-20 members acting within the “Framework for Strong, Sustainable, and Balanced Growth,” will continue to pursue the IMF-assisted Mutual Assessment Process (“MAP”) in conjunction with relevant international organizations with expertise on development, finance, labor market, and trade issues. This MAP system requires G-20 nations to submit for review and evaluation by the IMF and FSB national and regional economic plans so that coordinated global policy options can be implemented. Most importantly for this MAP system will be the planned adoption in Seoul of a Comprehensive Policy Action Plan to lead the world toward strong, sustainable, and balanced growth with specific policy commitments for each G-20 nation.<sup>20</sup>

Most would agree that these agenda items are very weighty issues, to say the least. These issues lie at the heart of a new “Bretton Woods system” which may well transform global economic regulation as we know it. In light of the importance of these issues to continued—or, rediscovered--world economic prosperity, one must wonder at the regime building process taking place here. Is the world on the cusp of redesigning the existing global economic governance architecture so as to possibly formalize such within an elite group of government leaders outside of the existing Bretton Woods system of the World Bank and IMF? Has a decision been made to keep the global economic regulatory process, at least on a *de facto* basis, outside of the United Nations (“UN”) system? Even acknowledging that these G-20 nations represent approximately 80% of world trade and around 90% of world product, have we arrived at the point where the ultimate global economic governance decisions will in effect be made within this exclusive club of nations? Finally, does this movement represent the progressive development of international law, or does this path more likely reflect economic and political reality; *i.e.*, the “Realist” theory in international law and affairs as discussed *infra*?

#### IV. The G-20 & Global Economic Governance: The Progressive Development of International Law?

Modern international relations and law scholars have been for some time now hotly debating the issues of global governance, with the current focus being upon the question of the continuing stability and efficacy of our current nation-state system of world order. Practitioners of regulatory law on the global level—concentrating upon their specialized areas and more and more detailed regulations--can get lost very quickly in this theoretical debate. Thus, let me briefly outline the current arguments and major movements in the study of global governance in general and, more specifically, global economic regulation. We may then conclude with an analysis of the current G-20 Summit system and its growing role in the development of global economic law.

##### A. International Law & World Order: Moving Beyond the Nation-State

Stemming from the so-called “nation-states system” established following the Peace of Westphalia in 1648<sup>21</sup> and then codified in 1945 within the principles of the UN Charter itself,<sup>22</sup> the current incarnation of the principle of state sovereignty is greatly under attack. Today’s young law student is inundated with legal scholarship setting forth the argument that humankind is on the threshold of a bold new global governance

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<sup>18</sup> Sewell Chan & David Jolly, U.S. Meets Resistance in Plan to Curb European Power at Monetary Fund, *International Herald Tribune*, September 10, 2010, p. 18.

<sup>19</sup> For a more detailed listing of the likely agenda items to be presented G-20 members in Seoul, *see generally* G20 Seoul Summit, Agenda, <http://www.seoulsummit.kr/agenda> [hereinafter G-20 Agenda], as well as the Progress Report on the Economic and Financial Actions of the Previous G20 Summits, July 20, 2010, [http://www.g20.org/pub\\_communiques.aspx](http://www.g20.org/pub_communiques.aspx).

<sup>20</sup> G-20 Agenda, *id.*, at p. 1.

<sup>21</sup> *See generally* Leo Gross, The Peace of Westphalia, 42 *American Journal of International Law* 20 (1948).

<sup>22</sup> UN Charter art. 2, para. 7.

system—or another new “New World Order.” International relations and law scholars strongly debate in academic fashion the processes and outcomes of this legal regime building; but all seem to agree on the underlying transformative process that is occurring as described by Kaniska Jayasuriya:

*Given the rapid globalization of the economy, the growth of regional institutions like the European Union (EU), and the emergence of international regulatory regimes, the conventional notion of a sovereign State has limited efficacy. The concept of a sovereign State as an entity that has exclusive jurisdiction over its territory (with the concomitant limitation on external encroachment on its power), as well as the notion of an internal sovereignty reflected in the internal unity of the State and its “monistic” legal order, needs rethinking. The notion of a single unified system of internal sovereignty has become increasingly problematic in a global political economy surrounded by islands of sovereignty, rather than by a single, central decision-making authority.<sup>23</sup>*

In their most general forms, international law theories concerning global governance can be divided into two opposing schools of thought—“Realism” vs. “Institutionalism.” These legal theories tend to be closely aligned with underlying political theories of “Unilateralism” and “Universalism,” respectively. In reaction to the post-World War I wave of “Wilsonian idealism,” and taking their cue from Cold War developments and the pervasive theory of Political Realism following World War II, Legal Realists such as George Kennan, Hans Morgenthau, and Kenneth Waltz challenged the presumption that international law and institutions could vanquish war and power politics.<sup>24</sup> For these Legal Realists, it was doubtful that “international law could ever play more than an epiphenomenal role in the ordering of international life.”<sup>25</sup> In more recent times, following serious challenges posed by the newly gathering Institutionalists as described below, the Legal Realist theory will enjoy a return in force—at least in the United States during the Reagan and George W. Bush administrations. By way of example, one only need refer to the titles of recent works by former Bush administration UN Ambassador, and prominent lawyer, John Bolton (currently Senior Fellow at the American Enterprise Institute), to gain an insight into the arguments put forth by what some refer to as the “Neo-Cons” in American foreign policy: namely, *Surrender is Not an Option*<sup>26</sup> and, most recently, *How Barack Obama is Endangering Our Sovereignty*.<sup>27</sup> While not rejecting multilateralism in foreign affairs *per se*, these earlier and, especially, current Legal Realists remain firm in their position that nation-states must jealously guard their state sovereignty and freedom to act within the international arena on the basis of upholding vital national interests—not necessarily on the altruistic basis of what some may consider to be for the common good of humankind.

However, in the early 1960’s eminent international relations scholars such as Ernst Haas, in his seminal work *Beyond the Nation-State*, were predicting a tectonic shift over the near-term in global governance with his theory of “Functionalism” in international relations—basically, the idea that states will increasingly cooperate (function) between them based upon common interests and imperatives brought forward by quickly developing economic, social, and security interdependencies.<sup>28</sup> His later work within the Commission on Global Governance<sup>29</sup> helped lay the foundation for further serious analysis of the possible legal framework for what

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<sup>23</sup> Kanishka Jayasuriya, *Globalization, Law, and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance*, 6 *Global Legal Studies Journal* 425, p. 426 (1999) [hereinafter Jayasuriya].

<sup>24</sup> Concerning the intertwining of international law and relations theories, see generally Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 *American Journal of International Law* 205 (April 1993) [hereinafter Burley]. See also Hans Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (4ed, 1967); George Kennan, *American Diplomacy: 1900-1950* (1951); Kenneth Waltz, *Man, the State and War* (1958).

<sup>25</sup> *Id.* Burley, at p. 206.

<sup>26</sup> John Bolton, *Surrender Is Not an Option* (2007).

<sup>27</sup> John Bolton, *How Barack Obama Is Endangering Our Sovereignty* (2010).

<sup>28</sup> Ernst Haas, *Beyond the Nation-State: Functionalism and International Organization* (1964), wherein Haas described his theory of Functionalism whereby nations are compelled to work together within developing international organizations in order to meet common goals.

<sup>29</sup> See Shridath S. Ramphal & Ingvar Carlsson, *Our Global Neighborhood: The Report of the Commission on Global Governance* (1995), which urged upon the world a greatly enhanced UN system including an “Economic Security Council” to better regulate the rapidly globalizing world economy.

some might refer to as the progressive development of international law. As might be expected on the legal theory side of the debate, the Institutionalists were there to eagerly pick up the mantle of what they considered to be the progressive development of international law. An example of the Institutional theory of global governance would be the work of Richard Falk of Princeton University in the 1970's and 80's, which built upon the then developing "Regime Theory" that emphasized the role and impact of international regimes—*i.e.*, the principles, norms, rules and decision-making processes that reflect state expectations and behavior.<sup>30</sup> According to Falk's analysis, the world is passing through a "transition interval" wherein the "elements of the new world order system intermingle with elements of the old" (*i.e.*, the old Westphalian system of nation-states).<sup>31</sup> Falk went on to propose four "World Order Options" so as to better structure an analysis of this transition period, which can be summarized as follows:

> Option A: World Government--illustrated by the Clark-Sohn plan and designed to produce a peaceful and more just world by combining total disarmament with a greatly augmented UN system of world governance;

> Option B: Concert of Great Powers--illustrated by then President Nixon's Geopolitical Management Scheme, which today has evolved into the G-20 Summit system;

> Option C: Concert of Multinational Corporate Elites--illustrated by the Trilateral Commission and, one might add, today's International Chamber of Commerce; and

> Option D: Global Populism--illustrated by the "World Order Models Project" and the writings of Myres McDougal of the so-called New Haven School, urging a values-oriented approach based upon the respect for human dignity, ecological concerns, and ensuring the life-chances of subsequent generations.<sup>32</sup>

Falk qualified Option A's World Government system as "unrealistic, since [it] shed[s] no light on the transition problem, and misleading since [it] assume[s] that existing elites will . . . voluntarily evolve a world order system that diminishes their relative power, wealth and prestige. . . ."<sup>33</sup> While conceding that Option B's Concert of Great Powers presented "by far the most accessible path to central guidance," Falk strongly objected to the "neo-Darwinian" ethos inherent therein whereby "[i]n a setting of global scarcity *all* will suffer unless *some* prevail. Therefore, the powerful will, and given the nature of life processes *should*, prevail (emphasis added by Falk)."<sup>34</sup> As for Option C's Concert of Multinational Corporate Elites, Falk acknowledged the probable "efficiency in resource use" and "maximum economic development" opportunities presented by this approach but strongly criticized this mode of transition to a post-statist system of world order due to its inherent weakness—the fact that this construct is a creature of economic inequality and needs a coercive support structure itself (*i.e.*, the state) in the face of popular discontent.<sup>35</sup> Finally, concerning Option D's Global Populism approach, Falk praises McDougal's "values-oriented approach" to global governance, but he was troubled by the lack of transition strategy for this global populist movement—*i.e.*, what path would global populist forces follow to transit from "the present late phases of the state system to the emergent form of central guidance most likely to realize preferred values."<sup>36</sup> While these options were presented as a mere analytical framework of the world's transitional phase in global governance, Falk did not attempt to hide his preference for a strengthening of the Global Populism approach (Option D) and, hopefully according to his argument, its future influence upon Options B and C.<sup>37</sup>

Other international law scholars have more recently brought into the debate over differing approaches to global governance an analysis of the growing effects of international law upon domestic law. This so-called

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<sup>30</sup> Burley, *supra* note 24, at p. 206.

<sup>31</sup> Richard Falk, *A New Paradigm for International Legal Studies: Prospects and Proposals* (1985), in *International Law and World Order: A Problem-Oriented Coursebook*, p. 1286-1308 (B. Weston, R. Falk & A. D'Amato) 1990.

<sup>32</sup> *Id.* at p.1291. Concerning the Sohn-Clark Plan, see Grenville Clark & Louis B. Sohn, *World Peace Through Law* (1968).

<sup>33</sup> *Id.* at p. 1292-3.

<sup>34</sup> *Id.* at p. 1293-5.

<sup>35</sup> *Id.* at p. 1295-1300.

<sup>36</sup> *Id.* at p. 1300-5

<sup>37</sup> *Id.* at p. 1307-8.

“Liberalism Theory” posits that international law, like European Union law, is starting to profoundly alter the internal laws and politics of nation-states—so as to transform nations “from the inside out.”<sup>38</sup> As expressed by Anne-Marie Slaughter (former Dean of the Woodrow Wilson School of Public and International Affairs at Princeton University and currently Director of Policy Planning, U.S. State Department), when considering the continuing “myth” of Westphalian sovereignty to the effect that domestic political authorities are the sole arbiters of legitimate behavior within their respective territories:

*Today, however, the challenges facing states and the international community alike demand very different responses from and thus new roles for the international system. The processes of globalization and the emergence of new transnational threats have fundamentally changed the nature of governance and the necessary purposes of international law in the past few years. From cross-border pollution to terrorist training camps, from refugee flows to weapons proliferation, international problems have domestic roots that an interstate legal system is often powerless to address. To offer an effective response to these new challenges, the international legal system must be able to influence the domestic policies of states and harness national institutions in pursuit of global objectives. . . . In turn, the primary terrain of international law must shift—and is already shifting in many instances—from independent regulation from above the national state to direct engagement with domestic institutions. The three principle forms of such engagement are strengthening domestic institutions, backstopping them, and compelling them to act.*

*These functions of international law are already well known to the members of the European Union (EU). . . . To the extent that what we describe is the “European way of law” is already evident both within the EU and now in a growing number of other contexts, this [then] describes an important reorganization of the means and mechanisms through which international law operates. Our argument goes further, however, by suggesting that these new mechanisms of international law have the power to make the system as a whole far more effective. We therefore move beyond description and prediction to prescription, suggesting ways that the European way of law should become the future of international law writ large.<sup>39</sup>*

Clearly, some international law specialists may choose to disagree with the proposition that the future of international law is that of the “European way of law” based upon such a Liberalism Theory. It should be noted, however, that even the U.S. government during the final year of the George W. Bush administration in 2008, felt compelled to acknowledge within its National Intelligence Council’s report entitled *Global Trends 2025: A Transformed World*, that certain “discontinuities” in world society were causing an abrupt change in the existing Westphalian international relations system, as follows:

*The international system—as constructed following the Second World War—will be almost unrecognizable by 2025 owing to the rise of emerging powers, a globalizing economy, an historic transfer of relative wealth and economic power from West to East, and the growing influence of non-state actors. By 2025, the international system will be a **global multipolar one** with gaps in national power continuing to narrow between developed and developing countries. Concurrent with the shift in power among nation-states, the relative power of various nonstate actors—including businesses, tribes, religious organizations, and criminal networks—is increasing. The players are changing, but so too are the scope and breadth of transnational issues important for continued global prosperity. . . . Policymakers and publics will have to cope with a growing demand for multilateral cooperation*

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<sup>38</sup> Concerning this Liberalism Theory, see generally Anne-Marie Slaughter, *The Future of International Law is Domestic (or, The European Way of Law)*, 47 *Harvard International Law Journal* 327 (Summer 2006) [hereinafter Slaughter]; see also Robert Cooper, *The Breaking of Nations: Order and Chaos in the 21<sup>st</sup> Century* (2009)

<sup>39</sup> *Id.* Slaughter, at p. 328-9.

*when the international system will be stressed by the incomplete transition from the old to a still-forming new order (emphasis supplied by NIC).<sup>40</sup>*

Upon reading this analysis, one must be forgiven for suspecting that at least one of the scholars or government officials stating this position is a former student of Professor Falk and takes to heart his “transition theory,” if not a dose of his analysis of the possible impact of Global Populism.

### B. The Developing Global Regulatory Legal Regimes

Many would consider the post-World War II expansion in global regulatory legal regimes to be nothing short of startling in scope and breadth—for the Universalists, another welcome step towards some form of world government. Of course, many Unilateralists would consider this possible spread of global governance shocking as an affront upon cherished notions of sovereignty, free enterprise and modern capitalism. Regardless of political or legal theory, however, one must admit that the widening and deepening web of global economic regulation—stemming from the highly developed World Trade Organization (“WTO”) legal regime,<sup>41</sup> the emerging international investment legal regime and its International Centre for the Settlement of Investment Disputes (“ICSID”),<sup>42</sup> and the rapidly transforming legal regime affecting international financial activities involving the IMF, World Bank, and Bank for International Settlements (“BIS”)<sup>43</sup>—is having a profound effect upon the development of international law.<sup>44</sup> Some of these global regulatory bodies meet well established notions of international law and international organizations, such as the WTO with its permanent secretariat, rule-making capacity and enforcement mechanism to compel compliance. Many others, however, like the BIS and new FSB, do not clearly fit conventional definitions of international law or international organizations on several grounds, as explained by Professor Jayasuriya:

*It is apparent that the increasing complexity of globalization brings with it a global system of governance and regulation. These regulatory forms have three main features. First, they are governed by networks of state agencies acting not on behalf of the State but as independent actors. Second, the emergent international regulatory order is primarily concerned with laying down standards and general regulatory principles rather than strict rules. Finally, recent developments in international regulation in the area of finance, securities, and the environment suggest the emergence of a system of decentralized enforcement or the regulation of self-regulation. In other words, the emergent regulatory system is characterized by a system of network governance providing broad standards and depending on compliance of State agencies in preference to direct enforcement. But a system of indirect regulation depends on a dramatic transformation of the Westphalian notions of sovereignty, which sit uneasily with the conventional understanding of international law.<sup>45</sup>*

Questions are being posed by those regulated as well as the populations for whose benefit the global regulations are imposed. Such questions concern the issues of efficacy, legitimacy, and accountability of these

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<sup>40</sup> NIC, Global Trends 2025 Report, *supra* note 7, at p. vi.

<sup>41</sup> See, e.g., Andrew T. Guzman, Global Governance and the WTO, 45 Harvard International Law Journal 303 (Summer 2004).

<sup>42</sup> See, e.g., Jeswald Salacuse, The Emerging Global Regime for Investment, 51 Harvard International Law Journal 427 (Summer 2010).

<sup>43</sup> See, e.g., John H. Walsh, Institution-Based Financial Regulation, 49 Harvard International Law Journal 381 (Summer 2008).

<sup>44</sup> Much of this web of international law obligations is based upon thousands of treaties. Concerning this positivist phenomenon, see generally Gabriella Blum, Bilateralism, Multilateralism, and the Architecture of International Law, 49 Harvard International Law Journal 324 (Summer 2008).

<sup>45</sup> Jayasuriya, *supra* note 23, at p. 453.



global regulatory bodies.<sup>46</sup> Some critics point to the problem of so-called “regulatory capture,” posing an essential question-- “In whose interest is the global economy being regulated?”<sup>47</sup> The consuming publics’ interest or that of the Multinational Corporate Elite, to use the language of Professor Falk? Based upon what economic model? Free market capitalism sustained by the Bretton Woods institutions or the now reemerging “state capitalism” propelled forward by the apparent success of the BRICS?<sup>48</sup> When considering these important questions and inherent doubts about the developing global economic regulatory system, it must be noted that the current world economic crisis has evidently focused the attention of global business leaders upon the necessity of further strengthening the global economic regulatory legal regime. The results of a survey questioning the need for establishing a global financial markets regulator conducted by a prominent international law firm of 700 global business leaders during the height of the current crisis, seem to reflect the differing positions of various regional and ethnical blocs:

*Market participants are divided on the need for a global regulator, with 58% of respondents in Continental Europe agreeing that one should be established, but respondents in both the UK (55%) and USA (56%) disagreeing. Respondents in Asia are split, with 44% agreeing and 41% disagreeing. Despite this, there is an overriding sense that globalization is irreversible. . . .*<sup>49</sup>

Possibly reflecting that “European way of law” discussed *supra*, the European members of the Multinational Corporate Elite appear prepared to push forward with the global financial regulatory enhancement process. But it looks as if the European business leaders will have a rather hard time convincing the majority of the Anglo-Saxon corporate elite of the necessity of further strengthening this international law regime. As for the Asian business leaders, the time appears to soon be upon us--as acknowledged within the American government’s *Global Trends 2025 Report*--when their ambivalence vis-à-vis the critical issue of global economic regulatory development will be replaced by growing national interests in maintaining international peace and prosperity.<sup>50</sup> The upcoming G-20 Summit to be held in Seoul, South Korea, may then be just the timid beginning of their world stage debut.

### C. The G-20 Summit System: Overstepping Its Rightful Role?

As one might expect, the G-20 Summit system is running head-on into a storm of criticism concerning its proper role (or for some, any role) within the global economic regulatory regime. Interestingly, this criticism stems from the Universalists as much as from the Unilateralists. As would be expected, the Universalists tend to strongly object to the prospect of handing over ultimate authority for global economic regulation to an elite Concert of Great Powers ( to appropriate the language of Professor Falk),<sup>51</sup> whereas the Unilateralists loudly

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<sup>46</sup> Concerning the importance of the concepts of legitimacy and accountability to international law and organizations, *see generally* T.M. Franck, *The Power of Legitimacy Among Nations* (1990); concerning the legitimacy and accountability of the WTO legal regime, *see generally* Anu Bradford, *International Antitrust Negotiations and the False Hope of the WTO*, 48 *Harvard International Law Journal* 383 (Summer 2007); concerning global financial regulatory regimes, *see generally* Stavros Gadinis, *The Politics of Competition in International Financial Regulation*, 49 *Harvard International Law Journal* 447 (Summer 2008).

<sup>47</sup> *See, e.g.*, Walter Mattli & Ngaire Woods, eds., *The Politics of Global Regulation* (2009), and their discussion of “regulatory capture” therein.

<sup>48</sup> *Supra* note 13.

<sup>49</sup> *The Future Direction of Global Financial Regulation: Allen & Overy Global Survey*, 12 November 2008, <http://www.allenoverly.com:AOWeb/binaries/50581.pdf>.

<sup>50</sup> Concerning China and its current approach to international law and global economic regulation, *see generally* N. Alexander Aizenstatd, *International Law in China: The Xiamen Academy of International Law*, *The International Law Quarterly*, Fall 2010, at p. 26; *see also* Pitman B. Potter, *Globalization and Economic Regulation in China: Selective Adaptation of Globalized Norms and Practices*, 2 *Washington University Global Studies Law Review* 119 (2003).

<sup>51</sup> *See, e.g.*, Yulius Hermawan, ‘Global Governance’ or ‘Global Clubbing’: Can an Exclusive Club Deliver Benefits for All Nations? (June 2009), one of several conference documents available at the United Nations University website, *infra* note 54; *see also* concerning the legitimacy and accountability of such elite groupings, Robert O. Keohane and Joseph S. Nye, Jr., *Between Centralization and Fragmentation: The Club Model of Multilateral*

complain against further transfer of an important part of their national sovereignty to yet another multilateral body.<sup>52</sup> Both schools raise serious questions pertaining to the legitimacy and accountability of this G-20 grouping in carrying out their expanding powers of global economic regulation.

A good example of the Universalist argument would be the position of the United Nations itself—perhaps the international institution amongst international institutions. A recent report by the United Nations Conference on Trade and Development (“UNCTAD”) concerning the global economic crisis and global economic decision-making, stated as follows:

*The crisis has made it all too clear that globalization of trade and finance calls for global cooperation and global regulation. But resolving this crisis and avoiding its recurrence has implications beyond the realm of banking and financial regulation, going to the heart of the question of how to revive and extend multilateralism in a globalizing world.*

*The United Nations must play a central role in guiding this reform process. It is the only institution which has the universality of membership and credibility to ensure the legitimacy and viability of a reformed governance system. It has proven capacity to provide impartial analysis and pragmatic policy recommendations in this area.*<sup>53</sup>

More specifically yet, on March 25, 2010, the United Nations University held a conference at UN headquarters in New York entitled “Global Governance: The G-20 and the UN,” wherein the questions of G-20 legitimacy and accountability were put to the audience in the following straightforward language:

*The G-20 process and the swift, decisive actions that it brought about helped to avert a global economic depression in the last year. However, for the G-20’s deliberations to be translated into effective actions on a global scale, they will need to be more consultative, inclusive and transparent. This will require the development of appropriate mechanisms to engage and consult a wider range of countries. At the same time, it should also be borne in mind that the United Nations is the only global body with universal participation and unquestioned legitimacy. The G-20 process should recognize and reflect this reality. The G-20 process and its actions and decisions should complement and strengthen the United Nations. What can be done to ensure that the G-20 process strengthens and not undermines the UN? How can we build up a framework of engagement between the G-20 and non-G-20 countries?*<sup>54</sup>

Suggested solutions to this institutional, regime-building dilemma have not been long in forthcoming. These suggestions range from a rather general proposal calling on so-called “Middle Powers” to formulate a long-term vision of international economic governance to better support their short-term objectives,<sup>55</sup> to very specific proposals to create a “World Financial Organization”<sup>56</sup> or to expand the G-20 membership while

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Cooperation and Problems of Democratic Legitimacy, Harvard University Faculty Research Working Papers Series RWP01-004, February 2001.

<sup>52</sup> See, e.g., John Bolton, Should We Take Global Governance Seriously?, 1 Chicago Journal of International Law 205 (2000). See also Peter J. Spiro, The New Sovereignists: American Exceptionalism and Its False Prophets, Foreign Affairs, Nov.-Dec. 2000, p. 9-11.

<sup>53</sup> UNCTAD, The Global Economic Crisis: Systemic Failures and Multilateral Remedies, p. iv, (2009), [http://www.unctad.org/en/docs/gds20091\\_en.pdf](http://www.unctad.org/en/docs/gds20091_en.pdf).

<sup>54</sup> United Nations University Conference Announcement, Global Governance: The G-20 and the UN, March 25, 2010, <http://www.ony.unu.edu/events-forums/new/MDForums/2010/global-governance>.

<sup>55</sup> See, e.g., Daniel D. Bradlow, Reforming Global Economic Governance: A Strategy for Middle Powers in the G20, Vox, 13 Aug 2010, contained within documents listed on the UN University website *id.*

<sup>56</sup> See, e.g., Barry Eichengreen, Not a New Bretton Woods but a New Bretton Woods Process, contained in What G20 Leaders Must Do to Stabilise Our Economy and Fix the Financial System, Vox, 2010, contained within documents listed on the UN University website *supra* note 54.

reducing the European Union to only one seat (plus installing the IMF as the permanent secretariat).<sup>57</sup> One may reasonably anticipate, following the upcoming Seoul G-20 Summit meeting with its likely transformational decisions, more such UN-centered, or multilateral-oriented, suggestions from the Universalists.

As for the Unilateralists, the risks to national sovereignty posed by a solidifying G-20 grouping (aided and abetted by the IMF, FSB and other international institutions) were further augmented with the recent proposals by the leaders of France and the United Kingdom to create a "Financial Activities Tax" (or, FAT) to be imposed upon financial institutions' balance sheets, profits, and compensation and paid into a nation's treasury to help finance the costs of a financial crisis (not to mention the additional French and British proposals to create global financial taxes to fund the fight against global warming and world poverty).<sup>58</sup> Although this proposal for a FAT was rejected at the G-20 Deputies Meeting in April 2010, some commentators have gone on to predict, what are for them, rather disturbing follow-on scenarios involving global regulation and taxation:

*If the G-20, IMF, the World Bank, the United Nations, and other international organizations choose to take this path, then one can imagine the following scenarios:*

*-The G-20 and IMF will require energy companies to conduct human rights impact assessments measuring the degree to which their products and policies prevent equal access for all to reliable and affordable energy or pose environmental risks (i.e., climate change), the estimated and potential losses from which must be funded by an Energy Activities Tax ("EAT") on energy company profits;*

*-The G-20 and IMF will require pharmaceutical companies to submit their product research and development plans to the IMF so that they can be reviewed to determine whether proper priority is being placed on the development of affordable (though unprofitable) medicines that are needed to combat disease in developing countries, with a Pharmaceutical Activities Tax ("PAT") being assessed on company profits to create a pool of funds which can be used to provide affordable health care to those who cannot access the necessary medicines; [and]*

*-The G-20 and IMF will require military defense contractors to provide details regarding their weapons research and development plans to determine the potential risks associated with the use of such weapons in regional conflicts, with a Military Activities Tax ("MAT") being assessed on company profits to create a pool of funds to be used to compensate the victims of war and rebuild war-torn societies and infrastructures.<sup>59</sup>*

Clearly, the Unilateralists, with the support of their schools of economic theory, are foretelling of a near future of invasive global economic regulation likely to adversely impact global economic growth to the point of near strangulation. The Universalists, with the support of their schools of economic theory, are not, however, likely to waiver from their position that world economic growth cannot be truly sustainable without a firm framework of sound global regulation. These opposing forces, with their dueling agendas, are very likely to be even more engaged in this debate over global economic regulation at the conclusion of what portends to be a very active G-20 Summit meeting in Seoul, South Korea, in November. Discontinuities--brought about by continuing globalization and economic crises--will not permit otherwise.

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<sup>57</sup> See, e.g., Raghuram Rajan, Reforming Global Economic and Financial Governance, contained within documents listed on the UN University website *supra* note 54.

<sup>58</sup> For an example of this concern with the transfer of national sovereignty to global regulators, see generally the website of Global Governance Watch, <http://www.globalgovernancewatch.org>; concerning the proposals by France and the United Kingdom concerning the creation of global financial taxes, see generally Brown & Sarkozy Move to Fund Climate Aid with Global Banking Tax, The Guardian, Dec. 11, 2009, <http://www.guardian.co.uk/environment/2009/dec/11/tax-climate-aid-brown-sarkozy>; and, Global Financial Tax Proposal 'Not Viable' Says EU Commissioner, EU Business, Sept 18, 2009, <http://www.eubusiness.com/news-eu/france-banking-tax>.

<sup>59</sup> Jim Kelly, G-20 and IMF Officials Institutionalize Economic Global Governance, April 28, 2010, p. 1-2, <http://www.globalgovernancewatch.org/spotlight-on-sovereignty>.

## V. Conclusion

Due to discontinuities in world society caused by the ever-increasing pace of globalization, as pushed forward by the current global economic crisis, those involved in regulatory matters can expect an even more intensive development of global economic regulation over the near-term. Whereas both the Universalists and Unilateralists will continue to argue over the wisdom of such further transfer of sovereignty over regulatory matters to multilateral instances, it seems clear that our world is likely to observe a continued strengthening of global regulatory bodies at the expense of nation-state sovereignty. The only major question remaining is just what form of global regulatory architecture will be built during this important transition phase that we are currently living through. Will it resemble a budding form of World Government with universal membership, strict rule promulgation and strong enforcement mechanisms, or will it more likely resemble a Concert of Great Powers along the lines of the developing G-20 Summit meeting system? What role will any possible Concert of Multinational Corporate Elites be able to play in this transition period from the Westphalian nation-state system to some new form of global governance? And, finally, what role will Global Populism play in determining the eventual structure of global economic regulation? Will the eventual outcome meet your definition of the progressive development of international law? As the saying goes, "Only time will tell."