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Summary

Financial Crisis and International Public Law

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1. Money, integration and stability of financial markets feature as public goods in domestic legal systems.

2. Due to the persistent prevalence of the ideology of deregulation, aspects of the activities of the banking sector were only subject to voluntary self-regulation. Banks creatively used the resulting regulatory free space for the invention and marketing of new high-risk financial products, thereby creating "bubbles on a whirl-pool of speculation" (Keynes).

3. At the time of the Austrian national bankruptcy in 1811 no applicable rules of international public law existed, there was no international financial system.

4. When reacting to market and government failure in the financial crisis, governments were unable to rely on instruments and procedures of international public law such as, for instance, on those of the IMF and WTO. It was only with the establishment of the Basel Committee on Banking Supervision (BCBS) in 1974 that a first step towards transnational regulation was taken.

5. The most important industrialised countries are in agreement about the framework conditions for regulatory reforms. They agree in principle: firstly, that regulatory reforms are necessary; secondly, that policies fostering financial stability should be pursued locally, as well as at regional and global levels, even possibly in regulatory competition with one another; and thirdly that both the so-called international financial architecture and applicable rules for conduct of actors operating in it require reform.

6. Generally, three methods for pursuing regulatory reform are available. Firstly, continued reliance on self-regulation; secondly, return to "hard law" of law-making treaties and institutions; and thirdly, reform by means of a new International Organisation.

7. Existing state practice aimed at securing global financial stability has not generated customary international law. On the other hand, activities of non-state actors, e.g. of expert groups of "civil society" (despite being recognised as such in some international treaties, e.g. the Cotonou Agreement), and of informal arrangements lacking a legal basis in international treaties (e.g. G-20 or the Financial Action Task Force (FATF)), are not considered sources under Article 38 (1) of the statute of the ICJ.

8. In reality, the so-called international financial architecture does not exist, consisting as it does of a small number of formal intergovernmental organisations and a multiplicity of loosely connected actors and negotiating *fora*, whether public or private in nature. There is, therefore, no comprehensive institutionalised system of surveillance apt for the identification, prevention and management of crises.

9. Since states failed to regulate international financial markets, their traditional international organisations belonging to the *ancien régime,* for example IMF and WTO, failed likewise. Therefore, for different reasons, they played practically no role in the financial crisis, nor with respect to the regulation of financial markets.

10. By contrast, international networks, both of the public sector (amongst others the Basel Committee on Banking Supervision (BCBS); various regulatory bodies under the auspices of the OECD, G-20), and of the private sector (Institute of International Finance (IIF); G-30; International Financial Standards Foundation (IFRS)) have contributed to regulation of certain aspects of world finance, either through the drafting of standards or the promotion of convergence between them.

11. Their work, though, is based on a compromise between legitimacy and efficiency and is increasingly being considered as a means to fill gaps between the formal institutions of existing multi-level governance.

12. All improvised approaches to problem solving – ad-hocery, soft law, as well as other flexible regulatory options attractive to politicians regarding policy-making and crisis management – have become discredited. Likewise, coordination of overlapping networks, the result of some kind of disaggregated governmental non-regulation, has had its day, as has avoidance of formal legal policy-making.

13. An alternative approach might consist of the establishment of a new Organisation, a World Financial Organisation (WFO). Such an organisation should have a double mandate: one the hand the responsibility to monitor certain macro-economic indicators and policies of members (balance of payments, currency reserves, foreign debt, exchange rates, liberalisation of capital transfers), and on the other hand to monitor and control the conduct and activities of financial markets influenced by these.

14. Such an organisation could assist in establishing coherent global financial governance thereby contributing more generally to greater coherence in global economic policy-making.