The Jean Monnet Center for International and Regional Economic Law & Justice

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THE JEAN MONNET PROGRAM

J.H.H. Weiler
European Union Jean Monnet Chair

in cooperation with the

IRPA

ISTITUTO DI RICERCHE
SULLA PUBBLICA AMMINISTRAZIONE

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THE NEW PUBLIC LAW IN A GLOBAL (DIS)ORDER
A PERSPECTIVE FROM ITALY

Jean Monnet Working Paper 16/10

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The Two Ways Of Global Governance After The Financial Crisis Multilateralism vs. Cooperation Among Governments

ISSN 1087-2221 (print)
ISSN 2161-0320 (online)
Copy Editor: Danielle Leeds Kim

New York University School of Law
New York, NY 10011
USA

Publications in the Series should be cited as:
AUTHOR, TITLE, JEAN MONNET WORKING PAPER NO./YEAR [URL]

The New Public Law in a Global (Dis)Order – A Perspective from Italy

This working Paper was borne of the collaboration between The Jean Monnet Center at NYU School of Law and the IRPA (*Istituto di ricerche sulla pubblica amministrazione* - Institute for research on public administration). IRPA is a nonprofit organization, founded in 2004 by Sabino Cassese and other professors of administrative law, which promotes advanced studies and research in the fields of public law and public administration. The seminar's purpose was to focus attention, in the international context, on the original and innovative contributions made by Italian legal scholars to the study of the transformations of the State, and to the fields of public law and public administration generally.

The project challenged some of the traditional conventions of academic organization in Italy. There was a "Call for Papers" and a selection committee which put together the program based on the intrinsic interest of each proposed paper as well as the desire to achieve intellectual synergies across papers and a rich diversity of the overall set of contributions. Likewise, formal hierarchies were overlooked: You will find papers from scholars at very different stages of their academic career. Likewise, the contributions were not limited to scholars in the field of "Administrative Law," "Constitutional Law," or "International Law," but of the integrated approach of the New Italian Public Law scholarship, as explained in the prologue to this paper.
The Jean Monnet Center at NYU is hoping to co-sponsor similar Symposia and would welcome suggestions from institutions or centers in other Member States.

J.H.H. Weiler*, Director, Jean Monnet Center for International and Regional Economic Law & Justice*
Sabino Cassese, *Judge of the Italian Constitutional Court*

Prologue:
The New Italian Public Law Scholarship

Since the second half of the 20th Century, a new distinctive Italian Public Law Scholarship has been developing.

Originally, traditional Italian Public Law scholarship was highly influenced by the German positivist and dogmatic approach. As a consequence, Italian Scholarship devoted greater attention to the law found in books rather than to law in action; the majority of legal scholars were also practicing lawyers; and Scholarship was focused on interpreting the law, not in analyzing the conditions of legal change and reform.

Beyond the mainstream of this scholarship, and within the line which links the founder of the Italian Public Law School, the Sicilian professor and politician Vittorio Emanuele Orlando to his main pupil, Santi Romano (who had also been the President of the Council of State) and to the most renowned student of Santi Romano, Massimo Severo Giannini, in the last quarter of the 20th century a new generation of scholars grew, whose programme was to find new ways to study Public Law. Since then, therefore, a new Italian Public Law has been developing.

The work of this New School has several distinctive features. It developed in the field of administrative law, but it has greatly contributed to the main subjects of constitutional law, such as the State and its crisis, and the Constitution. It has turned from German to British and especially American legal culture. It combines attention to tradition with that for innovation. It studies institutions and how they operate within their historical development and it contributes to researches on the history of Public Law ideas. It is not confined within the usual borders of the Public Law discipline, but it has a great interest in studying topics that are at the intersection of law, politics, economics, and sociology. It is an example of lateral thinking and it adopts methodological pluralism. It has greatly contributed to the ongoing body of research on the Europeanization and globalization of law, in collaboration with foreign scholars. It combines study of statutes with study of judicial decisions. It is engaged not only in study of the law, but also in legal reforms, participating in several manners to the legal process. It has gained prominence in the general public opinion, because its members play the role of public intellectuals. It is mainly based in Rome, but it has ramifications elsewhere (Universities of Viterbo, Urbino, Siena, Naples, Catania). It has established strong and permanent links with many European (French, German, British, Spanish), and some non-European legal cultures, namely American. It has produced important collective works (treatises, dictionaries) and edits two important law journals (“Rivista trimestrale di diritto pubblico” and “Giornale di diritto amministrativo”). It has established a research institute (*Istituto di ricerca sulla pubblica amministrazione* - IRPA), that is very active in the field.

For all these reasons, the Jean Monnet Center at NYU School of Law and the IRPA decided to host a seminar in order to focus attention, in the international context, on the original and innovative contributions made by Italian legal scholars to the study of the transformations of the State, and to the fields of public law and public administration generally.

The seminar – entitled "The New Public Law in a Global (Dis)Order – A Perspective from Italy" – took place on the 19th and 20th of September, 2010, at the New York University (NYU) School of Law[♦].

Here, a selection of the papers presented at the Seminar has been published. Our will and hope is that these articles shall contribute to the growth of the Italian Public Law Scholarship and to strengthen its efforts in dealing with the numerous legal issues raised by globalization.

Sabino Cassese, *Judge of the Italian Constitutional Court*
Giulio Napolitano, *Professor of Public Law at University "Roma Tre"*
Lorenzo Casini, *Professor of Administrative Law at University of Rome "Sapienza"*

[♦] Authors were selected through a call for papers and they were the following: Stefano Battini; Lorenzo Casini; Roberto Cavallo Perin, Gabriella Racca e Gianlugi Albano; Edoardo Chiti; Elisa D'Alterio; Maurizia De Bellis; Federico Fabbrini; Francesco Goisis; Daniele Gallo: Elena Mitzman; Giulio Napolitano; Cesare Pinelli. Discussants at the seminar were Eyal Benvenisti, Sabino Cassese, Angelina Fisher, Matthias Goldmann, Benedict Kingsbury, Mattias Kumm, Giulio Napolitano, Pasquale Pasquino, Richard B. Stewart, Luisa Torchia, Ingo Venzke, and Joseph H.H. Weiler. More information available at http://www.irpa.eu/index.asp?idA=302.

The Two Ways Of Global Governance After The Financial Crisis

Multilateralism vs. Cooperation Among Governments

By Giulio Napolitano*

Abstract

In a greatly interdependent world economy, the number of global and regional public goods, from financial stability to sustainable growth, quickly increase and call for greater global and regional collective action. This paper tries to understand which mechanisms, if any, have been adopted in order to achieve a proper degree of international cooperation after the 2008 financial crisis. The analysis displays that the move towards a new economic global governance is not the result of a single strategy, but rather an original mix or blend of different solutions enhanced by flexibility and experimentalism. Some of them are an effort to strengthen multilateral agreements and the effectiveness of supranational institutions and regulatory measures; others aim to develop new forms of cooperation among governments, through a «concerted practice» way of action. Informal contacts and meetings among political leaders and the G-20 summits became the preferred rooms to exchange points of view, to coordinate action without assuming legal obligations, to monitor voluntary compliance. The parallel approval of similar pieces of legislation at national level signaled the willingness of governments to effectively cooperate, though leaving space for opportunistic behaviors by some of them.

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* Professor of Public Law, Political Science Faculty, University "Roma Tre", gnapolitano@uniroma3.it. This article is an extensively revised version of a paper written for the Institute for Research on Public Administration (IRPA) and New York University Jean Monnet Center Seminar "The New Public Law in a Global (Dis-)Order. A Perspective from Italy" (New York, September 19/20 2010). The author warmly thanks all the participants for their helpful suggestions, and is grateful to Andrea Altieri, Lorenzo Casini, Sabino Cassese, Richard B. Stewart, Luisa Torchia, and Joseph H.H. Weiler for their comments. All the usual disclaimers apply.

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1. A Globalization failure? The 2008 financial crisis and the gaps of economic global governance

The financial crisis of 2008 reversed the dominant image of the relationships between state and markets of the last twenty years and offered a powerful argument in favor of a new economic global governance.

In the last twenty years, powers of most states declined, so that their authority over people and business inside their territorial boundaries greatly weakened. As a consequence, where states were once the masters of markets, markets, on many crucial issues, became «the masters over the governments of states». In this context, governments could play a merely reactive role, trying to minimize the adverse effects of market institutions behaviors and of general trends in economics. Mostly, they hadn't any more the proper tools to achieve their objectives, as far as all the relevant forces of the market operated beyond the scope of their authority.[1]

The privatization process greatly reduced the role of the State both in economic activities and in welfare provisions. Many goods and services, even if public and of general interest, began to be produced by private firms and non governmental organizations. At the same time, the deregulation movement pressed states to give up with regulatory powers and to be confident in self-regulatory virtues of the markets. This way, governments dismissed many regulatory tools, from entry controls to prices and standards setting. On the contrary, impersonal forces of world markets, integrated by private enterprises in finance, industry and trade, became more powerful than the states to whom ultimate political authority over society and economy was supposed to belong.[2]

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[1] For such a conclusion, S. Strange, *The Retreat of the State. The Diffusion of Power in the World Economy* (Cambridge University Press, Cambridge, 1996); *see also* D. Swann, *The Retreat of the State: Deregulation and Privatisation in the UK and US* (University of Michigan Press, Ann Arbor, 1998). Empirical evidence at European level is provided by V. Schneider and F.M. Hage, "Europeanization and the Retreat of the State", 15:1 *Journal of European Public Policy* (2008) p. 1 *et seq*. In the Italian literature, S. Cassese, *La fine della sovranità economica dello Stato*, Id., *La crisi dello Stato*, (Laterza, Roma – Bari, 2002) p. 36 *et seq*.

[2] From this perspective, the end of the state was going to be followed by the fall of administrative law: R.A. Posner, "The Rise and Fall of Administrative Law, *Chicago-Kent Law Rev.* (1997), p. 953 *et seq*.; for a different image, M. Taggart (ed.), *The Province of Administrative Law* (Hart, Oxford, 1997); S. Cassese, "Le trasformazioni del diritto amministrativo dal XIX al XXI secolo, *Rivista trimestrale di diritto pubblico* (2002), p. 27 *et seq*.; G.

In this context, the economic globalization largely exceeded the legal and institutional one. Many markets were fully integrated throughout the world, even in the absence of a common regulatory framework. This output could be considered coherent with the free market approach under which the contemporary globalization took place. As a consequence the institutional landscape of the economic global governance remained highly fragmented. On one side, international institutions revealed internal weakness and criticism. Moreover, no substantial connection among the different institutional systems was activated. Finally, important gaps even in a free-market perspective remained unfilled. The absence of an effective global antitrust jurisdiction is perhaps the most evident example of that.

The 2008 financial crisis put into question the fundamental assumptions and theories of the last two decades about the retreat of the State and the rise of markets' domain over governments. As a matter of fact, the crisis forced governments to act as "saviors" and to nationalize banks, financial institutions and other strategic companies.[3] The deregulation recipe was seriously attacked and regulatory reforms in order to strengthen standards and controls over finance and business were put at the top of the policy agenda.[4] Furthermore, the idea of a spontaneous

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Napolitano, *Pubblico e privato nel diritto amministrativo*, (Giuffrè, Milano, 2003); from the point of view of global administrative law, from the starting point of B. Kingsbury *et al.*, "The Emergence of Global Administrative Law", 68 *Law and Contemporary Problems* (2005), p. 15 *et seq*., and S. Cassese, "Administrative Law Without the State? The Challenge of Global Regulation", 37 *Journal of International Law and Politics* (2005), p. 663 *et seq*., to, recently, B. Kingsbury, "The Concept of 'Law' in Global Administrative Law", 1 *IILJ Working Paper* (2009); in the Italian literature, S. Cassese, *Lo spazio giuridico globale* (Laterza, Roma-Bari, 2003); S. Battini, *Amministrazioni senza Stato. Profili di diritto amministrativo internazionale* (Giuffrè, Milano, 2003); L. Casini, *Il diritto globale dello sport* (Giuffrè, Milano, 2010).

[3] The metaphor of the savior was introduced in the Italian literature by G. Napolitano, "Il nuovo Stato salvatore: strumenti di intervento e assetti istituzionali", 11 *Giornale di diritto amministrativo* (2008), p. 1083 *et seq.*.; the French one suggested that of the firefighter: D. Custos, "L'Etat pompier à la fin de la présidence de George W. Bush ou les subtilités de la nationalisation à l'américaine", *Droit Administratif. avril* (2009), p. 21 *et seq*. *See also* G.F. Schuppert, "The new interventionist state", in O. Cramme and E. Jurado (eds.), *Responses to the global crisis. Charting a progressive path*, (Policy Network, London, 2009), p. 71 *et seq*. The legal problems arising from public property in the U.S. law are addressed by M. Kahan and E. Rock, "When the Government is the Controlling Shareholder", *New York University. Law and Economics Research Paper,* No. 10-20.

[4] About this trend, R.D. Cudahy, "The Coming Demise of Deregulation II", 61 *Administrative Law Review* (2009), p. 543 *et seq*.

adjustment of markets towards an efficient equilibrium was denied and governments adopted comprehensive recovery plans.[5]

The dynamics of globalization were deeply reconsidered too. On one side, the crisis was at the origin of a potential de-globalization effect, due to reduced confidence on free-trade and to artificial barriers erected by governments' bailout and recovery measures. Moreover, tightened regulation after reforms could reduce the size, complexity and interconnectedness of financial institutions. On the other side, the crisis showed the need for supranational collective action. As far as the markets, both real and financial, have not been so integrated since the end of the 19th century, also the correction of their failures must be global, for two different, even if often confused, reasons. The first one is that merely national solutions would leave space to regulatory arbitrage by multinational enterprises in order to escape unwanted rules and controls. This way, government action would be ineffective. The second reason is that virtually all domestic policies produce important international spillovers, and some of these can be quite harmful. Uncoordinated national measures may cause a government's failure if regarded from a third country point of view and produce even a negative reverse effect for the state which adopted them.

How the financial crisis changed the economic role of government, the constitutional equilibrium inside it, and the administrative law instruments of its action has already been sketched.[6] What this paper wants to stress is that the crisis obliges states and governments to "play the music again" but globalization changes the environment in which countries assume their legal and economic policy strategies.[7] The point is that in a greatly interdependent world

[5] A general overview in R.A. Posner, *A Failure of Capitalism, The crisis of '08 and the descent into depression*, (Harvard University Press, Cambridge, 2009), p. 148 *et seq*.

[6] With reference to the U.S., E.A. Posner and A. Vermeule, "Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008", 440 *University of Chicago Law School, John Olin Law & Economics Working paper* (2008); A. Vermeule, "Our Schmittian Administrative Law", 122 *Harvard Law Review* (2008-2009), p. 1095 *et seq*.; from a comparative law perspective, G. Napolitano, "The role of the State in (and after) the financial crisis: new challenges for administrative law", in P. Lindseth and S. Rose-Ackerman, *Comparative administrative law*, (Edward Elgar, Cheltenham, 2010) chap. 33.

[7] From this perspective, the analysis is consistent with a new scientific stream that offers a much more nuanced view of the changing role of the state than the idea of its mere retreat. A first approach acknowledges that nation states

economy, the number of global or at least regional public goods quickly increased, from financial stability to sustainable growth, and called for greater global and regional collective action.[8]

In this context, it becomes fundamental to understand which mechanisms, if any, have been selected to achieve a proper degree of international cooperation and to ensure the production of global and regional public goods, as financial stability and sustainable and balanced growth. This requires also to ask whether the selected cooperative mechanisms are effective or not; to assess how compliance is monitored and enforced; to verify how governments can give evidence of their cooperative behavior e how they may hold-out?[9]

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will witness continuing erosion of their capacity to implement national policy objectives, but this destiny may be escaped if they will prove capable to cooperate in addressing international spillovers and systemic risks through a blend of national and international, domestic and foreign, policies: I. Kaul *et al*. *Conclusion: Global Public Goods. Concepts, Policies and Strategies*, in I. Kaul *et al.* (eds.), *Global Public Goods. International Cooperation in the Twenty-first Century*, (United Nations University Press, Tokio, 1999) p. 450 *et seq*. A second approach, recognizes that the State is far from being the only player and even the more important when it comes to regulating transnational business and production. Yet, this doesn't mean that the state is becoming obsolete as a regulator, either domestically or internationally. In both settings, on the contrary, its role is evolving from the centralized mandatory regulator of tradition to "a more subtle role as catalyst, coordinator and supporter of diverse regulatory activities" (K.W. Abbott and D. Snidal, *The Governance Triangle: Regulatory Standards, Institutions and the Shadow of the State*, in W. Mattli and N. Woods (eds.), *The Politics of Global Regulation*, (Princeton University Press, Princeton – Oxford, 2009) p. 44 *et seq*. The argument of the persisting role of the state, anyhow, shouldn't be used to contrast the feasibility of any form of global governance, as suggested by T.W. Waters, "The Momentous Gravity of the State of Things Now Obtaining': Annoying Westphalian Objections", 16 *Indiana Journal of Global Legal Studies* (2009), 1, p. 25 ff. In the Italian literature, the ambiguous decline of the state is stressed by M. Bussani, *Il diritto dell'occidente*, (Einaudi, Torino, 2010) p. 87 *et seq*.

8 On the topic, T. Saddler, "Overcoming Global and Regional Collective Actions Impediments", 1:1 *Global Policy* (2010) 40-50; with specific reference to the problem of systemic risk, I. Goldin and T. Vogel, "Global Governance and systemic Risk in the 21st Century: Lessons from the Financial Crisis", 1:1 *Global Policy* (2010) p. 4 *et seq*.

9 A remarkable exception is represented by the works of David T. Zaring: (with S.M. Davidoff) "Big Deal: The Government's Response to the Financial Crisis", 61 *Administrative Law Review* (2009), p. 463 *et seq*.; (with L. Cunningham) "The Three or Four Models of Financial Regulation", 39 *Geo Wash. L. Rev.* (2009), p. 78 *et seq*.; "International Institutional Performance in Crisis", 10 *Chi. J. Int'L L.* (2010), p. 475 *et seq.*

I tried to tackle the different institutional and legal issues arising from the financial crisis in: "Il nuovo Stato salvatore: strumenti di intervento e assetti istituzionali", *supra* note 3; "L'intervento dello Stato nel sistema bancario e i nuovi profili pubblicistici del credito", 4 *Giornale di diritto amministrativo* (2009), p. 429 *et seq*.; "L'assistenza finanziaria europea e lo Stato co-assicuratore", 10 *Giornale di diritto amministrativo* (2010); "The role of the State in (and after) the financial crisis: new challenges for administrative law", in P. Lindseth and S. Rose-Ackerman (eds.), *Comparative administrative law*, (Edward Elgar, Cheltenham, 2010) chap. 33.

The Istituto di ricerche sulla pubblica amministrazione - IRPA is carrying on a comprehensive research on "The public intervention after the 2008 financial crisis" that will be published in 2011. The analysis is focused on the changing role of the state, the bailouts, the fiscal sustainability policies, the stimulus plans, the impact on

The interesting point is that move towards a new economic global governance is not the result of a single strategy. Flexibility and experimentalism lead to an original mix or blend of different solutions. Some of them represent an attempt to strengthen multilateral agreements and the effectiveness of supranational institutions and regulatory measures; others aim to develop new forms of cooperation among governments. The output is the rise of a collective, even if unstable, discipline.

2. The pathway towards a new multilateralism: the global reaction to the financial crisis

At first sight the global economic crisis launched a new multilateralism. Numerous and regular G-20 Leaders' Summits took place immediately after its burning. New international or supranational institutions – such as the Financial Stability Board – have been created. Both the International Monetary Fund and the World Bank, and other multilateral development banks, have been promised new resources to mitigate the 'development emergency' caused by the crisis. The United Nations has become an important forum for discussion among world leaders about the development of markets and proper institutions to regulate them.[10]

The move towards a new multilateralism was strongly pushed after the burning out of the financial crisis by radical reformers who asked for a stronger global governance. Theories of 'light touch' regulation have been criticized, leaving space to the advocacy in favor of the establishment of a global financial authority, charged with the task of both regulating and supervising transnational financial institutions and operations.[11] Other and even more ambitious proposals aimed to add a specific protocol on business conducts in the framework of the United Nations Charter and to sign an international agreement on the propriety, integrity and transparency of all economic activities.

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competition and welfare policies, the regulatory reforms, the new financial architecture, the transformations of the global governance.

[10] The importance of these steps is underlined by N. Woods, "Global Governance after the Financial Crisis: A New Multilateralism or the Last Gasp of the Great Powers?", 1:1 *Global Policy* p. 51 *et seq.*

[11] I. Goldin and T. Vogel, *supra* note 8, p. 6.

Notwithstanding the gravity of the crisis and the widespread criticism towards the existing regulatory framework, the delegation of formal powers to new international organizations didn't take place. Nor governments agreed for a new international treaty on business conducts and economic activities.[12] Even without that, multilateral solutions were strengthened in different ways, in particular expanding the role, the structure and the resources of international forum, networks, and organizations. These developments may be better assessed in relation to: a) the establishment of the G-20 as the forum of economic global governance; b) the reformation of International Financial Institutions; c) the strengthening of the global regulation of financial markets.

2.1. *The establishment of the G-20 as the «premier forum of international economic governance»*

The first attempt to strengthen the institutional architecture of global governance was the establishment of the G-20 as the «premier forum of international economic governance».[13]

The Group of Twenty (G-20) Finance Ministers and Central Bank Governors was established in 1999 to bring together systemically important industrialized and developing economies to discuss key issues in the global economy.[14] At that time, the G-20 was created as a

[12] See M. Kahler and D.A. Lake, "Economic Integration and Global Governance: Why So Little Supranationalism?", in W. Mattli and N. Woods (eds.) *supra* note 5, p. 242 *et seq.*

[13] On this shift, J. Kirton, *Towards Multilateral Reform: The G-20 contribution*, 2004, <www.utoronto.ca□; P.I. Hajnal, *The G8 system and the G20: evolution, role and documentation* (Ashgate, Aldershot, 2007). A different issue concerns the emergence of a de facto joint leadership of U.S. and China, as underscored by G. Garrett, "G2 in G20: China, the United States and the World after the Global Financial Crisis", 1:1 *Global Policy* (2010) p. 29 *et seq*. From the perspective of middle powers, D.D. Bradlow, *Reforming Global Economic Governance: A Strategy for Middle Powers in the G20*, Paper prepared for the workshop on Going Global: Australia, Brazil Indonesia, Korea and South Africa in International Affairs, Jakarta, Indonesia, May 25-26, 2010. For an insight of the task accomplished by the G-20, see G. Tremonti, *Le cause e gli effetti politici della prima crisi globale*, Lezione presso la Scuola Centrale del Partito Comunista Cinese, November 24, 2009, who describes the G-20 as a political body playing a fundamental operational role on a case by case basis.

[14] The G-20 is made up of the finance ministers and central bank governors of 19 countries. The European Union, who is represented by the rotating Council presidency and the European Central Bank, is the 20th member of the G-20.To ensure global economic fora and institutions work together, the Managing Director of the International Monetary Fund (IMF) and the President of the World Bank, plus the chairs of the International Monetary and Financial Committee and Development Committee of the IMF and World Bank, also participate in G-20 meetings on an ex-officio basis. The G-20 thus brings together important industrial and emerging-market countries from all

response both to the financial crises of the late 1990s and to a growing recognition that key emerging-market countries were not adequately included in the core of global economic discussion and governance.[15]

The G-20 has progressed a range of issues since 1999, including agreement about policies for growth, reducing abuse of the financial system, dealing with financial crises and combating terrorist financing. The G-20 also aimed to foster the adoption of internationally recognized standards through the example set by its members in areas such as the transparency of fiscal policy and combating money laundering and the financing of terrorism. In 2004, G-20 countries committed to new higher standards of transparency and exchange of information on tax matters, in order to combat abuses of the financial system and illicit activities including tax evasion.

To tackle the financial and economic crisis that spread across the globe in 2008, the G20 members were called upon to further strengthen international cooperation. Accordingly, the G20 Summits have been held in Washington in 2008, in London and Pittsburgh in 2009, and in Toronto and Seoul in 2010. Leaders' Summits coupled the ones held by Treasury Ministers, giving the G-20 the highest political authority. This way, the G-20 became the premier forum for international economic development in order to promote open and constructive discussion between industrial and emerging-market countries on key issues related to global economic stability. By contributing to the strengthening of the international financial architecture and providing opportunities for dialogue on national policies, international co-operation, and

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regions of the world. Together, member countries represent around 90 per cent of global gross national product, 80 per cent of world trade (including EU intra-trade) as well as two-thirds of the world's population. The G-20's economic weight and broad membership gives it a high degree of legitimacy and influence over the management of the global economy and financial system.

[15] Prior to the G-20 creation, similar groupings to promote dialogue and analysis had been established at the initiative of the G-7. The G-22 met at Washington D.C. in April and October 1998. Its aim was to involve non-G-7 countries in the resolution of global aspects of the financial crisis then affecting emerging-market countries. Two subsequent meetings comprising a larger group of participants (G-33) held in March and April 1999 discussed reforms of the global economy and the international financial system. The proposals made by the G-22 and the G-33 to reduce the world economy's susceptibility to crises showed the potential benefits of a regular international consultative forum embracing the emerging-market countries. Such a regular dialogue with a constant set of partners was institutionalized by the creation of the G-20 in 1999.

international financial institutions, the G-20 is called to support growth and development across the globe.

The concerted and decisive actions of the G20, with its balanced membership of developed and developing countries, helped the world to deal effectively with the financial and economic crisis. The scope of financial regulation has been largely broadened, and prudential regulation and supervision have been strengthened. There was also great progress in policy coordination thanks to the creation of the framework for a strong, sustainable and balanced growth designed to enhance macroeconomic cooperation among the G20 members and therefore to mitigate the impact of the crisis. Finally, global governance improved to better take into consideration the role and the needs of emerging of developing countries, especially through the ambitious reforms of the governance of the IMF and the World Bank.

The G-20 cooperates closely with various other major international organizations and fora, as the potential to develop common positions on complex issues among G-20 members can add political momentum to decision-making in other bodies. The participation of the President of the World Bank, the Managing Director of the IMF aims to ensures that the G-20 process is well integrated with the activities of the Bretton Woods Institutions. The G-20 also works with, and encourages, other international groups and organizations, such as the Financial Stability Board and the Basel Committee on Banking Supervision, in progressing international and domestic economic policy reforms. In addition, experts from private-sector institutions and non-government organizations are invited to G-20 meetings on an ad hoc basis in order to exploit synergies in analyzing selected topics and avoid overlap.

The establishment of the G-20 as the premier forum of economic global governance was fundamental to transfuse new blood into multilateralism, overcoming limits of authority and legitimacy of the Group of Seven (G-7) industrialized countries.[16] The G-20 proved to be well-positioned to impulse both the reformation of International Financial Institutions and the strengthening of global financial regulation. Next challenges will be the capability to coordinate

[16] N. Woods, "Global Governance after the Financial Crisis: A New Multilateralism or the Last Gasp of the Great Powers?", 1:1 *Global Policy* (2010) pp. 51-52.

the economic policies of major countries and regions and to ensure an active follow-up on processes already underway. The more the G-20 will be able to play a prominent role in this phase, the more solutions adopted will be tinged with politics rather than with regulatory expertise and technocratic know-how.[17]

2.2. *The reformation of International Financial Institutions*

A second attempt to strengthen the economic global governance was represented by the reformation of the International Financial Institutions that were established in the framework of the Breton Woods Agreements: the World Bank and the International Monetary Fund. The fundamental idea was to modernize the institutions fundamentally so that they could better reflect changes in the world economy after the crisis and more effectively play their roles in promoting global financial stability, fostering development and improving the lives of the poorest.

In April 2010, the 186 countries that own the World Bank Group endorsed boosting its capital by more than $86 billion and giving developing countries more influence. Along with this first general capital increase for the World Bank for more than 20 years and shift in voting power to developing countries, the Development Committee of the Board of Governors also backed the Bank's new post-crisis strategy, and a comprehensive reform package in order to improve the governance of the Bank. The four main components of the package concern financial resources, voting power, post-crisis strategy, operational reforms.

About financial resources, on one side, it was decided an increase of $86.2 billion in capital for the International Bank for Reconstruction and Development (IBRD), the arm that lends to developing countries, from a general capital increase and a selective capital increase linked to the change in voting-powers; this includes $5.1 billion in paid-in capital. On the other side, there was a $200 million increase in the capital of the IFC, the World Bank Group's private sector arm, as part of an increase in shares for developing and transition countries. IFC will also,

[17] *See* Zaring, supra note 9.

subject to board approval, consider raising additional capital through issuing a hybrid bond to shareholding countries and through retaining earnings.

Fundamental changes in governance are related to a 3.13 percentage point increase in the voting power of Developing and Transition countries (DTCs) at IBRD, bringing them to 47.19 percent -- a total shift to DTCs of 4.59 percentage points since 2008. This increase fulfills the Development Committee commitment in Istanbul in October 2009 to generate a significant increase of at least 3 percentage points in DTC voting power. The IBRD 2010 realignment will result from a selective capital increase of $27.8 billion, including paid-in capital of $1.6 billion. There will be also an increase in the voting power of Developing and Transition Countries at IFC to 39.48 percent -- a total shift to DTCs of 6.07 percentage points. The IFC 2010 realignment will result from a selective capital increase of $200 million and increase in the basic votes for all members. It was also reached an agreement to review IBRD and IFC shareholdings every five years with a commitment to equitable voting power between developed countries and DTCs over time.

The post-crisis strategy aims to emphasize the role of the Bank in: targeting the poor and vulnerable, especially in Sub-Saharan Africa; creating opportunities for growth with a special focus on agriculture and infrastructure; promoting global collective action on issues from climate change and trade to agriculture, food security, energy, water and health; strengthening governance and anti-corruption efforts; and, preparing for crises alerts and managing.

Operational changes represent perhaps the most comprehensive reform agenda undertaken by the institution. These include, firstly, a new access to information policy, inspired by the Indian and U.S. freedom of information acts, which makes the Bank a world leader among multilateral institutions on information disclosure. Secondly it was launched the Bank's Open Data Initiative, in order to put the World Bank at the forefront of giving free and easy access to information on developing countries. Thirdly, investment lending reform is intended to improve the focus on results, increase speed and delivery, and strengthened risk management. Fourthly, strengthened governance and anti-corruption efforts should provide more resources for prevention and coordinated sanctions to fight corruption.

Also the International Monetary Fund was at the core of a comprehensive package of quota and governance reforms in order to achieve a more legitimate, credible and effective institution. The aim is to ensure that quotas and Executive Board composition are more reflective of new global economic realities, and to secure the IMF's status as a quota-based institution, with sufficient resources to support members' needs.

The reforms include five fundamental steps. First, there will be shifts in quota shares to dynamic emerging market and developing countries and to under-represented countries of over 6%, while protecting the voting share of the poorest. Second, there will be a doubling of quotas, with a corresponding rollback of the New Arrangements to Borrow (NAB) preserving relative shares, when the quota increase becomes effective. Third, continuing the dynamic process aimed at enhancing the voice and representation of emerging market and developing countries, including the poorest, there will be a comprehensive review of the quota formula by January 2013 to better reflect the economic weights; and through completion of the next general review of quotas by January 2014. Fourth, there will be greater representation for emerging market and developing countries at the Executive Board through two fewer advanced European chairs, and the possibility of a second alternate for all multi-country constituencies. Fifth, there will be a move to an all-elected Board, along with a commitment by the IMF's membership to maintain the Board size at 24 chairs, and following the completion of the 14^{th} General Review, a review of the Board's composition every eight years.

In this context, it was suggested to reform also the IMF's mission and mandate, in particular in order to strengthen surveillance. The fundamental idea is that IMF surveillance should be enhanced to focus on systemic risks and vulnerabilities wherever they may lie. The IMF will make financial stability assessments under the Financial Sector Assessment Program (FSAP) a regular and mandatory part of Article IV consultation for members with systemically important financial sectors. The IMF is also called to strengthen bilateral and multilateral work on surveillance covering financial stability, macroeconomic, structural and exchange rate policies, with increased focus on systemic issues; to enhance synergies between surveillance tools; to help members to strengthen their surveillance capacity; and to ensure even-handedness, candor, and independence of surveillance. The IMF will conduct spillover assessments of the wider impact of systemic economies' policies.

Notwithstanding all these achievements, the role of the IMF is different from the one that was envisioned for the IMF when it was founded after World War II. Then, it was supposed to more broadly serve as something like a central banker to the world, both developed and developing, and was designed to provide international market stability, as well as to backstop governments that found themselves in macroeconomic or budgetary crises. Now, even with its new resources, there is no prospect that the IMF could come to the aid of more than one member of the G20, were such a member in crisis. The IMF cannot bail out Europe, the United States, Japan or China. So rather than being part of the architecture of global finance, perhaps the IMF is better thought of as a sentry before the architecture, and a part of a different construction, aiming to global development.[18]

2.3. *Strengthening global financial regulation and supervision*

A third attempt to push for worldwide solution is the strengthening of global financial regulation and supervision.

On the institutional side, the most important achievement was the establishment in April 2009 of a new Financial Stability Board (FSB) as the successor to the Financial Stability Forum (FSF)[19]. In November 2008, the Leaders of the G20 countries called for a larger membership and a stronger institutional basis of the FSF. The purpose was to strengthen its effectiveness as a

[18] According to N. Woods, *supra* note 16, p. 51 *et seq*., «an ambiguous new order may be emerging in which multilateral institutions - such as the IMF – have only a limited role to play alongside emerging national and regional strategies».

[19] The FSF was founded in 1999 by the G7 Finance Ministers and Central Bank Governors following recommendations by Hans Tietmeyer, President of the Deutsche Bundesbank. G7 Ministers and Governors endorsed the creation of the FSF at a meeting in Bonn in February 1999. The FSF would bring together: national authorities responsible for financial stability in significant international financial centres, namely treasuries, central banks, and supervisory agencies; sector-specific international groupings of regulators and supervisors engaged in developing standards and codes of good practice; international financial institutions charged with surveillance of domestic and international financial systems and monitoring and fostering implementation of standard; committees of central bank experts concerned with market infrastructure and functioning. The FSF was first convened in April 1999 in Washington.

mechanism for national authorities, standard setting bodies and international financial institutions in order to address vulnerabilities and to develop and implement strong regulatory, supervisory and other policies in the interest of financial stability. As announced in the G20 Leaders Summit of April 2009, the expanded FSF was then re-established as the Financial Stability Board (FSB) with a broadened mandate to promote financial stability.

The FSB is now called to coordinate at the international level the work of national financial authorities and international standard setting bodies and to develop and promote the implementation of effective regulatory, supervisory and other financial sector policies. It brings together national authorities responsible for financial stability in significant international financial centers, international financial institutions, sector-specific international groupings of regulators and supervisors, and committees of central bank experts.

On the regulatory side, all financial institutions and operations were put under review. The most important achievement was the agreement reached by the Basel Committee on Banking Supervision (BCBS) on the new bank capital and liquidity framework, which increases the resilience of the global banking system by raising the quality, quantity and international consistency of bank capital and liquidity, constrains the build-up of leverage and maturity mismatches, and introduces capital buffers above the minimum requirements that can be drawn upon in bad times. The framework includes an internationally harmonized leverage ratio to serve as a backstop to the risk-based capital measures. The new standards are expected to reduce banks' incentive to take excessive risks, lower the likelihood and severity of future crises, and enable banks to withstand – without extraordinary government support – stresses of a magnitude associated with the recent financial crisis. This will result in a banking system that should better support stable economic growth.

Other regulatory initiatives aim to work in an internationally consistent and nondiscriminatory manner to strengthen regulation and supervision on hedge funds, OTC derivatives and credit rating agencies. In particular, the FSB adopted new standards for sound compensation and specific recommendations for implementing OTC derivatives market reforms, designed to fully implement our previous commitments in an internationally consistent manner, recognizing the importance of a level playing field. Furthermore, the FSB adopted principles on reducing reliance on external credit ratings. Standard setters, market participants, supervisors and central banks should not rely mechanistically on external credit ratings. Another issue is the role of financial institutions that are too big or too complicated to fail. The FSB proposed the policy framework, work processes, and timelines to reduce the moral hazard risks posed by systemically important financial institutions (SIFIs) and address the "too big to fail" problem. This requires a multi-pronged framework combining: a resolution framework and other measures to ensure that all financial institutions can be resolved safely, quickly and without destabilizing the financial system and exposing the taxpayers to the risk of loss; a requirement that SIFIs and initially in particular financial institutions that are globally systemic (G-SIFIs) should have higher loss absorbency capacity to reflect the greater risk that the failure of these firms poses to the global financial system; more intensive supervisory oversight; robust core financial market infrastructure to reduce contagion risk from individual failures; and other supplementary prudential and other requirements as determined by the national authorities which may include, in some circumstances, liquidity surcharges, tighter large exposure restrictions, levies and structural measures.

New and stronger rules must be complemented with more effective oversight and supervision. The FSB, in consultation with the IMF, was tasked to report to Finance Ministers and Central Bank Governors on recommendations to strengthen oversight and supervision, specifically relating to the mandate, capacity and resourcing of supervisors and specific powers which should be adopted to proactively identify and address risks, including early intervention. The institutional design of supervisory authorities, anyhow remains in the hands of national governments. Regional entities, like the European Union, may set minimal requirements of structural and functional independence. The G-20 members strengthened also the commitment to the IMF/World Bank Financial Sector Assessment Program (FSAP) and pledged to support robust and transparent peer review through the FSB. Other multilateral initiatives are addressing non-cooperative jurisdictions based on comprehensive, consistent, and transparent assessment with respect to tax havens, the fight against money laundering and terrorist financing and the adherence to prudential standards. International assessment and peer review should play a fundamental role in order to ensure the achievement of common objectives.

3. Myth and reality of cooperation among governments after the financial crisis: Concerted practices or parallel behaviors?

Nonetheless, greater level of global economic integration, even after a shocking experience like the financial crisis, didn't produce, at least apparently, a radical change on the institutional side.[20] As a matter of fact, states didn't transfer authority to existent or new supranational bodies. They just decided to let evolve the Financial Stability Forum in a Board and to strengthen the role and the financial resources of IMF. Even the enlargement of the G-8 in the G-20 as the «premier forum of international economic governance» didn't entail any delegation of authority.

Recently, some scholars, to offer a possible explanation of the "missing" supranationalism, described two additional modes of international governance: hierarchy, in which states transfer regulatory authority to a dominant state, and network, in which states and private actors meet and coordinate their action within a common institutional framework.[21] These alternative modes of global governance, anyhow, played a marginal role in managing the financial crisis. The hierarchy option can explain the relevance of some U.S. initiatives, in shaping bailout, financial reform and recovery plans strategies. But these couldn't work without coherent and coordinated action by other governments. Also the space for a network model solution was very limited, as it remained circumscribed to well-known applications, as in the case of public-private financial regulators.[22]

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[20] A critical assessment of the existing framework in D. Zaring, *supra* note 9. On the different techniques to promote accountability and legitimacy of the Basel process, M.S. Barry and G.P. Miller; "Global administrative Law: The View from Basel", 17 *European Journal of International Law* (2006), p. 15 *et seq.*; a comprehensive analysis in S. Battini (ed.), *La regolazione globale dei mercati finanziari*, (Giuffrè, Milano, 2007).

[21] See M. Kahler and D.A. Lake, *supra* note 12, p. 242.

[22] From a normative point of view, the establishment of a new network model of governance is suggested by K. Pistor, "Financial Governance Networks", in O. Cramme and E. Jurado, *Responses to the global crisis. Charting a progressive path* (Policy Network, London, 2009) pp. 39-40.

Individual action by national governments, on the contrary, was fundamental. The point is that governmental reactions to the crisis were not the object of a single player game. Instead, their outcomes are much more than ever in the past affected by other players' games. The problem is to understand if, in this context, governments are able to develop a cooperative approach, in order to share and divide a better pay-off, or, on the contrary, they are induced to develop unilateral ways of action, looking at short term benefits, under pressure of national political process. As a matter of fact, the crisis showed how far an individual government's decision (to bailout or not a big financial institution, just to take an example) may affect the economic and financial outcome of other countries. Since September 2008, then, governments realized the existence of relevant spill-over effects of every response to the crisis they were going to adopt, from banks' bailouts to regulatory reform, from recovery and growth policies to fiscal sustainability and financial assistance measures.

To better understand if and how cooperation is working after the financial crisis, new behavioral models must be figured out. From this perspective, a useful reference could be made to antitrust law, which prohibits all kinds of legal and actual conducts restricting the competition, either originated deliberately or consequentially.[23]

The "cooperative" actions (deemed as illegal from the antitrust point of view) are evaluated in one of the three categories including agreements among undertakings, concerted practices and decisions by association of undertakings. While agreements are the object of binding contracts, written or orally stipulated, and decisions by association are adopted by a well established institution, to which the members have delegated some kind of authority, a concerted practice may exist where there is informal cooperation without any formal agreement or decision and the related conducts do not provide obligatory power.

Transplanted into the international law setting, agreements may be considered similar to treaties and other forms of legally binding, bilateral or multilateral, "contracts" stipulated among

[23] For a confirmation of the broader meaning that the concept of concerted practice can assume, M. Del Mar, *Concerted Practices and the Presence of Obligations: Joint Action in Competition Law and Social Philosophy*, <ssrn.com.

states, and decisions by associations to any measure adopted by an International Governmental Organization or other "boards", "forum", or "networks" vested with some form of authority over its members. Sovereign and autonomous conducts of governments, on the contrary, may be considered as a form of concerted practice, whenever State actors' behavior is the result of direct or indirect contacts between countries leaders, that knowingly entered into practical cooperation.

As previously noted, to face the financial crisis and its cross-border effects, governments didn't stipulate new formal agreements, nor bilateral neither multilateral. At the same time, they didn't delegate any formal authority to a supranational organization. All governments recognized the importance of cooperation to achieve the production of new fundamental global public goods, like financial stability and sustainable growth. At the same time, experiencing the relation of the required decisions to the core of national sovereignty, they didn't want to tie their hands and to commit to some form of legally binding supranational authority.

That's why governments implicitly claimed that concerted practices were the most viable way to achieve cooperation in highly sensible political matters. Informal contacts and meetings among political leaders and the G-20 summits became the preferred rooms to exchange points of view, coordinate action without assuming legal obligations, monitoring voluntary compliance.

The claim that governments learnt the lesson of the financial crisis and effectively took cooperative action through a concerted practice scheme may be questioned reversing the argument usually made by undertakings suited for anticompetitive action. When undertakings are suspected of a violation of antitrust law through concerted practices restricting free trade and third parties' economic rights, they argue that the contested behavior is not the result of a somehow coordinated action but simply the object of an independent rational choice. The final output may well be a «parallel behavior» of multiple economic actors behind which there is no even informal or tacit agreement.

From this perspective, what governments claim to be cooperative behaviors at the global level could actually be mere parallel behaviors, simply adopted to satisfy domestic interests and pressures at the national level. This kind of ambiguity could perfectly fit a double and opposite need of governments: on one side, ensuring financial markets and public opinions throughout the world that global collective action is taking place through concerted practices; on the other side, assessing that the well-being of national citizens is at the core of sovereign decisions of governments (even if «parallel» across countries).

3.1 *Governmental bailouts and global financial stability*

The first response of governments to the financial crisis was the bailout of banks and financial institutions in order to guarantee the stability of the financial system, injecting liquidity into the market and restoring confidence among savers and investors.

In the first half of 2008, bailout measures were adopted on a case by case basis by governments, like the United Kingdom and the U.S., as purely domestic choices. At the beginning of September 2008, it was the decision by the U.S. not to bailout Lehman Brothers that revealed the worldwide negative spillover effect of a national government option. In such a dramatic way, it became clear the existence of a neglected global public good (financial stability), that should have been protected from both market and government failures.

Since that, efforts at coordination between states started.[24] Informal contacts and meetings among the U.S. and the European countries put the basis to share an economic policy analysis and to figure out the necessary measures to avoid the collapse of the global financial system. As the crisis was coming to a head, October 9 saw a simultaneous move of the central banks of U.S, Europe and China aimed at reducing interest rates by half a point. On October 11, the meeting of G-7 Finance Ministers, for the first time, outlined a set of joint rules and measures. Only after that, the enlarged G-20 Washington summit held in November 2008 for the first time agreed on the relevance of the «urgent and exceptional measures» taken by governments to stabilize financial markets and to support the global economy, providing liquidity, strengthening the capital of financial institutions, protecting savings and deposits, unfreezing credit markets.

Nonetheless, nor a formal agreement was stipulated, neither a decision from any

[24] Even if, in the meanwhile, some countries tried even to take advantage of first mover behavior. At the end of September 2008, the Irish decision to guarantee all of the liabilities of local banks led to a sudden shift of the legal seat of many financial institutions from U.K. to Ireland, before similar extensions of guarantees in virtually all the large countries in Europe.

supranational authority or network was delivered. On the contrary, governments adopted parallel behaviors in order to address insolvency and liquidity problems of financial institutions in each country. This way governments succeeded in combining a cooperative approach at global level with the defense of national prerogatives.[25] Even if coordinated, bailouts after the failure of Lehman Brothers continued to be predominantly national, for two fundamental reasons. On the one hand, the pressure from individuals, families and businesses for protective measures are focused on electorally-accountable national representative bodies. On the other hand, states are the only entities that possessed the financial resources necessary to fund rescue packages. Moreover, they were the only ones who had the necessary authorizing powers, as well as the acknowledged legitimacy to exercise them. The success of this strategy was assessed in the G-20 London summit, where the final declaration stated that governments «have provided significant and comprehensive support» to the banking systems «to provide liquidity, recapitalize financial institutions, and address decisively the problem of impaired assets».

In efforts at coordination, the approval of specific pieces of legislation on bailout played an important role, as a signal revealing the game that each state was going to play. Before that, each country decided case by case whether to bailout or not and how. Going on this way would have greatly increased uncertainty not only in the market but also in relationships among states. In this context, each government would have acted just looking at his own interest, ignoring the spillover effects of its decisions. On the contrary, the approval in many countries of a new body of legislation created a more cooperative environment, revealing the existence of a dominant strategy to bailout and creating a more uniform playground.

In this signaling behavior through law, the first mover were the U.S. On October 2008 the Congress passed the Economic Emergency Stabilization Act. The statute authorized the Treasury Secretary to establish a Troubled Asset Relief Program for the purpose of purchasing or committing to purchase "troubled" financial instruments. Through the approval of the statute, the

[25] As the Financial Stability Board stated, «while financial crisis management remains a domestic competence, the growing interactions between national financial systems require international cooperation by authorities» (FSF Principles for Cross-border Cooperation on Crisis Management, 2 April 2009, p. 2).

U.S. revealed a double commitment. On one side, the U.S. government was going to rescue national financial institutions and to protect citizens, workers and investors. On the other side, paying for the bailout, the U.S. showed their will to internalize part of the negative spill-over effects of the crisis.

Acting as first mover, the U.S. attempted to shape the behavior of second movers and to push the development of a cooperative environment, the more possible mirroring the domestic one. This was coherent with the common assumption that a dominant state will usually promote coordination that is centered on its domestic standards in order to minimize adjustment costs for its domestic actors.[26] The outcome, anyhow, was a only partial success. As a matter of fact, all European countries adopted in few months similar law and statutes on bailout, revealing this way their willingness to cooperate and the commitment to avoid a reverse effect in the U.S. caused by the failure of a big European financial institution. Moreover, limits and controls by the European Commission on state aids to banks and other institutions were relaxed.[27]

But only in some countries, like Spain, the legal and economic instruments of bailout were copied from the U.S. On the contrary, several different solutions were introduced in many European countries, like the creation of special funds, the concession of government guarantees and the exchange of government securities.[28] Above all, many European countries adopted the strategy of nationalization. As a matter of fact, outright acquisition of equity in banks was preferred to the purchase of "troubled" assets. The United Kingdom, for example, decided to buy equity in eight of the major banks, with a recapitalization plan backed by 50 billion. To this

[26] That's the fundamental argument explained by D. Drezner, *All Politics is Global* (Princeton University Press, Princeton, 2007). Anyhow, from a legal point of view, the issue is much more complicated, as far as there is a two-ways influence: R. Stewart, "U.S. Administrative Law: A Model for Global administrative Law", 68 *Law and Contemporary Problems* (2005), p. 63 ff.; Id., "The Global Regulatory Challenge to U.S. Administrative Law", 37 *Journal of International Law and Politics* (2005), p. 695 *et seq*.

[27] *See* Communication from the Commission - Temporary Community Framework for state aid measures to support access to finance in the current financial and economic crisis (2009/C 16/01), of January 22, 2009, and as modified on 25 February 2009.

[28] *See* Spain, the Real Decreto-Ley, October 10, 2008, n. 6, which creates the *Fondo para la Adquisición de Activos Financieros*, and the Real Decreto-Ley, October 13, 2008, n. 7, on *Medidas Urgentes en Materia Econòmico-Financiera*, including the issue of public guarantees for banks and the market. In Germany, the *Finanzmarktstabilisierungsgesetz* approved on October 17, 2008 created a special Fund for market stabilization managed by the Bundesbank, in conformity with direction from the Finance Minister.

purpose, the Banking Bill contemplates the hypothesis of "temporary public ownership" through the Treasury release of transfer orders of credits. The choice in favor of nationalization appeared to be both more effective and convenient for the taxpayer.

Up to a certain extent, European countries took advantage of acting as second movers, after having observed the negative reaction of markets and citizens to the choices of first mover. That's why the strategy of second movers finally reversed the one of the first. As a matter of fact, the U.S. Treasury, on the basis of the wide definition of "troubled asset" contained in the Economic Emergency Stabilization Act, which is capable of extending to any financial instrument, changed his approach since the early negative responses from the stock exchange towards plans to purchase only "troubled" mortgage-related securities and the initial success of the different European model based precisely on the government acquiring equity and stocks in banks. This way, even the U.S., traditionally reluctant to public ownership, were induced to experiment with nationalization.[29]

3.2. *Coordinating local reforms: a way to the new global financial regulation?*

While implementing bailout programs, governments announced a program of regulatory reforms to broaden the scope and strengthen the efficacy of markets supervision, particularly in the financial sector. Given internationally active banks, and globalized financial markets, collective action is even more required when it comes to crisis prevention through regulatory actions. The fundamental challenge is to ensure level playing fields and to fight attempts to avoid regulatory rules through international arbitrage.[30] From this perspective, the G-20 members pledged to act together to achieve the commitments to reform the financial sector made at the official summits.[31]

In the framework of this common strategy, efforts to establish system-wide oversight and

[29] The point has been stressed, with some malice, in French literature, by D. Custos, *supra* note 3.
[30] On the topic, W.R. White, *The Importance of Collective Action and Sound Policy Frameworks*, Introductory address at the G20 Workshop on a Framework for Strong, Sustainable and Balanced Growth, Toronto, may, 7-9, 2010.
[31] Useful suggestions were provided by FSB, Improving Financial Regulation. Report of the Financial Stability Board to G20 Leaders, 25 September 2009.

macro-prudential policy arrangements greatly depend on measures adopted at national level and on the capacity of governments to coordinate them to ensure global financial stability.[32] The problem is that strategies may vary in the different areas of the world. In the U.S. and in Europe, the key issue is how to prevent the systemic risk arising from financial innovation and highly concentrated big institutions. In Asia, on the contrary, financial institutions and structures are less sophisticated. The main problem is how to make the financial system more efficient and responsive to real sector needs.[33] African countries may call for broadening the scope of the regulatory agenda in order to guarantee effective access to financial services for their citizens and small companies.[34]

In the transatlantic area, the U.S. were first mover once again. On June 2010 the Congress approved a comprehensive Financial Act, which passed into law the Regulatory Reform program presented by the Obama Administration the year before.[35] First, the bill creates a new independent watchdog, housed at the Federal Reserve, with the authority to ensure consumers get the information they need to shop for mortgages, credit cards, and other financial products, and protect them from hidden fees, abusive terms, and deceptive practices. Second, the bill aims at creating a safe way to liquidate failed financial firms; imposes tough new capital and leverage requirements that make it undesirable to get too big; updates the Fed's authority to allow system-wide support but no longer prop up individual firms. Thirdly, it creates a council to identify and address systemic risks posed by large, complex companies, products, and activities before they threaten the stability of the economy. Fourthly, it tries to eliminate loopholes that allow risky and

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[32] The danger of another «messy compromise between the needs of financial markets for global coordination and the protectiveness of national governments» is stressed by H. Davies, "Global Financial Regulation after the Credit Crisis", 1:2 *Global Policy* (2010), p. 185 *et seq*. But, for the argument that «international and regional cooperation and national political leadership are essential complements for achieving global financial reforms», *see* "Modernisation of the Global Financial Architecture: Global Financial Stability", Remarks of Mario Draghi, Chairman of the Financial Stability Board, to the Committee on Economic and Monetary Affairs European Parliament, 17 March 2010.

[33] The point is stressed by A. Sheng, "The Regulatory Reform of Global Financial Markets: An Asian Regulator's Perspective", 1:2 *Global Policy*, 1, 2, 2010, p. 191 *et seq*.

[34] On this issue, D.D. Bradlow, *supra* note 13, p. 7

[35] About the different alternatives faced by legislatures, D. Zaring and L. Cunningham, *supra* note 9, p. 78 *et seq.*. On the position of the Administration, S.S. Rehman, "The Obama Administration and the U.S. Financial Crisis", 10:1 *Global Economy Journal* (2010) p. 1 *et seq.*.

abusive practices to go on unnoticed and unregulated - including loopholes for over-the-counter derivatives, asset-backed securities, hedge funds, mortgage brokers and payday lenders. Fifthly, it strengthens oversight and empowers regulators to aggressively pursue financial fraud, conflicts of interest and manipulation of the system that benefit special interests.

The European regulatory reform is far less comprehensive, but, like the U.S. new legislation, aim to better address the fundamental problem of systemic risk.[36] To this purpose, it is established a European financial supervision system based on two pillars. The first is a new European Systemic Risk Board that will monitor and assess potential threats to financial stability that arise from macro-economic developments and from developments within the financial system as a whole ("macro-prudential supervision"). The second is the European System of Financial Supervisors (ESFS), which consists of a robust network of national financial supervisors working in tandem with new European Supervisory Authorities to safeguard financial soundness at the level of individual financial firms and protect consumers ("micro-prudential supervision").[37]

The existence of a European project and its final approval did not stop, in the meanwhile, parallel reforms at national level, all aiming to face the problem of systemic risk through similar institutional solutions. Informal contacts among leaders, imitative behaviors by governments and

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[36] Asymmetries between U.S. and European strategies can be explained in the light of the different institutional and political context. The U.S. bill, in order to gain political consensus in the Congress and among citizens, aims to strengthen consumer protection and reveals the U.S. purpose to lead the worldwide process of regulatory reform. The E.U. proposal, on the contrary, is much more concerned about the problem of institutional cooperation at European level between national authorities. It's a progress, if compared with the present situation, but it runs the risk of being not courageous enough to reduce the transaction costs arising from a system of multi-level governance. Both in U.S. and in Europe, anyhow, it remains unfulfilled the objective to increase the level of cooperation and integration between supervisory authorities, as far as responsibilities are still strongly divided among several sectoral regulators (in banking, insurance, or real estate), and different levels of governments (in the U.S. between Federal and State authorities; on the other side of the Atlantic between in European and national ones). On the topic, *see* D. Masciandaro, *Designing Authorities in Financial Supervision, Economic, Politics and Law*, Paolo Baffi Center, Bocconi University.

[37] On the topic, F. Recine and P.G. Teixeira, *The new financial stability architecture in the EU*, <ssrn.com/abstract=1509304>. A comparison between U.S. and European solutions in G. Bertezzolo, "Prevenire nuove crisi finanziarie: la riforma del sistema americano e comunitario in prospettiva globale", 1 *Giornale di diritto amministrativo* (2010), p. 83 *et seq*.

legislatures and peer review by the FSB played a fundamental role in ensuring some degree of coordination.[38]

In France, banking and insurance authorities merged to create a new Prudential Authority. The aim is to strengthen financial stability by establishing a supervisory authority capable of monitoring risks across financial sectors and eliminating "blind spots" in the monitoring. To tighten the regulation of the financial sector, a Council for financial regulation and systemic risk will be established by the end of 2010. Chaired by the Minister of Finance, the Council will gather all the supervisory authorities of the financial sector in order to analyze the situation from a macro-prudential point of view and to assess the systemic risk. This way, it will ease the cooperation and the synthesis of the work to implement European and international financial sector rules. Furthermore, the Autorité des Marchés Financiers established an in-house Risk Committee to identify risks at an early stage and extended its scope of supervision to all markets and products including OTC derivatives markets.

In the U.K. it was approved a new Financial Services Act. The Act aims to strengthen the financial stability framework, through the introduction of a statutory financial stability objective for the Financial Services Authority (FSA). In addition, a new committee (the Council for Financial Stability) has been established, consisting of the Chancellor, FSA Chairman and Governor of the Bank of England. The objective of the Council is to analyze and examine emerging risks to the financial stability of the U.K. economy and coordinate the appropriate response. The Financial Services Act provides the FSA with greater powers to seek information from non-regulated entities, where the information concerned is relevant to the financial stability either of individual financial institutions or of one or more aspects of the financial system. This includes the power to collect information from non-regulated financial services firms and providers of critical services to such firms and the power for Treasury to extend the scope of information-gathering powers in future. Other reforms announced by the new Cabinet aim to enhance to role of the Bank of England in prudential macro-supervision.

[38] *See* FSB, *Overview of The Progress in the Implementation of the G20 Recommendations for Strengthening Financial Stability*, Report of the Financial Stability Board to G20 Leaders, 18 June 2010.

This highly fragmented landscape raises a fundamental question: Why governments reform national regulation and supervision over banks and other financial institutions, if they recognize that the issue must be solved at a global, or at least regional, level? There are at least five possible explanations of that. Firstly, national reforms respond to a citizens' demand for stricter rules and controls over financial institutions that political actors playing at national level feel compelled or at least highly motivated to answer to. Not surprisingly, in the U.S. the approval of the Financial Act is widely considered a relevant political success of the Obama administration and of the democratic majority of the Congress, in defense of Main Street, against Wall Street. Secondly, reforms at national level may strengthen the power of political actors both against independent regulatory agencies and financial institutions. The hypothesis is confirmed by the fact that almost everywhere reforms establish oversight councils on financial stability chaired by political actors (Treasury ministers, usually). This kind of institutional arrangements will give the Treasury the last word on regulatory and oversight strategies of each individual regulator and on conflicts between them arising from overlapping authority over the market. Furthermore, the Treasury can develop specific expertise on financial matters, without solely relying on disclosure of information by regulators. Thirdly, reforms at national level, even when complex, face lower transaction costs than the ones that must be played in a regional or in the global arena. This is true even in a system of divided government like U.S., where the reform was approved in less than one year since the announcement of the proposals by the Obama Administration. While debates and negotiations go on at global and international level, governments may be quicker in approving regulatory reforms at national stage. Fourthly, the race to earlier approval of reforms at national level may be a device for the pre-emption of supranational reform. This may be especially true for leading countries whose models of business may differ from that of other countries. That's the case of U.S., where, instead of European countries, financial institutions are much more relevant than banks. A stricter national regulation of the latter, if transplanted at global level, may foster a competitive advantage for the entire American economic system. Fifthly, even if substantial rules should be more and more common at global level, institutional structures, like supervisory authorities, may still differ at regional and national level. This means that they can be widely and freely shaped by legislatures according to purely political evaluations.

All this considered, the interplay between global and national initiatives and its outcome are highly uncertain.[39] In general terms, as far as national reforms reduce systemic risk at country level, their overall impact may be positive at global level. Furthermore, sound national solutions may be transplanted in other countries, if proved to be effective or at least fashioned. Also in this case, even if stronger models of supranationalism are still far to achieve, successful cooperation at global level can be achieved through concerted practices among governments. As a matter of fact, without assuming any legal obligation, countries, through direct and indirect contacts, adopted parallel behaviors enacting new laws and statutes and adopting similar institutional solutions, in the field, for example, of macro-prudential oversight. The interplay between the U.S. and the E.U. reform is a good example of that.

Future benefits arising from cooperation among governments, anyhow, must not be overstated. Some countries may be tempted to free-ride regulatory reforms of other countries which reduce overall systemic risk and to seduce this way financial institutions with the promise of an island of free-love. Moreover, enacting reforms at national or regional level could impede for a long time the negotiation of an international treaty or of other forms of supranational agreement for regulating the global financial system, even though this step is both necessary and a declared objective of many countries. As far as Parliaments have passed legislation altering the national financial regulatory structure, these alterations will prevent the Executives from acceding to foreign proposals inconsistent with them and will thus erect a barrier to successful negotiations.[40] The final output may be once again a leopard's spots system in which financial institutions may still adopt strategies of regulatory arbitrage, taking advantage both of incoherent legislation and fragmentation among global, regional, national and local supervisory authorities.

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[39] The argument that in the globalised world, worldwide and local action must go «hand in hand» is developed by E. Wymeersch, "Global and Regional Financial Regulation: The Viewpoint of a European Securities Regulator", 1:2 *Global Policy* (2010) p. 201 *et seq*.

[40] The argument is drawn from R. Posner, The crisis of capitalist democracy, Cambridge, Harvard University Press, 2010, p. 165 ff.

3.3. *Synchronizing national recovery programs to enhance a worldwide balanced growth*

The governments' response to the crisis was not limited to the financial sector. With potential supply exceeding actual demand, due to falling of private consumption, each country adopted stimulus packages to restore balance in the markets. Once again, in a deeply interconnected economy, national measures, to be effective, must be coordinated at global level, in order to cover supply both through internal consumption and export. The problem is that fiscal stimulus policies, compared to financial regulation, represent a field where achieving true supranationalism is even more difficult, as far as they produce distributional effects and largely rely on taxpayers. That's why, also in this field, cooperation among governments was the only viable mechanism through which some form of economic global governance could take place.

Since the first Washington summit on November 2008, the G-20 recognized «the importance of monetary policy support, as deemed appropriate to domestic conditions» and required to «use fiscal measures to stimulate domestic demand to rapid effect, as appropriate». Six months later, in the London summit, the G-20 countries stressed the fact that they were «undertaking an unprecedented and concerted fiscal expansion». As a matter of fact, almost all countries in the G-20 announced and then approved fiscal stimulus measures. While almost all countries signed on to the fiscal stimulus program, the size of the stimulus, of course, varied substantially across nations.[41]

The U.S. played a leading role also in recovery policies, inducing parallel behaviors in several other countries. The American Recovery and Reinvestment Act and the similar statutes

[41] The total amount of stimulus in the G-20 amounted to about $692 billion for 2009, which was about 1.4 percent of their combined GDP and a little over 1.1 percent of global GDP. Three countries—the U.S., China and Japan—accounted for about $424 billion of the overall stimulus in 2009, with their shares in the overall global stimulus amounting to 39 percent (U.S.), 13 percent (China) and 10 percent (Japan). Measures for 2009 in the U.S. stimulus package amounted to 1.9 percent of its 2008 GDP and the corresponding numbers for China and Japan were 2.1 percent and 1.4 percent, respectively. For the remaining G-20 economies, the total fiscal stimulus amounted to 1.0 percent of their overall GDP. In 2010, the U.S. accounts for over 60 percent of planned stimulus. China and Germany are the next largest contributors with China contributing 15 percent of G-20 stimulus and Germany contributing 11 percent. Measures for 2010 in the U.S. stimulus package amount to 2.9 percent of 2008 GDP, China's 2.3 percent, and Germany's 2.0 percent. According to E. Prasad and I. Sorkin, *Assessing the G-20 Economic Stimulus Plans: A Deeper Look*, Brookings Institution, Washington, March 2009, «this is a significant amount of stimulus, but appears to fall short of what is needed to tackle a crisis of the proportion we are currently in».

passed in all western countries in the last two years focused the stimulus mainly on three areas: aids to specific economic sectors, social welfare expenditures and public works programs. Tax reductions, instead, played a very limited role.[42]

Firstly, state aids were introduced in favor of specific economic sectors, the most relevant example being the benefits conferred upon the automakers. The U.S. initiative was justified with the argument that the peculiarities and the dimensions of the industry would have made bankruptcy likely to exacerbate the nation's miserable economic condition.[43] In a globalized market, the U.S. initiative stimulated also the European one. Member States were induced to adopt similar measures not to misplace the competitive position of their national industries.[44] On both sides of the Atlantic, State aids were conditioned to the use of specific green technologies. More generally, many countries decided to support the development of new networks, like broadband, capable of producing positive externalities on the environment, information and high quality services. An indirect way to give aid to business is to link government underwriting of bonds in banks and other financial institutions to the way in which they are managed and the credit is supplied to third parties. The U.S. Financial Stability Plan obliges operators who receive credit to demonstrate how public support is to extend loans to businesses and families and obliges the Treasury Secretary to publish data and reports on the subject. In some European countries, like France and Italy, financial institutions aided by the State must guarantee an adequate credit flow to the economic operators and to the families affected by unemployment. State officials operating at local level are charged with enforcing these commitments, through administrative law powers and soft law tools.

Secondly, the economic crisis following the financial one induced many countries to adopt programs to transfer wealth and other social welfare expenditures. All over the world, protection against poverty and unemployment was strengthened. The U.K. developed a comprehensive plan

[42] In the U.S. it may be quoted the Tax Extenders and Alternative Minimum Tax Relief Act of 2008, which reduced taxes or postpone their payment for the unemployed and victims of natural disasters.
[43] Auto Industry Financing and Restructuring Act of 2008; on the topic, R.A. Posner, *supra* note 5, pp. 153 *et seq*.
[44] In Germany, *Gesetz zur Neuregelung der Kraftfahrzeugsteuer und Änderung anderer Gesetze*, approved on 2009, May 29th; in Spain, *Plan Integral de Automoción*, approved on 2009, February 13th.

to help people and small business.[45] France and in Italy introduced mechanisms of money transfers in favor of the poorest.[46] The U.S. were the first to enlarge the coverage of public subsidies in case of unemployment.[47] At the beginning of 2009, Germany and Spain approved the more comprehensive statute in the field of welfare services.[48] Many countries introduced new provisions about housing. The U.S. scored the record on the topic. On the one hand, the Federal Housing Finance Regulatory Reform Act of 2008 established a new Federal Housing Finance Agency, holding regulatory and oversight powers over Fannie Mae, Freddie Mac and the Federal Home Loan Banks. On the other, the Emergency Economic Stabilization Act of 2008 and the Helping Families Save Their Homes Act of 2009 gave assistance to homeowners.

Thirdly, most countries adopted public-works programs.[49] The problem of delay in beginning to spend project funds was reduced in two ways. On one side, resources were concentrated on projects that had been interrupted by the economic downturn and could have been resumed at short notice. On the other side, ordinary rules on adjudication were derogated, allowing direct negotiating. Even if in Europe this solution proved to be difficult, considering the existing regulatory framework on public contracts, some countries, like France, tried to do that.[50]

First outcomes of all these stimulus and recovery plans were appreciated in the second half of 2009. The Pittsburgh summit declaration recognized that «national commitments to restore growth resulted in the largest and most coordinated fiscal and monetary stimulus ever undertaken» and that G-20 countries «acted together to increase dramatically the resources

[45] *See* Department for business, enterprise and regulatory reform, "Real help now for people, for businesses"**,** february 2009.

[46] *See*, in France, "Décret n° 1351-2008 du 19 décembre 2008 instituant une prime de solidarité active"; in Italy, "decreto legge n. 112/2008", art. 81, co 29 ff.

[47] *See* Unemployment Compensation Extension Act of 2008.

[48] *See*, in Germany, "Gesetz zur Sicherung von Beschäftigung und Stabilität in Deutschland" (approved on 2009, march 2); in Spain, "Real Decreto-ley 2/2009, de medidas urgentes para el mantenimiento y el fomento del empleo y la protección de las personas desempleadas" (approved on 2009, march 6).

[49] *See*, in France, "Décret n° 1355-2008 du 19 décembre 2008 de mise en œuvre du plan de relance économique dans les marchés publics "; "Loi n° 2009-179 du 17 février 2009 pour l'accélération des programmes de construction et d'investissement publics et privés".

[50] "Décret n° 1356-2008 du 19 décembre 2008 relatif au relèvement de certains seuils du code des marchés publics".

necessary to stop the crisis from spreading around the world». But as far as the process of recovery and repair remains incomplete, the G-20 member states pledged to sustain the strong policy response adopted until a durable recovery is ensured. In the short term, unilateral exit strategies were strongly contrasted. On the contrary, governments were asked to «avoid any premature withdrawal of stimulus». In the Toronto summit, the G-20 recognized that «unprecedented and globally coordinated fiscal and monetary stimulus is playing a major role in helping to restore private demand and lending». But to strengthen and to sustain recovery, governments need to follow through on delivering existing stimulus plans, while working to create the conditions for robust private demand.

Cooperation among governments, once again, played a fundamental role in shaping a collective response to the crisis, while preserving the sovereign domain of national economic fiscal policies. Informal talks among governments and open discussions within the G-20 summits helped to discuss and compare different solutions, then adopted through the simultaneous approval of specific pieces of legislation at national level. Once approved, the G-20 asked to avoid unilateral holding-out and to keep recovery plans at work. Perfect synchronization of stimulus action was intended as a key factor in order to ensure full success of the concerted practice strategy.[51]

Relying on national measures approved by elected Parliaments, anyhow, may be dangerous, as far as the results of the political process could be altered by the influence of pressures groups. For example, cooperative games to sustain recovery may be vanished by crisis-era state measures that are likely to adversely affect a large number of trading partners and a sizeable amount of international trade. Notwithstanding the repeated collective commitments to further develop an open global economy and to «fight protectionism»[52], governments have

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[51] The relevance of the simultaneity or near simultaneity criteria in antitrust law to detect the existence of a concerted practice is stressed by O. Black, *Conceptual Foundations of Antitrust* (Cambridge University Press, Cambridge, 2005).

[52] Since the first Washington summit the G-20 member states reaffirmed the importance of an open global economy and assumed the commitments to refrain from raising barriers to investment or to trade in goods and services. From this perspective, in the Pittsburgh summit, governments declared their intention to minimize «any negative impact on trade and investment» of their «domestic policy actions, including fiscal policy and action to support the financial

almost trebled the amount of discrimination in place by imposing 356 discriminatory measures, with harmful measures outnumbering beneficial measures by a ratio of 4:1.[53] Even among the G-20 countries, some of them conflicted a lot more harm than others. So any notion that the current G-20 process generates a parity of pain and opportunity ought to be dismissed. European countries (especially Germany) were in the top-five list of discriminatory measures ranked by overall number, sectors and trading partners affected. Other countries at the top of the list are Russian Federation, Argentina, Venezuela, China and India.

One of the most powerful discriminatory measure is the "buy American" requirement included in the "American Recovery and Reinvestment Act of 2009" approved by the U.S. Congress on February 2009. The bill requires that all of the iron, steel, and other manufactured goods used in the program be made in the United States. In response to the Administration's concerns over sending a protectionist message, the Senate amended the bill to specify that these provisions «shall be applied in a manner consistent with United States obligations under international agreements». This anyhow allows the U.S. to discriminate those developing and transition economies that have not signed the World Trade Organization's Government Procurement Agreement (GPA) nor reached other free trade agreements with the United States. It has been calculated that total trade that could be affected by this measure is equal to US$ 337.808 bn, involving 106 trading partners (included 16 out of the G20). An ambiguous legislative provision allowed the U.S. to respect existing international treaties; to be in principle consistent with international agreements and practices; and, at the same time, to frustrate them giving preference to national manufacturers interests.

The outcomes of cooperation among governments are even more uncertain as far as the recovery and stimulus programs must turn to achieve a «strong, sustainable and balanced growth». According to the Pittsburgh summit, this objective requires to work together in order to manage the transition to a more balanced pattern of global growth. The crisis and the subsequent

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sector»; reassessed the importance of an «open global economy»; vigorously stated their commitment to « fight protectionism».

[53] Global Trade Alert, *Unequal Compliance: The 6th GTA Report*, Centre for Economic Policy Reasearch, June 2010.

initial policy responses already produced significant shifts in the pattern and level of growth across countries, as far as, within the context of national stimulus packages, many countries took important steps to expand domestic demand, bolstering global activity and reducing imbalances. While governments have started moving in the right direction, a shared understanding and deepened dialogue will help build a more stable, lasting, and sustainable pattern of growth throughout the world.[54]

The G-20 members committed to agree on shared policy objectives that should be updated as conditions evolve. In order to achieve these objectives, they will set out medium-term policy frameworks and work together to assess the collective implications of national policy frameworks for the level and pattern of global growth and to identify potential risks to financial stability. In particular, the G-20 countries committed to implement responsible fiscal policies, attentive to short-term flexibility considerations and longer-run sustainability requirements and to promote more balanced current accounts. That's why they will undertake monetary policies consistent with price stability in the context of market oriented exchange rates that reflect underlying economic fundamentals. Furthermore, they will approve structural reforms to increase the potential growth rates and, where needed, improve social safety nets. Finally, they will promote balanced and sustainable economic development in order to narrow development imbalances and reduce poverty.

The process to ensure more balanced global growth, anyhow, must be undertaken in an orderly manner. All G-20 members agreed to address the respective weaknesses of their economies, adopting different strategies in relation to their specific situation. On one side, G-20 members with sustained, significant external deficits pledged to undertake policies to support private savings and undertake fiscal consolidation while maintaining open markets and strengthening export sectors. On the other side, G-20 members with sustained, significant external surpluses pledged to strengthen domestic sources of growth. According to national

[54] *See* Leaders' Statement. The Pittsburgh Summit, September 24-25 2009, Annex, 2-8. Moreover, the G-20 countries adopted «Core Values for Sustainable Economic Activity, which include those of propriety, integrity and transparency», building on Chancellor Merkel's proposed Charter and on Italian Government proposal of a set of Global Legal Standards.

circumstances, this could include increasing investment, reducing financial markets distortions, boosting productivity in service sectors, improving social safety nets, and lifting constraints on demand growth. In this context, concerted practices should be not identical, but complementary, to achieve a cooperative outcome.

As the Pittsburgh summit final declaration clearly stated, of course, «each G-20 member bears primary responsibility for the sound management of its economy». But, in the same time, the G-20 members also have a «responsibility to the community of nations to assure the overall health of the global economy». Regular consultations, strengthened cooperation on macroeconomic policies, the exchange of experiences on structural policies, and ongoing assessment can strengthen cooperation and promote the adoption of sound policies. In this context, a fundamental role will be played by the IMF, which was asked to assist Finance Ministers and Central Bank Governors in the process of mutual assessment by developing a forward-looking analysis of whether policies pursued by individual G-20 countries are collectively consistent with more sustainable and balanced trajectories for the global economy, and to report regularly to both the G-20 and the International Monetary and Financial Committee (IMFC).

This system will provide the «mutual reliance with a common goal and with knowledge gained, in part, by communication» that distinguishes, according to antitrust law, concerted practices from mere conscious parallelism.[55] Of course, it remains to be questioned if such a cooperative mechanism will be strong enough to overcome the multiple and divergent pressures arising from the national political processes when fundamental economic policy choices are on the carpet.

3.4. *Joint financial assistance and sovereign debt sustainability*

The objective of building up a strong and balanced growth is even more difficult to achieve in the moment in which the Greek crisis in the spring of 2010 highlighted the importance of

[55] In that sense, O. Black, "Communication, Concerted Practices and the Oligopoly Problem", 1 *European Competition Journal* (2005) p. 341 *et seq*.

sustainable public finances and the need for all the G-20 countries to put in place credible plans to deliver fiscal sustainability, differentiated for and tailored to national circumstances.

On the topic, the Toronto summit clearly stated that «sound fiscal finances are essential to sustain recovery, provide flexibility to respond to new shocks, ensure the capacity to meet the challenges of aging populations, and avoid leaving future generations with a legacy of deficits and debt». At the same time, the Toronto summit warned that «the path of adjustment must be carefully calibrated to sustain the recovery in private demand». As a matter of fact, there is a risk that «synchronized fiscal adjustment across several major economies could adversely impact the recovery». But the failure to implement consolidation where necessary would undermine confidence and hamper growth.

Reflecting this balance, advanced economies committed to fiscal plans that will at least halve deficits by 2013 and stabilize or reduce government debt-to-GDP ratios by 2016. Fiscal consolidation plans shall be credible, clearly communicated, differentiated to national circumstances, and focused on measures to foster economic growth. To further facilitate concerted practices, the European Union announced its will to promote the synchronization of national budget decisions, through prior approval at European level of the draft measures issued by governments.

The problem is that in the pathway to fiscal consolidation, governments may face serious risks of default. According to some financial institutions, all over the world there is a potential crisis caused by sovereign balance sheets being overstretched, to the point where insolvency ceases to be merely possible and becomes plausible. This danger is not limited to the periphery of Europe. It is global and it is far from over.[56] Such a situation might become extremely difficult to manage also because there is no formal mechanism at the global level to help restructure sovereign debts owed to foreign creditors.[57]

Cooperation on this side would require proper mechanisms of financial assistance that at

[56] To quote the provocative assessment of a recent Morgan Stanley note (A. Marès, *Ask Not Whether Governments Will Default but How*, 30 August 2010).
[57] The point is stressed by E. Helleiner, "Filling a Hole in Global Financial Governance? The Politics of Regulation Sovereign Debt Restructuring", in Mattli and Woods, *supra* note 5, p. 89 *et seq*.

the moment are far away from being consolidated (quite surprisingly G20 summits' final declarations are silent on the matter). In this context, cooperative action may develop on three different levels: a) supranational; b) bilateral; c) regional.

The first one is based on IMF's lending capacity. The problem is that developing countries, being underrepresented in the governance of the body, seem not to trust enough the Fund and prefer not to accept its scrutiny over national economic policy. As a matter of fact, during the crisis, only European countries and those allied with the U.S. asked to borrow from the IMF.

The second one works through case by case bilateral agreements between a lending national authority and a borrowing national authority. As an example, during the crisis, Singapore and South Korea received assistance from the U.S. monetary authorities through a mechanism of bilateral swaps.

The third one is based on a multilateral agreement on a regional scale. An interesting example is coming out from the Chang Mai agreement, that establishes a specific fund of 120 billion dollars at disposal of Korea, China, Japan and the other Asean member states to face financial emergencies and unbalances. Another good example is the solution adopted in the euro zone to face the Greek crisis and the others that might occur in the future. On one side, the euro zone countries adopted an exceptional measure of parallel loans from each member state to the Greece. On the other, the Council adopted a European Stabilization Mechanism to preserve financial stability in Europe. The mechanism is based on Art. 122.2 of the Treaty, which requires "qualified majority" at the Council and the Parliament to be informed, and an intergovernmental agreement of euro area member states.

The exceptional assistance given to the Greece was based on a concerted practice scheme, as far as each country adopted a parallel national decision to grant a loan to Greece. Only in the meanwhile, a special kind of international agreement was signed by all euro member states, even if compliance to it was not mandatory. Partially different is the mechanism established to grant financial assistance to a member state in difficulties or seriously threatened with severe difficulties caused by exceptional occurrences beyond its control. The financial assistance shall take the form of a loan or of a credit line granted to the Member State concerned. Within this institutional framework, the Commission is allowed via the facility created under Article 122 to contract borrowings on the capital markets or with financial institutions on behalf of the European Union. All interest and loan principal is repaid by the beneficiary Member State via the Commission.[58] In addition, the Mechanism envisages possible financial assistance to a euro area member state via a special purpose vehicle (SPV), which will be established by intergovernmental agreement among all euro-area member States.[59] The Mechanism overcomes the concerted practice scheme experimented in the Greek crisis in order to better preserve the stability, unity and integrity of the European Union.[60]

When one country faces a serious risk of default, because its sovereign debt is going out of control, governments may manage a twofold problem of strategic behavior.

On the side of potential lender, countries others than the one under menace have to decide whether to engage in a program of financial assistance or not. This is of course not an easy decision, because at national level citizens usually are not willing to pay the bill for others, especially if they assume that the risk of default has been created by opportunistic or even fraud conducts of other governments and people. Multi-lateral concerted practices may face both transaction costs and agency losses.

As regards the problem of transaction costs, it is quite well-known that in particular the

[58] A member state seeking financial assistance under the Mechanism shall discuss with the Commission in liaison with the ECB an assessment of its financial needs. It shall submit a draft economic and financial adjustment program to the Commission and the Economic and Financial Committee. Acting on a proposal by the Commission, the Council shall adopt a decision by qualified majority vote granting financial assistance. This Council decision shall include the maximum amount, price and duration of the financial support, the number of installments to be disbursed and the main policy conditions attached to the support. It shall entrust the Commission with the responsibility for negotiating a Memorandum of Understanding (MoU) with the country concerned detailing the conditionality. The Commission will closely monitor the respect of the policy conditions by the beneficiary Member State, in liaison with the ECB, before installments of the loan are disbursed. If it concludes that the conditions are met, it proposes to the participants to disburse the installments.

[59] The amount of loans or credit lines available via the facility established under Article 122 shall be limited to the margin available under the own resources ceiling for payment appropriations of the EU budget. A volume of up to €60 bn is foreseen. The SPV established by intergovernmental agreement amongst euro area Member States will guarantee on a pro-rata basis lending up to €440 bn.

[60] Financial assistance under the SPV will be provided only to euro area Member States however. Non euro area member states remain also covered by the Balance of Payment facility. Under this facility, the Commission has already granted assistance to Latvia, Hungary and Romania.

German government resisted the idea to assist Greece, as it retained strongly unpopular to do that, this way stopping for some months any decision by the E.U. countries. Only an external pressure by the U.S. President, representing the worldwide negative spillover effects of a Greek default, pursued the German Chancellor to give her fundamental consent to a European program of financial assistance. Maybe the final decision was influenced also by the opportunistic consideration of the large amount of Greek bonds in the hands of the main German banks.[61]

After the framework for concerted practice was established, agency losses emerged. As a matter of fact, the Slovakia's Parliament voted against the participation of in the conditional loan arrangement for Greece. The vote represented a breach both of the political commitment undertaken by Slovakia in the Eurogroup to provide temporary and conditional financial assistance to Greece and of the general principle of solidarity among Member States, in particular within the euro area. Anyhow, the Slovak Parliament vote did not put in danger the loan and the reform program of Greece, as far as the two-third threshold of participating countries was already reached. In the next future, the European shift from a concerted practice mechanism to a supranational one should reduce the space available to both ex ante and ex post opportunistic behaviors by governments.[62]

On the side of potential borrower, the country in financial distress must decide whether to ask for financial assistance or not. Even if they would really need to borrow money from other countries they could decide not to do it if the lend is released under strong conditionality, which

[61] Nonetheless, only a few hours after the German Bundestag's legislation was passed, four individuals brought a claim before the German Constitutional Court seeking to prevent the German President from signing the legislation by way of an interim injunction. The applicants claimed that the legislation would have infringed their constitutional right to property and other fundamental principles of the social state. The Constitutional Court rejected the application on the same date, arguing that the EU might be adversely affected were the interim injunction issued. Moreover, the absence of Germany's contributions would question the feasibility of the package altogether and threaten the stability of the Eurozone. Accordingly, the Constitutional Court held that this risk outweighed the risk that the legislation could violate the German Constitution. The case is really interesting also because it shows how far cooperative outputs may be put on danger at national level, not only by the political process but also by the legal system and its mechanisms of rights' protection.

[62] The establishment of the Special Purpose Vehicle as a pillar of the new common policy aiming to protect the euro currency is stressed by G. Tremonti, Lezione al Walter Eucken Institut, Freiburg, Albert-Ludwigs-Universität, 20th July 2010, <www.tesoro.it□. The changing role of the state in the context of the European Stabilization Mechanism is sketched by Napolitano, *supra* note 9.

would oblige the government to adopt unpopular measures. Greece and Hungary offer two interesting cases of alternative strategies. Greece accepted all the conditions imposed by the European program of financial assistance and is properly respecting the scheduled program. Hungary, on the contrary, after signing a borrowing agreement with the IMF, renounced to the last tranche of the lending, because the new executive preferred to implement the program of tax reduction promised during the electoral campaign. The differences among the two cases show that when the potential spillovers effects are higher, as in the case of Greece, due to its membership in the euro group, the external pressures for a governmental cooperative behavior may be stronger and more successful.

4. **Rational governments and economic global governance**

The financial crisis and the responses adopted by governments offer an interesting test to analyze the strategic interactions between sovereign states and their capacity to develop a cooperative framework. From this perspective, the research suggests a broader view on global governance transformations after the crisis. As a matter of fact, the establishment of a better working «global collective action» is following different ways, through a mixture of international, supranational and national initiatives.

The establishment of the G-20 as the premier forum for economic global governance, the reformation of international financial institutions and the strengthening of global financial regulation and supervision were important achievements reached at international and supranational level, through multilateral agreements.

More difficult to assess is the actual development of new modes of cooperation between governments when they adopt purely national decisions, that in some way appear to be similar in the conduct and in the output. As a matter of fact, many western countries adopted bailouts of banks and other financial institutions, regulatory reforms of financial markets, and recovery programs. In the European area, governments experimented also new forms of financial assistance in case of a sovereign debt crisis. To some extent, these decisions may be considered as independent parallel behaviors, each of them rationally satisfying a purely domestic interest.

But sometime, they appeared to be the object of an informal concerted practice, able to combine the resurrected authority of the state with the necessity of cooperation among governments to achieve the production of global public goods, like financial stability and balanced growth. The G-7 preliminary meetings and the enlarged G-20 summits became the most important forum where to share points of view, define common strategies and assess consistent, even if not compulsory, execution by governments.

Also within the European Union, the intergovernmental concerted practices approach was successfully experimented to allow cooperation in emergency situations, where supranational mechanisms of collective action weren't at work yet. In some cases, they represented a fundamental preliminary step in the shift towards a more stable, comprehensive and supranational solution, as it happened with the institutionalization of a financial assistance mechanism. This shift should make easier to reduce ex ante transaction costs (as the one faced at the moment of the German initial refusal to assist Greece) and ex post agency losses (like the one generated by the Slovakia denial to pay for the loan granted to Greece).

In this context, it becomes particular difficult to consider measures and solutions issued by governments as parallel and independent behaviors adopted without any form of practical cooperation. As a matter of fact, governments repeatedly interacted, observing and transplanting each other solutions, defining common objectives and assessing outcomes. In some cases, the cooperative argument was fundamental to overcome national resistance to unpopular or controversial measures, such as aids to banking and auto sectors and assistance to countries in financial distress.

In the establishment of a concerted practice a major role was played by the U.S. It was already observed that an influential leader nation that is a major contributor to the problem can also be an important facilitator of global collective action. In this case, the United States were at the origin of the crisis and played a fundamental role in shaping the responses to it. Once the United States pushed for action and showed that all western and other countries could achieve net gains from adopting the same measures, decisive global action followed swiftly. As a matter of fact, the economic and legal solutions adopted at national level by U.S. soon influenced the measures assumed in other countries. The analysis, anyhow, offers evidence also of the fact that second movers may take advantage of late coming and play a reversed influence on the first mover, as it happened in the case of bailout measures.

Moreover, collective action through concerted practices allowed nations to cooperate without sacrificing much autonomy. This way, governments could use their discretionary power in executing the concerted practice also to strengthen or expand political influence and consensus at home. As a matter of fact, external pressures for nationalizing banks legitimated national governments' unrevealed desire to influence credit flows on the market. The common purpose to ensure macro-prudential oversight was satisfied through the establishment of councils and board headed or influenced by political actors. International commitment to recovery plans for the economy helped many governments to overcome limits and control on state aids established at regional and global level and to meet the demands coming from pressure groups. Even financial assistance provided to other states proved to be extremely useful for some governments in order to protect the interest of national investors holding sovereign debt bonds of the assisted country.

National law, through specific bills and statutes, represented a key factor facilitating cooperation, in several ways. It was used as a signal, by leading countries, to show the right way to go to all other countries, as it happened for the Economic Emergency Stabilization Act adopted in U.S. It was an instrument for the execution of collective orientations, as it occurred for national measures on bailout, regulatory reform and recovery. And it was an instrument of compliance – or, better, a signal of the willingness to comply – when it incorporated the required economic policy measures in the framework of a financial assistance program issued by the IMF or the E.U. In this context, also legislative techniques based on ambiguity and delegation played a relevant role. Many rules adopted at national level as a response to the crisis share these peculiarities, that all deserve flexibility. Cooperation in an uncertain context as the one arising from a financial and economic crisis requires repeated fine tuning that can better work through adjusting and manipulating existing pieces of national legislation, rather than every time adopting new ones. Principle-based or general clauses rules managed by expert bureaucrats in a proper timetable era the best equipped to reach the common purposes set in international meetings, as the ones of the G-20.

The analysis, however, showed the many limits and traps of existing modes of cooperation in facing the financial crisis: loopholes in safety net, incoherent regulatory reforms, protectionist measures are just few examples. Flexibility of legal provisions was used also to allow drift and opportunistic behavior. Through delegation, the bureaucrats could secretly conspire together with legislatures to turn rules adopted within a cooperative framework into discriminatory conducts. All these outcomes are due to the dependence of the national political process from interest groups' pressure and short time calculation of electorally accountable actors. Only under special conditions, when domestic interests run together with third party or collective ones, cooperative behaviors are more likely to prevail. In all other cases, the production of global public goods, like financial stability and balanced growth, is not yet guaranteed.

Game theory and rational choice approach may help to better understand and perhaps predict when and why cooperation succeeds or fails. As a matter of fact, the financial crisis created a context of repeated interactions among governments all engaged in winning the 'match' against instability and economic depression. But not all the games in the match against the financial crisis are equal.

Bailouts, regulatory reforms and recovery plans satisfy, first of all, a prevailing national interest (of course with both winners and losers within each country). Even without efforts at coordination, each state would have adopted similar strategies by its own, after the learning experience of Lehman Brothers case. Thus, parallel behaviors would have spontaneously emerged all the same.

Coordination and cooperation, anyhow, proved to be effective to achieve superior payoffs to the extent that all these policies present a network effect. Their utility increases as far as an additional mover (a particular government) plays the same game. Financial stability is more intensively protected the more are the governments that will provide bailout whenever necessary and the more are the governments that decide to strengthen financial regulation and supervision in order to prevent future crisis. Recovery chances, too, are higher when many countries supply stimulus programs, this way enhancing domestic consumption of goods and services at benefit both of national producers and of exporting countries (of course, if nations escape the prisoner's dilemma of erecting each other trade barriers).

The strategic interactions in the game of financial assistance, instead, are different. Bailout measures, regulatory reforms and stimulus plans are in principle self-interested domestic policies, even if cooperation at international level increases individual and collective payoffs. Providing financial assistance to a third country, instead, is in principle an 'altruistic' policy. When and why rational governments commit to them?

In principle, countries rarely have a strong interest in preserving well-being in other countries. The governments stay in power by providing benefits to voters, not to foreigners. Thus, governments give aid to foreigners only when doing it benefits voters, who mostly care about security and prosperity. A possible conclusion is that more direct is the cause-effect relationship between "well-being" of foreigners and "security/prosperity" of citizen, the more likely is the dominance of a cooperative/altruistic strategy (which actually converts in a selfish one).

Let's take the above cited example. The existence of a common currency, like the Euro, whose stability can be threatened by the default of a member state, incentives all the others to provide financial assistance. Moreover, when national financial institutions hold foreign sovereign debt bonds, they might push governments to intervene. This explains why euro zone countries, after some resistance, decided to adopt coordinated parallel behaviors to provide financial assistance to Greece (through bilateral and synchronized loans). Acting this way, governments provided benefits not only to foreigners, but also to citizens and pressure groups.

When minimal requirements to ensure the workability of the financial assistance program are fulfilled (the two-third threshold of participating countries is reached), however, other countries may free-ride. Slovak parliament refusal to approve the participation to the European program was a rational choice. Benefits of the delivered financial assistance cannot be excluded to non paying countries. So why pay for that?

Ex ante delegation to a supranational agency (as the Special Purpose Vehicle established in Europe to manage future emergencies after Greece) could solve the sovereign free-ride problem: especially, if governments have to pay their fee in advance. Thus, in specific contexts, truly supranational models should be preferred to mere «concerted practices» schemes of global or regional governance. When powers are delegated to some form of supranational, transnational or international organization, however, transaction costs within the body and agency losses due to political or bureaucratic drift might arise. That's a well-known story: once you start playing, games never end.