ARTICLES

INTERNATIONAL ORGANIZATIONS AND THE DEVELOPMENT OF INTERNATIONAL LAW

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ABSTRACT

This Article examines the contribution that international organizations have made in the development of international law in two distinct areas: first, through the exercise of the "enabling authority" that is provided to these organizations under the relevant treaty; second, through the development of soft law in the regulation of domestic financial institutions and markets. With respect to the exercise of enabling authority, a comparative analysis of the United Nations, the International Monetary Fund and the Organization for Economic Cooperation and Development reveals how the charters of these institutions have enabled them to specify the scope of members' obligations in a dynamic manner; i.e., in a manner that gives them the flexibility to take into account ongoing developments that are relevant to the mandate of these institutions. With respect to the development of soft law, a number of international organizations have taken the lead in designing the international best practices and standards that make up the soft law system in the area of domestic regulation. Moreover, by assessing member countries against these standards, they have also played a critical role in the "enforcement" of these standards and practices.

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I. Introduction

The recent symposium organized by the Georgetown Journal of International Law entitled "The Evolution of International Organizations and Cooperation" ("Symposium Program") was a timely one.[1] The pandemic has dramatically revealed the extent to which the problems we confront, being global, require global solutions. Yet in that regard, the international community seems to be confronted with a paradox: on the one hand, it is evident that more—not less—cooperation is needed on a global level; on the other hand, over the past several years, we have witnessed a period of resurgent nationalism, where global cooperation, although increasingly urgent, is increasingly unpopular.

Why? While globalization has generated significant welfare gains, it has also created economic dislocation. In advanced economies, there is the view that this dislocation has been exacerbated by a number of the rules—or at least the application of these rules—that underpin the international system. To the extent that international organizations generate these rules and oversee their implementation, they are seen as part of the problem—not part of the solution.[2] For developing countries, there is a range of complaints. Among them is the concern that their own interests are not adequately taken into account in the governance of the institutions that manage the system, which they still feel is dominated by advanced countries—whether it be at the World Bank, the International Monetary Fund, or the Security Council of the United Nations.[3]

So while the international community needs more—not less—cooperation, it is also clear that both the substantive rules and governance arrangements that underpin the existing system are in need of reform. Appropriately, the

1. The Symposium took place virtually on April 15-16, 2021. Symposium, *The Evolving Role of International Organizations and Cooperation*, GEO. J. INT'L L. (2021), http://www.gjil.org [hereinafter *Symposium Program*].

2. An article recently written by the former U.S. Trade Representative provides a list of U.S. concerns with the WTO and the multilateral trading system that it oversees. *See* Robert E. Lighthizer, *How to Set World Trade Straight*, WALL ST. J. (Aug. 20, 2020), https://www.wsj.com/articles/how-to-set-world-trade-straight-11597966341.

3. For example, the April 5 Communiqué of the Group of 24 (made up of 24 developing countries) calls for the implementation of long-awaited governance reforms within the IMF that would increase the quota share of emerging markets and developing countries while protecting the shares of the poorest countries. *See Intergovernmental Group of Twenty-Four on International Monetary Affairs and Development*, IMF (Apr. 5, 2021), https://www.imf.org/en/News/Articles/2021/04/05/g24-communique-april-5-2021. With respect to the reform of the U.N. Security Council, *see* Meetings Coverage, General Assembly, Security Council Must Reflect Twenty-First Century Realities, Delegates Tell General Assembly, with Many Calling for Urgent Expansion of Permanent Seats (Nov. 16, 2020), https://www.un.org/press/en/2020/ga12288.doc.htm.

agenda of the Symposium Program was dedicated to a review of the reform priorities of the various international organizations, as well as the steps that individual countries, including the United States, would need to take to ensure that this agenda is realized. Importantly, the discussion also recognized the need for multilateral organizations to accommodate and support the trend towards regional integration.[4]

This Article does not seek to outline a forward-looking reform agenda that would address these important policy issues. Rather, it provides a retrospective on certain aspects of the legal framework that supports the existing global architecture. Specifically, it analyzes the contribution that international organizations have made to the development of international law, with a focus on two very different modalities. The first is the adoption of decisions with legally binding effect pursuant to the "enabling authority" that is given to the international organization under the relevant treaty. The second involves the promotion of "soft law" by a number of these organizations; namely, the promotion of standards and best practices (primarily in the area of domestic financial regulation) that countries agree—pursuant to a nonbinding political commitment—to adopt as a matter of national law.

The premise of this Article is that a retrospective with respect to these legal issues is relevant to the forward-looking policy agenda. As countries debate the reform of the substantive rules that have underpinned cooperation over the past decades, it is important that consideration also be given as to how these rules are formulated. In that context, to what extent does experience to date on the use of enabling authority and soft law provide guidance as to the optimum way in which we secure cooperation going forward?

II. The Exercise of Enabling Authority

A central area of inquiry for any student of public international law is the identification of the sources of such law. The traditional starting point of this inquiry is, of course, Article 38 of the Charter of the International Court of Justice ("ICJ"), the principle judicial organ of the United Nations and the leading tribunal available for the settlement of disputes among states.[5] Article 38 of the ICJ Charter sets forth

4. *See* Symposium Program, *supra* note 1.

5. The International Court of Justice was established pursuant to Chapter XIV of the United Nations Charter. Although it is available to States as a means of resolving disputes among them, States must consent to the Court's jurisdiction. For an overview of the International Court of Justice, see Hugh Thirlway, *The International Court of Justice*, *in* INTERNATIONAL LAW 573—600 (Malcolm Evans ed., 2018).

a list of sources of law to be relied upon by the ICJ, with international conventions (i.e., treaties) being at the top of this list.[6]

Some legal scholars have noted that, with the passage of time (the Charter entered into force in 1945), this list of sources is out of date and fails to address a number of the issues that arise from modern international relations.[7] Without trying to engage in the broader debate regarding the adequacy of Article 38 as "the source for sources" of international law, there is at least one source of international law that is *not* specifically identified on the enumerated list: the decisions of international organizations. In fairness to Article 38, it may be said that decisions of international organizations are not independent sources of international law since their legal effect is derived from the international treaty that establishes them. Nevertheless, it has become abundantly clear that international organizations, which themselves are subjects of international law with the capacity to act independently of states, have adopted a range of decisions that have had an important impact on the development of international law in the political, national security, economic, and financial areas.

Many decisions of international organizations relate to the internal regulation of the organizations. Unless and until these decisions are amended, they are binding on the organization itself and therefore have an important impact on the activities of the institution in question. However, there are other decisions that have an external rather an internal impact. More specifically, a number of the charters of international organizations include provisions that authorize the organization to make decisions that, once adopted, determine the scope of obligations of member countries under the respective treaty. The authority given to these organizations under the treaty to take such decisions—which this Article refers to as "enabling authority"—may be viewed as a form of delegation of authority by the signatories to the organization. Importantly, it

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6. The full text of Article 38, Section 1 of the Statute of the International Court of Justice reads as follows:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles of law recognized by civilized nations;
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Statute of the International Court of Justice art. 38 (1), Oct. 24, 1945, 33 U.N.T.S. 993.

7. *See* MALCOLM EVANS, INTERNATIONAL LAW 100 (5th ed. 2018).

gives the organization the capacity to specify the obligations of members from time to time in a manner that takes into account changing circumstances. Importantly, and as will be discussed further below, this type of delegation obviates the need for an amendment of the treaty itself, which can be a lengthy and uncertain process.

The concept of enabling authority is a subtle one. As a general matter, treaties do not confer upon an international organization the authority to establish entirely new obligations. This can only be achieved through an amendment of the treaty itself. Rather, the grant of enabling authority to an organization is normally designed to enable the organization in question to adopt binding decisions that give effect to an obligation that already exists, albeit one that is so general and indeterminate that, on its own, is effectively unenforceable. The objective is to give the organization the capacity to give effect to these general obligations through the adoption—and revision—of more specific decisions that take into account changing circumstances, thereby giving the organization the needed flexibility to oversee members' obligations. This forward-looking and dynamic quality of enabling authority distinguishes it from the exercise of interpretive authority, where the focus is primarily on the text, the overall context, and, in the event of ambiguity, the treaty's *travaux prepraratoires* (legislative history). For this reason, the exercise of interpretive authority provides an international organization far more limited flexibility when responding to changing circumstances.[8]

The remainder of this section discusses the design and application of enabling authority through the examination of three international organizations: The United Nations ("U.N."), the International Monetary Fund ("IMF"), and the Organization for Economic Cooperation and Development ("OECD"). Obviously, these organizations differ from each other in a number of respects. While the central purpose of the U.N. relates to the preservation of international peace and security, the mandates of the IMF and the OECD focus on economic cooperation. Moreover, while the U.N. and the IMF are organizations of universal membership, membership in the OECD is effectively restricted to those countries that have achieved a certain level of economic development.[9]

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8. The general rule that guides the interpretation of treaties, including treaties establishing international organizations, is set forth in Article 31 of the Vienna Convention on the Law of Treaties. *See* Vienna Convention on the Law of Treaties art. 31, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

9. As of June 1, 2021, the membership of these institutions was as follows: U.N. (193 members); IMF (190 members) and OECD (38 members). The conditions for membership in the OECD are described in the following: Chair of the Working Group on the Future Size and Membership of the Organization to Council Framework for the Consideration of Prospective

Yet they all share one important characteristic: they are all charged with overseeing their members' obligations with respect to activities that fall within the organization's mandate. As will be seen, the enabling authority provided to the organization under the respective treaty plays a critical role in this oversight process.

A. *The United Nations*

The U.N. has a broad set of purposes to be achieved through multiple organs. However, as articulated at the conclusion of the Dumbarton Oaks conference in 1944,[10] where the key principles of the U.N. charter were agreed upon, its core objective is to "maintain international peace and security; and to that end to take effective collective measures for the prevention and removal of threats to the peace and the suppression of acts of aggression or other breaches of the peace[.]"[11] The Security Council is the organ responsible for achieving this objective and, as will be discussed below, its powers are largely dependent on its ability to exercise the enabling authority granted to it under the U.N. Charter.[12]

As with other international organizations, the scope of the Security Council's enabling authority is best understood by examining the scope of the general obligations that countries incur when they adhere to the U.N. Charter. Importantly, not only are member countries required to "settle their international disputes by peaceful means" and to "refrain in their international relations from the threat or use of force,"[13] but they are also required to assist the U.N. in its efforts to address threats to peace; i.e., assist in helping the U.N. to address the hostile acts of other states.[14] Specifically, under Article 2, Section 5, members are required to "give the United Nations every assistance in any action it takes in accordance with the present Charter and shall refrain from

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Members, *Framework for the Consideration of Prospective Members*, OECD (June 7, 2017), http://www.oecd.org/mcm/documents/C-MIN-2017-13-EN.pdf [hereinafter OECD Report].

10. The Dumbarton Oaks Conference took place in Washington, D.C. from Aug. 21, 1944 to Oct. 7, 1944. It resulted in an agreement on a document entitled "The United Nations Dumbarton Oaks Proposal for a General International Organization" (Dumbarton Oaks Proposal) which provided the basis for the negotiations in San Francisco that led to agreement on the U.N. Charter. *See* U.N. Conference on International Organization, *The United Nations Dumbarton Oaks Proposals for a General International Organization* (Apr. 25, 1945) [hereinafter *Dumbarton Oaks Proposal*], https://digital.library.cornell.edu/catalog/ss:2179668.

11. *Id.* ch. 1.

12. The purposes, powers and governance structure of the Security Council are set forth in Chapters V through VIII of the U.N. Charter. *See* U.N. Charter art. 23–54.

13. *Id.* art. 2, § 3–4.

14. These general obligations are enumerated in Article II of the U.N. Charter. *See id.* art. 2.

giving assistance to any state against which the United Nations is taking preventive or enforcement action."[15]

As a means of exercising oversight with respect to the performance of these obligations, Chapter VII of the U.N. Charter gives to the U.N. Security Council the enabling authority to require members to take specific actions that will assist it in preserving international peace and security, the range of actions falling within the Security Council's discretionary authority. In circumstances where the Security Council determines that measures not involving the use of armed forces will be adequate, it may "call upon the Members of the United Nations" to take such measures, which "may include [the] complete or partial interruption of economic relation[] . . . and the severance of diplomatic relations" (Article 41).[16] Where, however, such actions may be inadequate (or have proved inadequate), the Security Council may decide that the U.N. "may take such action by air, sea, or land forces as may be necessary to . . . restore [] peace and security" (Article 42).[17] In this latter set of cases, the Security Council may require members to make available to the Security Council, "on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities."[18] The fact that Security Council may decide that its decisions will be legally binding on those members who are called to provide assistance is made abundantly clear in Article 48, which provides, in part, that "[t]he action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine."[19]

Over the course of its history, the U.N. Security Council has exercised its enabling authority, described above, in a broad range of circumstances. For example, pursuant to its authority under Article 41 of the U.N. Charter, it has adopted resolutions requiring the entire membership to impose broad economic sanctions against a member that was judged to be acting in a manner that threatened international peace and security. In some cases, as in the case of Iraq's invasion of Kuwait in 1991, the sanctions were imposed because of territorial aggression.[20] In other cases, economic sanctions were imposed because of a perceived threat

15. *Id.* art. 2, § 5.
16. *See id.* art. 41.
17. *See id.* art. 42.
18. *See id.* art. 43.
19. *See id.* art. 48.
20. S.C. Res. 661 (Aug. 6, 1990).

to international peace and security arising from national programs to develop weapons of mass destruction, including the programs of Iran and North Korea.[21] Because these sanctions interfered with commercial activities of private parties, implementation of the obligation set forth in the relevant resolution required member countries, such as the United States, to adopt measures that gave the resolution domestic legal effect.[22] There have also been cases where the Security Council has adopted a decision that "recommends" that assistance be provided by members but stops short of actually requiring members to do so.[23]

There have been occasions where the objective of the sanctions imposed pursuant to Chapter 7 has been both political and economic. In 2003, following the invasion of Iraq and the collapse of the government of Saddam Hussein, the international community, led by organizations such as the IMF, was actively engaged in seeking to rebuild the economy of Iraq. A key element of this strategy was securing a reduction of Iraq's external debt, including debt owed by the government to private creditors. As a means of limiting the ability of creditors to interfere with the debt restructuring process through the pursuit of litigation against Iraq, the terms of the Security Council Resolution, in addition to lifting the sanctions that it had previously imposed, required all members to adopt measures that would effectively prevent private creditors from enforcing their claims against Iraq through the seizure of its assets.[24]

An assessment of the significance of any international organization's enabling authority requires an evaluation of its governance structure. One of the essential characteristics of any international organization is that it possesses organs that have the capacity to act independently of

21. In the case of Iran, see S.C. Res. 1737 (Dec. 27, 2006), S.C. Res. 1747 (Mar. 24, 2007), and S.C. Res. 1929 (June 9, 2010). In the case of North Korea, see S.C. Res. 1718 (Oct. 14, 2006), S.C. Res. 1874 (June 12, 2009), S.C. Res. 2087 (Jan. 22, 2013), S.C. Res. 2094 (Mar. 7, 2013), S.C. Res. 2270 (Mar. 2, 2016), S.C. Res. 2321 (Nov. 30, 2016), S.C. Res. 2371 (Aug. 5, 2017), S.C. Res. 2375 (Sept. 11, 2017), and S.C. Res. 2397 (Dec. 22, 2017).

22. For example, in the case of the broad economic sanctions imposed against Iraq, the U.S. implemented U.N. Security Council Resolution by Executive Order No. 12724 adopted August 9, 1990. *See* Exec. Order No. 12,724, 31 C.F.R. § 575 (1991).

23. This was the approach used in June 1950, following the invasion of South Korea by North Korea. *See* S.C. Res. 84 (July 7, 1950).

24. *See* S.C. Res. 1483, § 22 (May 22, 2003). For a discussion of the use of Chapter VII as a means of restructuring, see Lee C. Buchheit & Mitu Gulati, *Sovereign Debt Restructuring and US Executive Power*, 14 CAP. MKTS. L. J. 114, 114–30 (2018). *See also* Martin A. Weiss, *Iraq's Debt Relief: Procedure and Potential Implications for International Debt Relief*, CONG. RES. SERV. (2011), https://fas.org/sgp/crs/mideast/RL33376.pdf.

its member states.[25] The greater this capacity, the more significant is the grant of enabling authority by the membership to the organization in question. With respect to the Security Council, one aspect of its governance structure does enable it to act independently—its size. Even though it is limited to fifteen members, the Security Council may make decisions that are binding on all members—irrespective of whether non-Security Council members agree with the decision.[26] At the same time, however, both the composition and the voting rules of the Security Council clearly constrain its exercise of enabling authority. Among the fifteen Security Council members, ten of them are elected for two-year terms.[27] The remaining five are permanent members. Under the terms of the Charter, although a decision can be taken by an affirmative vote of nine of the fifteen members, it must also include the concurrence of all of permanent five members; i.e., any of the permanent five members may veto a Security Council decision (an abstention by a permanent five member will, however, enable a decision to be adopted if it has received the affirmative vote of nine members).[28] The "Permanent Five" (which are specified in the Charter itself), are China, France, Russia, the United Kingdom, and the United States.[29]

When the U.N. Charter was negotiated, it was recognized that the Permanent five veto, while a significant constraint, was a necessary one: if the U.N. wished to be an effective institution it would need to have universal membership. However, universal membership would not be possible unless the veto privilege was granted to the most powerful states at the time—the allied powers during World War II—who were perceived to be the effective guarantors of the collective security system.[30] Of course, as is the case of the governance structure of other international organizations, the Security Council voting system has been criticized for not taking into account important shifts in geopolitical power over the past seventy-five years. Accordingly, one of the major reform proposals would expand the permanent veto group to include Brazil, Germany, India, and Japan. While such a reform proposal, if adopted, would give the Security Council greater political legitimacy, it should be noted that it would further reduce the ability of the Security

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25. For a summary of the essential attributes of an International Organization, see Dapo Akande, International Organizations, in EVANS, supra note 5, at 227.

26. U.N. Charter art. 48.

27. *Id.* art. 23.

28. *Id.* art. 27.

29. *Id.* art. 23.

30. *See Voting System*, U.N. SECURITY COUNCIL, https://www.un.org/securitycouncil/content/voting-system.

Council to exercise its enabling authority since it would increase the number of countries that could block Security Council decisions.[31]

B. *The International Monetary Fund*

The fact that the Articles of Agreement of the IMF were negotiated at approximately the same time as the U.N. Charter is not coincidental. A key motivation for the establishment of the IMF in 1945 was the recognition that the political cooperation to be achieved through the U.N. could not be safeguarded without effective economic cooperation. Indeed, a review of the record reveals an acute awareness that the political instability that persisted during the 1930s—and which had eventually led to war—had been exacerbated by the economic nationalism that followed the Great Depression.[32] This economic nationalism manifested itself in a number of ways, including through the manipulation of exchange rates to gain an unfair competitive advantage and the discriminatory use of restrictions on the availability of foreign exchange.[33] These measures were perceived to have significantly undermined the operation of the multilateral trading system. As will be discussed below, members' obligations under the Articles are designed to constrain such practices, and, as is the case of the U.N., the IMF's enabling authority plays a key role in the oversight of these obligations.

It should be noted at the outset that, unique among international organizations, the IMF has both regulatory and financial powers. Specifically, in addition to overseeing members' obligations (its regulatory responsibility), the IMF provides financial resources to countries experiencing balance of payments problems.[34]A key purpose of such assistance is to help members resolve their balance of payments problems in a manner that enables them to avoid the type of measures described

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31. *See* Press Release, G4 Ministerial Joint Press Statement (Sept. 23, 2020), https://www.auswaertiges-amt.de/blob/2396692/279888edff0353d32b9ef1c01c8841ff/200923-g4-ministererklaerung-data.pdf. For a critique of the G4 proposal, *see* Ass. Jur. Philipp Semmelmayer, *Musical Chairs at the United Nations Security Council: Time for Reform and the G4 to Change Tactics*, INT'L L. BLOG (Dec. 1, 2020), https://internationallaw.blog/2020/12/01/musical-chairs-at-the-united-nations-security-council-time-for-reform-and-the-g4-to-change-tactics/.

32. To gain insight into the U.S. perspective on why joining the IMF was of critical importance to both the multilateral trading system and global peace, see COMMITTEE ON BANKING AND CURRENCY, PARTICIPATION OF THE UNITED STATES IN THE INTERNATIONAL MONETARY FUND AND THE INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT, H.R. REP. NO. 79-629 (1945).

33. *Id.* at *3*.

34. The IMF's authority to provide its General Resources to members in order to help them address their balance of payments problems are set forth in Article V, Section 3 of the IMF's Articles of Agreement. *See* Articles of Agreement of the IMF, art. V, § 3 [hereinafter IMF Articles].

above that were so destructive during the 1930s.[35] In this sense, the IMF's financial powers can be seen as supporting its regulatory authority. Although not the subject of this Article, the Articles give the IMF significant enabling authority with respect to the exercise of its financial powers. Thus, for example, the Articles require the IMF's Executive Board—its key decision-making organ—to adopt "policies" that ensure that the IMF's resources are only made available in circumstances where the member is taking steps to address the underlying problems.[36] These policies may be described as internal rules since, although they are binding on the IMF itself (unless or until they are changed), they do not constitute obligations of members.

With respect to the enabling authority applicable to the IMF's oversight of members obligations, set forth below is an analysis of the scope of this authority in three distinct areas: exchange rate policies, the provision of information, and exchange restrictions.

1. Exchange Rate Policies

As in the case of the U.N. Charter, an understanding of the IMF's enabling authority in this area requires a review of the scope of members' obligations. Article IV, Section 1 of the IMF's Articles requires members to "collaborate with the Fund and other members to assure orderly exchange arrangements and to promote a stable system of exchange rates."[37] This very general obligation of collaboration is supplemented by a list of specific obligations, which are identified as being those that, "in particular," members should observe for purposes of complying with their general obligation to collaborate, including the "obligation

35. Article I(v) of the IMF's Articles provides that one of the purposes of the IMF is "[t]o give confidence to members by making the general resources of the[t]o give confidence to members by making the general resources of the Fund temporarily available to them under adequate safeguards, thus providing them with opportunity to correct maladjustments in their balance of payments without resorting to measures destructive of national or international prosperity available to them under adequate safeguards, thus providing them with opportunity to correct maladjustments in their balance of payments without resorting to measures destructive of national or international prosperity." *Id.* art. I(v).

36. More specifically, the text of Article V, Section 3(a) provides as follows:

> The Fund shall adopt policies on the use of its general resources, including policies on stand-by or similar arrangements, and may adopt special policies for special balance of payments problems, that will assist members to solve their balance of payments problems in a manner consistent with the provisions of this Agreement and that will establish adequate safeguards for the temporary use of the general resources of the Fund.

Id. art. 5, § 3(a).

37. *Id.* art. IV, § 1.

to avoid manipulating exchange rates or the international monetary system in order to prevent effective balance of payments adjustment or to gain an unfair competitive advantage over other members."[38]

In order to ensure compliance with these obligations, the IMF is required to exercise "firm surveillance" over members' exchange rate policies and, as means of giving the IMF the ability to discharge this mandate, the Articles give the IMF important enabling authority in two respects.[39] First, as a matter of procedure, when requested by the IMF, a member is required to "consult" with the IMF about its exchange rate policies. Second, as a matter of substance, the IMF is required to "adopt specific principles for the guidance of all members with respect to [exchange rate] policies."[40]

With respect to the legal implications of this enabling authority, several observations may be made.

First, although the adoption of principles on exchange rate policies requires the IMF to interpret the scope of members' exchange rate obligations, the authority to adopt principles constitutes more than just an exercise in the IMF's interpretive authority. As noted in the introduction of this Article, this type of enabling authority is designed to give the IMF the flexibility to revise the principles periodically in light of changes in the international monetary system. Indeed, they were most recently revised in 2007 in an environment where there was concern that some members were relying on exchange rate policies to promote their own exports.[41] The authority of the IMF to adopt these principles may

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38. The relevant provision of Article IV, Section 1 provides as follows:

> In particular, each member shall: (i) endeavor to direct its economic and financial policies toward the objective of fostering orderly economic growth with reasonable price stability, with due regard to its circumstances; (ii) seek to promote stability by fostering orderly underlying economic and financial conditions and a monetary system that does not tend to produce erratic disruptions; (iii) avoid manipulating exchange rates or the international monetary system in order to prevent effective balance of payments adjustment or to gain an unfair competitive advantage over other members; and (iv) follow exchange policies compatible with the undertakings under this Section.

Id. art. 4, § 1.

Importantly, these enumerated obligations, while they are of particular importance, do not exhaust the scope of the general obligation to collaborate and, accordingly, the Fund may identify other actions —consistent with the enabling authority discussed in this section—that may need to be taken by members in order to meet their collaboration obligation. A discussion of the scope of members' obligation under Article IV may be found in Sean Hagan, *Reforming the IMF*, *in* INTERNATIONAL MONETARY AND FINANCIAL LAW: THE GLOBAL CRISIS 40 (Mario Giovaoli & Diego Devos eds., 2010).

39. IMF Articles, *supra* note 34, art. IV, § 3(b).

40. *Id.*

41. In particular, the U.S. believed that the IMF was "asleep at the wheel" for failing to exercise over exchange rate policies of members (including China) that were considered to be

be understood as reflecting a willingness of the signatories of the Articles to delegate to the IMF the authority to continuously update the content of the rather general—and indeterminate—"collaboration" obligation set forth in Article IV, Section 1, quoted above.

Second, although the principles, once adopted, are not legally binding, it is open for the IMF to subsequently determine that the failure of a member to observe them gives rise to a breach of its exchange rate obligations. To date, the IMF has declined to take this subsequent step. With respect to the procedural obligation to consult, the IMF has adopted a policy that identifies the overall periodicity of the consultation process for all members. However, it has not taken the step of determining that a member's failure to meet the deadlines established by the IMF constitutes a breach of obligations under the Articles.[42] In the above respects, the IMF's exercise of enabling authority has differed from those cases where the Security Council has issued legally binding resolutions pursuant to its authority under Chapter VII. However, as noted in the previous section, there have also been cases where the U.N. has adopted resolutions that only "recommend" assistance by members; i.e., as in the case of the IMF, it is has refrained from making the action an obligation.

Finally, while the Security Council's exercise of its enabling authority is primarily event driven (e.g., the invasion of a country or the development of a nuclear weapons program) and explicitly directed against a country or a group of countries, the IMF's enabling authority is of a more general nature: the principles, while they may be revised from time to time in light of the evolution of the international monetary system, are designed to be more enduring and, by their terms, do not target a particular member country.

2. Provision of Information

The ability of the IMF to effectively exercise its surveillance authority, as described above, depends on its capacity to obtain timely and accurate information from its members.[43] This is also the case with respect

undervalued for purposes of promoting exports. *See* Press Release, Timothy D. Adams, Under Sec'y for Int'l Affairs, U.S. Dep't of Treasury (Sept. 23, 2005), https://www.treasury.gov/press-center/press-releases/Pages/js2940.aspx.

42. *See* Strengthening the Effectiveness of Article VIII, Section 5, *in* Selected Decisions and Selected Documents of the IMF, Forty-First Issue (2020), https://www.imf.org/en/Publications/Selected-Decisions/description?decision=13183-(04/10).

43. In the run up to the Asian Financial Crisis, IMF surveillance was significantly undermined by its ability to obtain accurate information concerning the economic situation of some of its Asian members, including with respect to the level of their reserves. For a discussion of this

to the provision of financial assistance: to ensure that its financing is being used to address—rather than simply delay—the resolution of a member's balance of payments problem, the IMF needs to obtain a complete picture of the member's economic and financial position. As a means of ensuring that the IMF has adequate information to perform the above functions, the Article's give the IMF important enabling authority. Specifically, Article VIII Section 5 sets forth a minimum list of information that members are required to provide the IMF. Given that this list was compiled in 1944 when the Articles were finalized, it is somewhat outdated: for example, while it requires detailed information on gold holdings (which, at the time, constitute the anchor of the international monetary system), it requires no information in other critical areas, including a country's fiscal position. Fortunately, Article VIII gives the IMF the authority to require additional information that it "deems . . . necessary for the effective discharge of the Fund's duties."[44] In 2004, the Executive Board of the IMF exercised this enabling authority by approving a supplemental list of information that members were required to provide to the IMF on a regular basis.[45]As with the principles on exchange rates that the IMF has adopted—and revised—in the context of surveillance, Article VIII, Section 5 has given the IMF the ability to adjust the scope of members obligations in light of changing circumstances. However, unlike the principles on exchange rates, the decisions adopted by the IMF in this area are legally binding and, to that end, the IMF has adopted an enforcement framework that it applies in the event of a member's breach of this obligation.[46]

3. Approval of Exchange Restrictions

A final example of the IMF's enabling authority is its authority to approve exchange restrictions that are subject to its jurisdiction. Article VIII, Section 2(a) sets forth the general obligation of members to refrain from imposing restrictions on the making of payments and transfers for current international transactions. As with the case with members' obligations regarding exchange rate policies, members' obligation with respect to exchange restrictions may be understood as

problem and the implication on the quality of IMF Surveillance, *see* IMF, *The IMF and Recent Capital Account Crises: Indonesia, Korea, Brazil*, Evaluation Report (Sept. 2003) [hereinafter IEO Report], https://www.imf.org/external/np/ieo/2003/cac/pdf/all.pdf.

44. IMF Articles, *supra* note 34, art. VIII, § 5(a).

45. Strengthening the Effectiveness of Article VIII, Section 5, *supra* note 42.

46. The Decision setting forth the supplemental information required under Article VIII, Section 5 also sets forth the procedural framework to be used by the Fund in the event of a breach. *Id.*

supporting an open multilateral trading system. While an undervalued exchange rate can be viewed as the equivalent of a trade tariff (inasmuch as it increases the price of imports), an exchange restriction is the equivalent of a quantitative restriction on imports since, by limiting the availability of foreign exchange to pay for certain goods or services, it effectively prevents the underlying import.

The enabling authority that exists with respect to exchange restrictions is of a different nature than that which applies to exchange rate policies and the provision of information, discussed above. The definition of the obligation in Article VIII, Section 2(a) is sufficiently specific to be enforced in accordance with its terms.[47] Rather, the enabling authority arises from another source: recognizing that there may be economic circumstances where members would have no choice but to limit the availability of foreign exchange, Article VIII gives the IMF the authority to "approve" them, with the effect of bringing the restriction in question into conformity with the member's obligations under the Articles. Relying on this authority, the IMF has adopted policies (i.e., decisions of general application) that identify the conditions under which it would grant approval. The principal policy currently in place provides that restrictions will only be approved if the IMF determines that they are temporary, nondiscriminatory, and imposed for balance of payments reasons.[48] Of course, the IMF retains the discretion to revise this policy and, depending on the nature of the revisions, it may have the effect—as with the exercise of the other forms of enabling authority discussed earlier—of expanding or reducing the scope of members obligations in this area.

As with the United Nations, the significance of all of the above examples of enabling authority depends on the extent to which the decision-making process in the IMF constrains its ability to exercise it. Unlike the U.N., the IMF relies on a weighted voting system; specifically, the number of votes cast by each member takes into account the relative

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47. Under Article VIII, Section 2(a), members are generally precluded from imposing restrictions on "the making of payments and transfers for current international transactions." IMF Articles, *supra* note 34, at art. VIII § 2(a). Moreover, Article XXX of the Articles sets forth a definition of "payments for current transactions." IMF Articles, *supra* note 34, at art. XXX. For an overview of how this obligation has been interpreted by the Fund, see Sean Hagan, *Transfer of Funds*, in UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS, U.N. Doc. ITE/IIT/20, U.N. Sales No. E.00.II.D.38 (2000), https://unctad.org/en/Docs/psiteiitd20.en.pdf.

48. *See* Articles VIII and XIV, *in* Selected Decisions and Selected Documents of the IMF, Forty-First Issue (2020), https://www.imf.org/en/Publications/Selected-Decisions/description?decision=1034-(60/27)#article.

size of its economy in the global economy.[49] A limited number of decisions require an affirmative vote of 85% of the total voting power, effectively giving the U.S. (which currently possesses approximately 16.5% of the voting power) a veto over these decisions.[50] Importantly, however, all of the decisions that exercise the various form of enabling authority described above can be taken by a majority of votes cast, representing a significant delegation of authority by the membership to the IMF. Indeed, with respect to both the provision of information and the approval of exchange restrictions, it is fair to say that the IMF has actively used its enabling authority through the adoption of both general and member-specific decisions that require a majority of votes cast. With respect to exchange rate policies, however, there has been much greater hesitancy. As noted earlier, the IMF has not adopted a decision making the principles on exchange rate policies legally binding. Moreover, it has never made a determination that a member is actually failing to observe these principles. Even though, as a legal matter, such decisions may be taken by a majority of votes cast, it is fair to say that assessments regarding exchange rate policies are so politically sensitive that the IMF has been unwilling to adopt legally binding decisions in this area in the absence of a broad consensus among the membership.[51]

C. *The OECD*

The Organization for Economic Cooperation and Development ("OECD") was established in 1960 and, unlike the U.N. and the IMF, is not an organization of universal membership.[52] Rather, membership is restricted to countries that have, inter alia, achieved a "state of readiness"

49. More specifically, a member's voting power is determined primarily on the size of its quota in the IMF. *See* IMF Articles, *supra* note 34, at art. XII, § 5.

50. Decisions requiring 85 percent of the total voting power include, for example, a decision involving a change in a member's quota which, as described above, determines a member's voting power. As of June 2021, the current voting power of the United States at the IMF is 16.51. *See IMF Executive Directors and Voting Power*, IMF (last updated July 14, 2021), https://www.imf.org/external/np/sec/memdir/eds.aspx.

51. As noted earlier, the IMF has also been unwilling to make the determination that current deadlines regarding the completion of Article IV Consultations will be legally binding.

52. As of June 2021, the OECD has 38 member countries. *See Where: Global Reach*, OECD, https://www.oecd.org/about/members-and-partners/ (last visited July 14, 2021). To obtain a general understanding of the considerations that gave rise to the establishment of the OECD, see PETER CARROLL & AYNSLEY KELLOW, THE OECD: A STUDY OF ORGANISATIONAL ADAPTATION (2011).

as a rules-based, open market economy.[53] This readiness takes into account the stability of a country's financial system and, as is described below, its ability to observe obligations that are derived from the exercise of the OECD's exceptionally broad enabling authority. For purposes of this Article, the focus will be on those obligations that arise from the Code of Liberalization of Capital Movements.[54]

The purposes of the OECD are exclusively economic in nature and, as with the IMF, a stated objective is the promotion of international trade, with members incurring a general obligation to "pursue their efforts to reduce or abolish obstacles to the exchange of goods and services and current payments[.]"[55] However, OECD members go one step further and incur a general obligation to agree "to maintain and extend the liberalisation of capital movements[.]"[56] When the IMF was established fifteen years earlier, the removal of restrictions on all forms of international investment was considered neither feasible nor desirable—there was a perception that the economic instability of the 1930s had been exacerbated by speculative capital movements.[57] Accordingly, the obligation regarding the removal of exchange restrictions under the IMF's Articles was limited to those related to trade and services; i.e., current transactions.[58] By 1960, however, a number of countries had achieved a sufficient level of financial stability to enable them to remove restrictions on investment. As is made explicit in the OECD Convention, there is a view that the liberalization of both inward and outward investment would not only benefit more advanced economies but would also contribute to the development of emerging market and low-income countries.[59]

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53. The criteria for membership of the OECD are set forth in the Report of the Chair of the Working Group on the Future Size and Membership of the Organization to Council: Framework for the Consideration of Prospective Members (June 2017). *See* OECD Report, *supra* note 9.

54. The other legally binding code adopted by the OECD is the Code of Liberalisation of Current Invisible Operations. *See* OECD, *Code of Liberalisation of Current Invisible Operations*, OECD/LEGAL/0001 (Dec. 12, 1961), https://www.oecd.org/finance/private-pensions/InvisibleOperations_WebEnglish.pdf.

55. Convention on the Organisation for Economic Co-operation and Development art. 2(d), Dec. 14, 1960, 888 U.N.T.S. 179 [hereinafter OECD Convention].

56. *Id.*

57. Questions and Answers on the International Monetary Fund, U.S. Treasury (1944).

58. Indeed, Article VI, Section 3 of the IMF Articles provides that "[m]embers may exercise such controls as are necessary to regulate international capital movements." IMF Articles, *supra* note 34, at art. VI, § 3.

59. Accordingly, Article 2(e) of the OECD Convention provides that members will "contribute to the economic development of both Member and non-member countries in the process of economic development by appropriate means and, in particular, by the flow of capital to those

As a means of achieving its "aims," the OECD Convention grants the OECD remarkably broad enabling authority. Specifically, Article 5 provides that the "Organisation may . . . take decisions which, except as otherwise provided, shall be binding on all the Members."[60] Exercising this authority, the OECD has adopted the Code of Liberalization of Capital Movements ("Capital Code"), a legally binding decision setting forth a comprehensive set of obligations in this area.[61] Under the Capital Code, members are required not only to remove restrictions on the ability of nonresidents to make investments in their country, but also the ability of their own residents to make investments abroad.[62] The scope of investments covered is comprehensive, ranging from foreign direct investment (i.e., investments that give the investor effective control over the enterprise) to the purchase and sale of securities and the provision of short-term credit.[63] The Capital Code sets forth a comprehensive reservation system and is structured in a manner that gives members latitude to reimpose restrictions on those investments that can create financial instability.[64] Finally, it establishes a monitoring system that enables the OECD to oversee members' performance of their obligations.[65]

While the scope of the enabling authority provided to the OECD under the OECD Convention ("Convention") is broad, the governance structure of the OECD is such that members continue to exercise effective control over how it is exercised. The Convention is the organ of the OECD that is responsible for adopting legally binding decisions such as the Capital Code, and all OECD members are represented at the

countries, having regard to the importance to their economies of receiving technical assistance and of securing expanding export markets." OECD Convention, *supra* note 55, at art. 2(e).

60. OECD Convention, *supra* note 55, at art. 5. Interestingly, in the case of the OECD, the stated basis for its enabling authority is its objectives (its "aims") rather than the general obligations of members set forth in Article 2.

61. The Capital Code was adopted in 1961. *See* OECD, *Code of Liberalisation of Capital Movements*, OECD/LEGAL/0002 (Dec. 12, 1961) [hereinafter *Capital Code*], https://www.oecd.org/daf/inv/investment-policy/Code-capital-movements-EN.pdf.

62. For a summary of the provisions of the Capital Code, see Hagan, *supra* note 47.

63. The types and range of operations covered are set forth in Annex A of the Capital Code. *See* Capital Code, *supra* note 61, annex A, at 29–36.

64. *See id.* The latitude given to members to impose restrictions depends on whether the operation is included in List A or List B of the operations set forth in Annex A. To the extent to which an item is on List B (which covers short-term and, therefore, more volatile investments) members have greater latitude to impose restrictions.

65. *Id.* Part III, at 23 (setting forth the terms of reference of the Investment Committee that is responsible for monitoring members' compliance with the obligations set forth in the Capital Code).

Convention.[66] Critically, the Convention provides that, absent unanimous agreement, decisions may only be taken by mutual agreement by all members.[67]As was described earlier, this is unlike the IMF and the U.N. Security Council, where decisions do not require unanimity. It may be argued therefore, that the degree of delegation by the members to the OECD is illusory since all OECD members would need to agree to the OECD's use of it. However, there is effective delegation in one important respect: the adoption of legally binding decisions by the Council, since it does not involve an amendment of the OECD Convention itself (but rather the exercise of enabling authority granted under the Convention) it does not require the type of domestic legislative approval that is normally required for the amendment of a treaty.

D. *Managing the Overlap*

It is worth making a final observation regarding the exercise of enabling authority by the U.N., the IMF and the OECD; namely, how they manage the overlap of their respective jurisdictions. In the event that the U.N. Security Council adopts a resolution pursuant to Article 41 that requires U.N. members to impose restrictions on financial flows, to what extent do these restrictions conflict with members' obligations under the IMF's Articles of Agreement and the OECD Convention? Although both the IMF and the OECD have taken steps to address this potential conflict, the approach taken by each institution has differed.

In the case of the IMF, the problem has been solved through the exercise of its authority to approve exchange restrictions, described above. To the extent to which a U.N. Security Council Resolution restricts the making of a payment or transfer for a current international transaction, the IMF takes the position that such restrictions are, as a legal matter, subject to its jurisdiction: the fact that they are imposed for reasons of national security does not mean that they are no longer exchange restrictions within the meaning of the Articles.[68] However, one of the policies that the IMF has adopted pursuant to the enabling authority granted under Article VIII, Section 2(a) is the approval of

66. OECD Convention, *supra* note 55, at art. 6–7.

67. OECD Convention, *supra* note 55, at art. 6, §1.

68. This policy is set forth in Decision 144 of the IMF's Executive Board, adopted in 1952. *See* Payments Restrictions for Security Reasons: Fund Jurisdiction, *in* Selected Decisions and Selected Documents of the IMF, Forty-First Issue (2020), https://www.imf.org/en/Publications/Selected-Decisions/description?decision=144-(52/51).

restrictions imposed for national security reasons.[69] Two aspects of this policy are worthy of note. First, the policy is designed to give significant—but not complete—deference to the member that has imposed the restrictions. The policy requires the member to notify that it has imposed restrictions for national security reasons and, unless the IMF objects within a certain period, the restrictions are considered to be approved. In principle, the IMF reserves the right to refrain from approving restrictions on the basis of a determination that they are not, in fact imposed for national security reasons. It has never done so, however. Second, this approval policy does not, on its face, distinguish between national security restrictions imposed pursuant to a U.N. Security Council Resolution and those that a member may impose in the absence of such a resolution—the procedure for both types of restrictions is the same. However, in its cooperation agreement with the United Nations, the IMF has committed that it will have "due regard" for decisions of the Security Council.[70] Moreover, from the perspective of the member countries, Article 103 of the U.N. Charter provides that "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."[71]

In the case of the OECD, the potential conflict has been resolved by creating a carve-out within the Capital Code—one that distinguishes between: (a) restrictions that are imposed pursuant to a member's international obligations—including its obligations under Chapter VII of the U.N. Charter—and (b) those that are imposed in the absence of an international obligation. With respect to the former, such restrictions are treated as being automatically consistent with a member's obligations under the Capital Code.[72] With respect to the latter, the OECD does reserve the right, consistent with the approach adopted by the IMF, to scrutinize them for purposes of ensuring that they are, in fact, imposed for national security reasons.

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69. *Id.* There has never been a case where a U.N. Security Council Resolution that gives rise to an exchange restriction subject to the IMF's jurisdiction has not been approved by the IMF.

70. Agreement between the United Nations and the International Monetary Fund, *in* Selected Decisions and Selected Documents of the IMF, Forty-First Issue (2020), https://www.imf.org/en/Publications/Selected-Decisions/description?decision=DN15.

71. U.N. Charter art. 103.

72. Article 3 of the Capital Code reads, in part, as follows: "The provisions of this Code shall not prevent a Member from taking action which it considers necessary for: . . . (iii) the fulfilment of its obligations relating to international peace and security." Capital Code, *supra* note 61, art. 3, at 13.

III. International Organizations and the Development of Soft Law

In the area of international economic law, the relevant legal frameworks are not, of course, limited to those overseen by the IMF and the OECD, two of the organizations that were discussed in the previous section. The World Trade Organization ("WTO") oversees obligations relating to the liberalization of trade and services, thereby complementing the IMF's liberalization of the payments relating to such transactions. Moreover, although only a limited number of countries are bound by the OECD's Capital Code, many countries have entered into bilateral or regional treaties that establish international investment obligations, although the scope of these obligations differ somewhat from those set forth in the OECD Capital Code.[73]

There are important areas of economic activity, however, that are not regulated by international treaty, notwithstanding the fact that these areas require considerable international cooperation. One such area is the regulation of domestic financial institutions and markets. As has been noted by Chris Brummer, international cooperation in this area has largely been achieved through "soft law"; namely, through the establishment of nonbinding international agreements that establish best practices and standards in the area of domestic financial regulation, and which are then implemented domestically through the adoption of the necessary domestic legislation or regulation.[74] As noted by Brummer, one of the key advantages of a soft law approach is that it entails lower sovereignty costs.[75] While countries have been prepared to sign treaties that surrender some degree of legal sovereignty with respect to the regulation of international transactions (i.e., international trade and payments, and international investment, as noted above), they have been less willing to do so when it comes to the regulation of domestic institutions and markets. At the same time, however, there is a recognition that some form of international cooperation and harmonization in this area needs to be achieved in light of the globalization of financial markets. Divergent and uncoordinated approaches by domestic regulators will, among other things, result in regulatory

73. According to the United Nations Conference on Trade and Development (UNCTAD), as of June 30, 2021, over 2,298 bilateral investment agreements are in force. *See International Investment Agreements Navigator*, INV. POL'Y HUB, https://investmentpolicy.unctad.org/international-investment-agreements/by-economy (last visited July 14, 2021). For a summary of the scope of the investment obligations created by these treaties, see Hagan, *supra* note 47.

74. *See* Christopher Brummer, *Why Soft Law Dominates International Finance—And Not Trade*, 13 J. INT'L ECON. L. 623 (2010).

75. *Id.* at 631.

arbitrage as market participants seek out the most permissive regulatory jurisdiction, with the accompanying risk that imprudent practices will result in a financial crisis with adverse international spillovers.

One of the distinctive features of the international soft law system in the area of financial regulation is that, as noted by Brummer, it is also supported by "soft" institutions and fora; namely, organizations that, unlike the IMF, the OECD and the WTO, are not established by international treaty.[76]A number of these soft institutions are led by technical experts, such as the Basel Committee on Banking Supervision, whose membership consists of the Governors of the Central Banks of key jurisdictions. However, and as will be discussed below, political fora such as the G7 and G20 have also played a critical role in developing soft law in this area.

What is perhaps less recognized is the role that treaty-based organizations such as the IMF, the OECD, and the World Bank have played in both the development and "enforcement" of soft law in the area of financial regulation. This section seeks to analyze the nature and evolution of this role. As will be seen, international financial crises have catalyzed an increasing level of involvement of these institutions and, along with it, what may be described as an incremental "hardening" of this soft law regime.

A. *The Initial Catalyst: The Asian Financial Crisis*

While the Asian Financial Crisis that erupted in 1997 may not have been the first international financial crisis, it was unique in one important respect: the over-indebtedness that led to a collapse of market confidence did not arise primarily from sovereign borrowing; i.e., borrowing by the government or the central bank. Rather, the crisis experienced by countries such as Thailand, South Korea, and Indonesia arose from excessive external indebtedness of banks and corporations. The ability of the institutions in these countries to access the international capital markets was driven by the prevailing narrative that the economic growth model of these "Asian Tigers" was robust—and indeed should be replicated in other emerging market economies.[77]

Some observers have taken the view that the crisis was simply a classic "run" by foreign lenders, who suddenly—and irrationally—panicked

76. *Id.* at 627.

77. For a comprehensive discussion of the underlying causes of the Asian Financial Crisis and the policy response, see Timothy Lane, Atish Ghosh, Javier Hamann, Steven Phillips, Marianne Schulze-Ghattas & Tsidi Tsikata, *IMF-Supported Programs in Indonesia, Korea, and Thailand: A Preliminary Assessment,* IMF (1999), https://www.imf.org/external/pubs/ft/op/op178/OP178.pdf.

and scrambled for the exits. However, the prevailing view is that, while investor panic may have exacerbated the problem, the underlying causes of the crisis were weaknesses in the Asian financial systems.[78] Local banks had provided long-term financing to corporate conglomerates with funds that they had borrowed externally on a short-term basis.[79] The inherent risk arising from this type of maturity "mismatch" was made more acute by a number of other factors. First, the banks had borrowed in foreign currency and generally failed to hedge against currency risk, which resulted in distress when there was a depreciation in the local currency.[80] Second, the lending conditions that the banks had used when lending were often not based on business criteria: not only were the banks often affiliated with the corporate conglomerates, but the government exerted pressure on the banks to provide financing to state-owned enterprises.[81] Systemic corruption exacerbated the problem.[82]

In light of these failures, the official sector—led by the G7 countries—decided to put in place a new international regulatory architecture that was intended to prevent a recurrence of this type of crisis. At the center was the newly formed Financial Stability Forum (later transformed into the Financial Stability Board [the "FSB"]), a "soft" (i.e., non-treaty based) institution whose membership initially consisted of the treasuries and national regulators of the G7 countries.[83] The central task of the FSB was to identify international standards and best practices that were considered critical to financial stability. For example, in light of the experience of many Asian countries, a key standard is the Core Principles for Effective Banking Supervision created by the Basel Committee in Banking Supervision. These Principles identified best practices for banking supervision and regulation, including constraints

78. For a discussion of the strengths and weaknesses of these alternative theories—and their proponents, see Ramon Moreno, *What Caused East Asia's Financial Crisis?*, FED. RSRV. BANK OF S.F. (Aug. 7, 1998), https://www.frbsf.org/economic-research/publications/economic-letter/1998/august/what-caused-east-asia-financial-crisis/.

79. *Id.*

80. *Id.*

81. *Id.*

82. For a discussion of the systemic corruption that existed in Indonesia during this period, see Zora Ledergerber & Bivitri Susanti, *Anti-Corruption Policy Making in Practice: Indonesia—A Country Case Study*, *in* ANTI-CORRUPTION POLICY MAKING IN PRACTICE: WHAT CAN BE LEARNED FOR IMPLEMENTING ARTICLE 5 OF UNCAC? 85 (Karen Hussmann ed., 2007).

83. *History of the FSB*, FSB, https://www.fsb.org/about/history-of-the-fsb/ (last visited July 15, 2021). The FSF was established in February 1999 by the G7 Ministers of Finance and Central Bank Governors. *Id.* For a history of the FSF, see *id.*

on connected lending, a key problem that was revealed during the Asian Financial Crisis.[84]

While technical bodies such as the Basel Committee played a key role in this soft law system, "hard" international organization such as the IMF, the World Bank, and the OECD have made critical contributions in two different respects.

First, they are responsible for developing several standards that the FSB considered to be critical for financial stability. In particular, the OECD has developed a standard entitled "Principles on Corporate Governance," out of a recognition that good corporate governance—namely, the rules and practices that govern the relationship between the managers and shareholders of corporations, as well as stakeholders such as employees and creditors—contributes to both growth and financial stability.[85] The World Bank for its part has taken the lead in developing a standard for corporate insolvency entitled "the Insolvency and Credit Rights Standard."[86] During the Asian Financial Crisis, the restructuring of the excessive debt of the corporate debt had been stymied by the absence of any effective insolvency framework. Moreover, in terms of the health of the financial sector, it has been recognized that the liquidation provisions that form part of the insolvency framework serve to enhance credit discipline and enable banks to maximize the value of their claims.[87] Finally, the IMF has developed two standards that seek to enhance transparency with respect to the government's own activities. The first is the General Data Dissemination System, which is designed to promote sound practices with respect to both the compilation

84. The FSF—now the FSB—has identified Key Standards for Sound Financial Systems, which it divides into three categories (a) Macroeconomic Policy and Transparency, (b) Financial Regulation and Supervision, and (c) Institutional and Market Infrastructure. *See Key Standards for Sound Financial Systems*, FSB, https://www.fsb.org/work-of-the-fsb/about-the-compendium-of-standards/key_standards/ (last visited July 15, 2021).

85. *See* OECD Publishing, *G20/OECD Principles of Corporate Governance*, OECD (2015), https://www.oecd.org/daf/ca/Corporate-Governance-Principles-ENG.pdf. The OECD's Principles on Corporate Governance were originally adopted in 1999 and have been subsequently revised. *Id.* at 3.

86. This standard was developed jointly with the U.N. Commission on International Trade Law (UNCITRAL) and in consultation with the International Monetary Fund. *Principles for Effective Insolvency and Creditor/Debtor Regimes*, THE WORLD BANK (Nov. 19, 2015), https://www.worldbank.org/en/topic/financialsector/brief/the-world-bank-principles-for-effective-insolvency-and-creditor-rights.

87. For a discussion of how an effective insolvency law can contribute to the resolution of financial crises, see Sean Hagan, *Insolvency Reform and Economic Policy*, 17 CONN. J. INT'L L. 63 (2001).

and the dissemination of economic and financial statistics.[88] One of the aggravating factors that led the Asian Financial Crisis was the failure to disclose critical information about the government's financial position, especially with respect to the weakness in international reserves.[89] The second standard developed by the IMF is the Fiscal Transparency Code, which sets forth a set of principles and practices that ensures full transparency with respect to a government's own revenue and expenditures.[90] Among other things, there is a general recognition that adequate transparency with respect to the government's finances would constitute an effective means of addressing systemic corruption.[91]

The second contribution of international organizations relates to what may be loosely described as the "enforcement" of the standards that make up the soft law system. Shortly after the Asian Financial Crisis, the World Bank and the IMF established the Financial Sector Assessment Program ("FSAP"), which involves an in-depth diagnosis of the stability of the financial system of countries. An important feature of the FSAP is the benchmarking of the country's financial system against the standards identified by the FSB, including the standards developed by the international organizations themselves, described above.[92] The core findings of the FSAP are published. There are two aspects of the FSAP program that have made it such an important component of the soft law system. First, since the World Bank and the IMF are organizations of universal membership, the FSAP program has effectively enabled the FSB to fully "multilateralize" the standards that it had identified. Second, although participation in the FSAP program was, at least initially, voluntary for all countries, a number of developing countries were motivated to participate as a means of sending a "signal" to the market regarding the quality of their financial systems.[93] This

88. *IMF Standards for Data Dissemination*, IMF, https://www.imf.org/en/About/Factsheets/Sheets/2016/07/27/15/45/Standards-for-Data-Dissemination (last visited February 16, 2022).

89. In a 2003 report, the IMF's Independent Evaluation Office analyzed the adverse impact of the absence of reliable data with respect to these countries; *see* IEO Report, *supra* note 43, at 25–29.

90. IMF, *The Fiscal Transparency Code* (2014), https://blog-pfm.imf.org/files/ft-code.pdf.

91. For a discussion of the role that transparency can play in addressing systemic corruption, see IMF, *Corruption: Costs and Mitigating Strategies*, Staff Discussion Note (May 11, 2016), https://www.imf.org/en/Publications/Staff-Discussion-Notes/Issues/2016/12/31/Corruption-Costs-and-Mitigating-Strategies-43888.

92. For a brief summary of the FSAP program, see *Financial Sector Assessment Program (FSAP)*, THE WORLD BANK, https://www.worldbank.org/en/programs/financial-sector-assessment-program (last visited July 15, 2021).

93. As noted by the IMF's Independent Evaluation Office in a report completed in 2006, the coercive effect was more powerful for countries where overall transparency was the least. In those cases, failure to participate in an FSAP sent a significant negative signal. *See* IMF, *The Financial*

supports the argument made by Brummer to the effect that, although soft law has no legal "teeth," the market can play an important coercive role.[94]

B. *The Soft Law System under Stress: The Great Financial Crisis*

While the Asian Financial Crisis and the debt crisis of the 1980s were emerging market crises, the Great Financial Crisis of 2008 originated in the advanced economies. As was recognized by the G20 leaders when they met in Washington in October 2008 to put in place a recovery strategy, not only had financial market participants failed to exercise proper due diligence, but regulators and supervisors in some advanced economies (including the U.S. and the U.K.) had failed to "adequately appreciate and address the risks building up in financial markets, keep pace with financial innovation, or take into account the systemic ramifications of domestic regulatory actions."[95] Indeed, leading up to the crisis, there had been a view amongst these regulators in these countries that financial innovation, including securitization, would serve to mitigate—rather than exacerbate—any risks in the system.[96]

For the G7 countries that had developed the soft law architecture, the Great Financial Crisis was a humbling experience. The soft law system that they had taken the lead in developing was premised on the assumption that they knew best when it came to designing best practices for domestic financial regulation. It is therefore not surprising that efforts to enhance the soft law system to incorporate lessons learned from the crisis involved a more inclusive approach. Specifically, the Financial Stability Forum was transformed into the Financial Stability

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Sector Assessment Program, Evaluation Report 1, 35–36 (2006), https://ieo.imf.org/en/our-work/Evaluations/Completed/2006-0105-financial-sector-assessment-program.

94. *See* Brummer, *supra* note 74, at 638–39.

95. *Declaration of the Summit on Financial Markets and the World Economy*, OECD (Nov. 15, 2009), https://www.oecd.org/g20/summits/washington-dc/declarationofthesummitonfinancialmarketsandtheworldeconomy.htm.

96. The misplaced confidence that economists and financial sector experts had in the US financial system is well documented in a report of the Independent Evaluation Office of the IMF. *See* IMF, *IMF Performance in the Run-Up to the Financial and Economic Crisis: IMF Surveillance in 2004-07*, Evaluation Report (2011) [hereinafter *IEO Surveillance Report*], https://ieo.imf.org/en/our-work/Evaluations/Completed/2011-0209-imf-performance-in-the-run-up-to-the-financial. The failure of the IMF in this regard is well summarized as follows:

> "[The IMF] was sanguine about the propensity of securitization to disperse risk, and about the risks to the financial system posed by rising leverage and the rapid expansion of the shadow banking system. In fact, the IMF praised the United States for its light-touch regulation and supervision that permitted the rapid financial innovation that ultimately contributed to the problems in the financial system." *Id.* at 7.

Board and its membership was expanded to include relevant authorities from all of the G20 countries, which included major emerging market economies such as Brazil and China.

The enhancements included both revisions to existing standards and the creation of new ones. With respect to revisions, the Basel Committee revised its standard in a number of respects. First, it raised the requirement with respect to the quantity and the quality of capital that banks would be required to have in order to enable them to weather periods of financial stress, with higher capital buffers being required for systemically important banks. Second, to prevent liquidity problems from evolving into insolvency, the revised standard provides for banks to hold a sufficient amount of liquid assets that can be sold in times of stress. Finally, recognizing that certain risks are highly correlated across the financial system (e.g., a collapse of the housing market), supervision was augmented to address risks that might adversely affect not only individual institutions but also the financial sector as a whole (macroprudential regulation).[97]

Among the new standards, the establishment of a standard regarding the insolvency of financial institutions was an important breakthrough. Although the bailout of the banking sector at the height of the crisis was a necessary means of ensuring financial stability, there was a realization that such bailouts created significant moral hazard: unless these banks and their creditors were forced to bear the costs of the risk that they incur, they would continue to ignore such risks. However, designing an insolvency system that would allow for the wind-down of a financial institution in a manner that did not generate systemic risk was complicated by the fact that, since these institutions operated on a global basis, there would need to be close international cooperation amongst the relevant national regulators. The standard generated by the FSB entitled "Key Attributes for Effective Resolution Regimes for Financial Institutions" seeks to address these challenges by recommending: (a) the adoption of domestic legislation that enables national regulators to cooperate with other jurisdictions when resolving an institution, (b) the harmonization of domestic rules that govern the wind-down of a financial institution (thereby increasing the chances of

97. The revised standard, referred to as "Basel III," is well summarized in a report prepared by the Bank of International Settlements entitled "Overview of Basel III and Post Crisis Reforms—Executive Summary." *See* Financial Stability Institute, *Overview of Basel III and related post-crisis reforms—Executive Summary*, BANK FOR INTERNATIONAL SETTLEMENTS (June 24, 2017), https://www.bis.org/fsi/fsisummaries/b3_rpcr.pdf.

effective cooperation), and (c) the establishment of agreements and procedures that allow for rapid cooperation in the event of a crisis.[98]

While the above enhancements were important, it was recognized that there was another weakness in the soft law system that still needed to be addressed. Although, as noted earlier, many developing countries had agreed to be assessed under the FSAP program prior to the crisis, a number of large, systemically important countries—including the United States—had not undertaken an assessment. Unlike vulnerable developing countries, the United States had felt no market pressure to do so—indeed, the unshakable confidence that investors had in the U.S. had been part of the problem. Of course, it may be argued that, even if the United States had agreed to participate in an in-depth FSAP, the assessment would not have uncovered any of the weaknesses that eventually led to the crisis. In particular, as noted above, the staff of the IMF—as with many other experts prior to the crisis—had been convinced that the financial regulatory system of the U.S. was sound.[99]

Nevertheless, one of the lessons of the crisis was that the voluntary nature of the FSAP process would need to be eliminated—at least with respect to those countries whose financial sectors were of systemic importance. As further evidence of the central role that international organizations play in supporting the soft law system, this change was implemented through the IMF surveillance process and, in particular, through the exercise of the IMF's enabling authority. How was this achieved? Although exchange rate policies are given priority under the IMF surveillance, the text of Article IV recognizes that appropriate domestic policies—including financial sector regulation—are also of relevance to members' obligation to collaborate to promote a stable system of exchange rates.[100] An unstable domestic financial system can

98. *Key Attributes for Effective Resolution Regimes for Financial Institutions*, FSB (Oct. 15, 2014), https://www.fsb.org/2014/10/key-attributes-of-effective-resolution-regimes-for-financial-institutions-3/. For an analysis of the considerations that underpin this standard, see Sean Hagan, *Debt Restructuring and Economic Recovery*, *in* SOVEREIGN DEBT MANAGEMENT 366, 366–72 (Rosa M. Lastra & Lee Buchheit eds., 2014).

99. *See IEO Surveillance Report*, *supra* note 96.

100. Among the obligations that members are required to observe "in particular" as a means of adhering to its general obligation to collaborate, include two obligations set forth in Article IV, Section 1 that have been understood as focusing on domestic policies:

> (i) endeavor to direct its economic and financial policies toward the objective of fostering orderly economic growth with reasonable price stability, with due regard to its circumstances;
> (ii) seek to promote stability by fostering orderly underlying economic and financial conditions and a monetary system that does not tend to produce erratic disruptions.

IMF Articles, *supra* note 34, at art. IV, § 1.

create exchange rate instability. Relying on its enabling authority to require members to consult on issues that are relevant to member's obligations under Article IV, the IMF's Executive Board adopted a decision requiring that, as part of the Article IV Consultation process, countries with systemically important financial sectors engage in the FSAP process at least every five years.[101] Although a country is not necessarily obliged to follow the recommendations of the FSAP report (including recommendations arising from the assessment of the various soft law standards), the IMF's reliance on the use of its enabling authority in this context may be described as a "hardening" of the soft law system.

IV. Concluding Observations

In terms of the forward-looking agenda, what lessons can be distilled from the issues that have been discussed in this Article? With respect to international cooperation in the area of domestic financial regulation, it is likely that the soft law system will continue to dominate, with international organizations playing an important, albeit supporting role. When the Great Financial Crisis erupted in 2008, there was some speculation that there would be a shift away from soft law, with the IMF—or perhaps a new organization—being given direct regulatory authority over financial institutions.[102] This speculation was short-lived. Countries were not prepared to surrender sovereignty over domestic financial regulation and, as discussed, opted to enhance the soft law system instead. There is no indication that attitudes have changed. Indeed, it may be argued that the COVID crisis has demonstrated the effectiveness of the soft law reforms that were put in place after the Great Financial Crisis. Notwithstanding the huge dislocation to the real economy caused by lockdowns, the interruption of supply chains, and the necessary imposition of other health measures, the financial sector has been relatively resilient. The stronger capital

101. *Mandatory Financial Stability Assessments Under The Financial Stability Assessment Program*, IMF, https://www.imf.org/en/Publications/Selected-Decisions/description?decision=15495-(13/111) (last updated July 31, 2020).

102. As reflected in an article published by the Guardian in November 2008, there was discussion of the need for a "Bretton Woods II" that would involve establishing "a new global regulator that can force banks and hedge funds to be more transparent about their borrowings and their investment positions." Such an organization would also have had the authority to "force banks to hold greater capital cushions." *See Bretton Woods II-Five Key Points on the Road to a New Global Financial Deal*, The Guardian (Nov. 13, 2008), https://www.theguardian.com/politics/2008/nov/14/g20-summit-key-aims-imf.

and liquidity positions of the banks—put in place as a result of the post-crisis reforms—enabled them to withstand major credit losses.[103]

Some aspects of the system remain untested. In particular, there is a question as to whether, in the event of distress of a systemically important financial institution, regulators will be willing to take the risk of winding down the institution in accordance with the newly established procedures envisaged under the FSB's Key Attributes.

With respect to international economic transactions, which have typically been regulated through treaty-based law, an interesting question is whether the enabling authority that has been relied upon by organizations such as the IMF and the OECD may also be useful in other contexts. The WTO—an international organization whose future is particularly uncertain—may be a potential candidate.[104] The international obligations that it oversees are set forth in multiple treaties, which countries commit to upon becoming a member. However, there is a concern that the scope of the obligations set forth in these treaties require revision given the evolution of the global economy. For example, a number of countries complain that the rules regarding the application of subsidies fail to capture the full range of government intervention in the economy—both formal and informal—that are relied upon by countries such as China.[105] Moreover, the general obligation of most favored nation treatment—a pillar of the multilateral system—has become increasingly hollowed out as a result of the proliferation of regional trade agreements that are permitted (subject to the conditions set forth in the relevant treaty).[106] In addition, the WTO's dispute settlement system is in crisis. Under this system, the resolution of disputes that arise with respect to application of WTO obligations has been delegated to an organ (the Dispute Settlement Body) that operates under rules that are designed to ensure an independent judicial process. However, the United States has effectively blocked the

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103. *See* Emilie Bel, *Financial Regulation in the Face of COVID-19: Resilient but Complex Clockwork*, ATLANTIC COUNCIL (Aug. 11, 2020), https://www.atlanticcouncil.org/blogs/new-atlanticist/financial-regulation-in-the-face-of-covid-19-resilient-but-complex-clockwork/.

104. For a summary of the concerns regarding the WTO system and the various reform proposals, see M. Sait Akman, Axel Berger, Fabrizzio Botti, Peter Draper, Andreas Freytag, Pier Carlo Padoan & Claudia Schmucker, *The Need for WTO Reform: Where to Start in Governing World Trade?*, G20 INSIGHTS, https://www.g20-insights.org/policy_briefs/the-need-for-wto-reform-where-to-start-in-governing-world-trade/ (last updated Dec. 10, 2020).

105. *See* Lighthizer, *supra* note 2.

106. For a discussion of the treatment of Preferential Trade Agreements under the GATT and the implications of their proliferation, see ANDREW GUZMAN & JOOST H.B. PAUWELYN, INTERNATIONAL TRADE LAW 353–80 (2d ed. 2016).

operation of this system out of a concern that the dispute settlement process, by filling in the perceived gaps in the relevant treaties, has effectively modified the rights and obligations of members.[107]

The WTO reform agenda is a complex one and is certainly beyond the scope of this Article. However, to the extent that agreement is eventually reached on the various policy issues, some of which are briefly identified above, consideration could be given to implementing them through a revised legal framework that provides the WTO with the type of enabling authority that has been conferred to the organizations surveyed in this Article. It should be noted that the WTO legal framework already grants the WTO enabling authority in at least one important respect. Pursuant to Article IX of the WTO Agreement, the Ministerial Conference may, "in exceptional circumstances" grant members a waiver with respect to their performance of their obligations under the WTO Agreements.[108] This authority is analogous to the approval authority of the IMF with respect to exchange restrictions. The question arises as to whether, under a revised legal framework, another form of enabling authority could be adopted. Specifically, and consistent with the approach used in the U.N., the IMF, and the OECD, instead of trying to specify all aspects of members' obligations in the text, the revised treaty could define members' obligations—or a particular class of them—in general terms and confer upon the plenary organ of the WTO—currently the Ministerial Conference—the authority to adopt decisions that would give effect to this general obligation, with the express understanding that these decisions could be revised to take into account changing circumstances. In addition to providing flexibility, such reform would have the benefit of removing some of the pressure from the dispute settlement system: since the relevant decisions would be periodically updated, there would be presumably fewer gaps to fill through interpretation.

As is the case with the U.N., the IMF, and the OECD, the significance of this enabling authority will depend on whether the WTO's governance structure is also reformed. Under the current system, all decisions taken by the Ministerial Conference (where all WTO members

107. For an extensive discussion of the factors that have given rise to the current crisis in the WTO's dispute settlement system and the range of reform options, see Robert McDougall, *Crisis in the WTO—Restoring the WTO Dispute Settlement Function*, CTR. FOR INT'L GOVERNANCE INNOVATION (Oct. 2018), https://www.cigionline.org/publications/crisis-wto-restoring-dispute-settlement-function/.

108. For a recent discussion of the WTO's practice with respect to the exercise of its waiver authority, see *The Legal Framework for Waiving World Trade Organization (WTO) Obligations*, CONG. RSCH. SERV. (May 17, 2021), https://crsreports.congress.gov/product/pdf/LSB/LSB10599.

are represented) are to be taken by consensus, as is the case with the OECD. Article IX, Section 1 of the WTO Agreement provides that "the WTO shall continue the practice of decision-making by consensus followed under GATT 1947." Although the same provision also provides that voting shall take place when a consensus cannot be reached, as a matter of practice all decisions by WTO organs are taken by consensus (other than the Dispute Settlement Body, where a "reverse consensus" rule applies). If the consensus approach is continued, the significance of the delegation of enabling authority will be more limited, since all WTO members would need to agree—as would be the case with respect to the establishment of a new treaty. More generally, as the WTO has expanded its membership, there is a serious question as to whether the continuation of a consensus approach is viable given the risk that, as a result of the growing diversity of interests, decisions will be blocked by certain members. However, if the rules were modified to allow for majority voting, countries may push for the introduction of either some form of weighted voting system (as in the IMF) or the inclusion of a veto for certain members or classes of members (as in the U.N.). Of course, it is recognized these would constitute far-reaching governance reforms and it is not at all clear whether there would be sufficient political appetite for their adoption.[109] It should be noted, however, that even if the governance structure remains the same and all decisions are adopted by consensus, the creation of enabling authority would at least enhance flexibility in one important respect: since it would involve a decision of a WTO organ rather than the revision of a treaty, it would at a minimum—as in the case of the OECD—obviate the need of undergoing the domestic legislative process that normally accompanies the treaty-making process.

109. For an analysis of the various reform proposals regarding the WTO's decision-making process, see Jaime Tijmes-Lhl, *Consensus and Majority Voting in the WTO*, 8 WORLD TRADE REV. 417 (2009).