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"International Financial Law," An Increasingly Important Component of "International Economic Law": A Tribute to Professor John H. Jackson

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“INTERNATIONAL FINANCIAL LAW,” AN INCREASINGLY IMPORTANT COMPONENT OF “INTERNATIONAL ECONOMIC LAW”: A TRIBUTE TO PROFESSOR JOHN H. JACKSON

*Joseph J. Norton**

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I. PRELUDE: A BRIEF SALUTE TO PROFESSOR JOHN JACKSON

Long before the hype of the “Global Law School” came into recent vogue, the University of Michigan Law School was providing its students a “global perspective.” Professors such as Yntema, Bishop and Stein; research scholars such as Rabel and Bolgar; regular visiting professors from leading law faculties around world; an ongoing program of visiting lectures by leading governmental and intergovernmental civil servants, international practitioners, and multinational representatives; and an international and comparative law library collection without peer—these all have made the hallowed halls of the “Quad” a true global environment.

The key link between the post-World War II international and comparative law tradition of the Michigan Law Faculty and the modern era of “international economic law” is Professor John H. Jackson. In one

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sense, Professor Jackson is a traditionalist, steeped in public international and constitutional law scholarship and a keen analyst and critic of the "Bretton Woods System" of multilateral trade (GATT), economic development and investment (World Bank Group), and international monetary stability (IMF).¹ His exhaustive 1969 treatise on the GATT is a seminal work of major international legal significance.²

There is little debate that after another three decades, Professor Jackson remains the leading legal scholar in the world on multilateral trade. This has not been an easy accomplishment because the rather defined environment of the Bretton Woods System was coming to its end at the very time Professor Jackson published his classic work on GATT.

However, Professor Jackson's contribution to international legal scholarship goes well beyond the trade arena. He has become one of the primary architects of the evolving subject-matter area of "international economic law." While, at heart, a great respecter of "hard law" (which in the international arena largely means treaty law) and a consummate lawyer and legal scholar, Professor Jackson came to present a much broader and deeper horizon of the need for differing developing processes and levels for international "rules" and "standards" in our modern and rapidly changing global society. While sensibly expansionist in his approach, he always searched for coherency through underlying jurisprudence, policies, and rules that would not let "international economic law" become an open-ended proposition.³

This author had the privilege of studying under Professor Jackson as a postgraduate student in the early 1970s, along with Professors Bishop and Stein—what a trio of "giants" in international scholarship, all at U. of M. at one time! Without these global underpinnings provided by the Michigan Law School, this author could never have achieved his own modest international career.

Yet, Professor Jackson's support of his students was not limited to the classroom. With this author and with other of his students, he provided substantial, but discrete support at critical times in the student's career development path. For example, Professor Jackson's support was critical for the SMU Law School (where I was and am teaching) to es-

1. See, for example, the leading and longstanding casebook, originally authored by Professor Jackson, JOHN H. JACKSON, WILLIAM J. DAVEY & ALAN O. SYKES, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT ON THE NATIONAL AND INTERNATIONAL REGULATION OF TRANSNATIONAL ECONOMIC RELATIONS* (1995), is deeply immersed in constitutional, statutory and treaty analyses, and sources.

2. See *e.g.*, JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT: TREATIES ON A LEGAL ANALYSES OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE* (1969).

3. See *e.g.*, JOHN H. JACKSON, *THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE* (1998).

tablish its Institute of International Banking and Finance, and he remains most supportive of my current efforts at the University of London (where he is a Distinguished Visiting Professor).

It is in this context of sincere appreciation that this author presents this brief tribute to Professor John H. Jackson, as the American father of “international economic law.”

II. THE CONTEXT FOR THE NEW “INTERNATIONAL FINANCIAL LAW” AS PART OF INTERNATIONAL ECONOMIC LAW

It has become evident (whether referring to lesser developed countries, developing countries, emerging or transitioning economies, newly industrialized countries, or the industrialized economies) that issues of economic and commercial law reform are of primary political and societal concern. The sustainability of economic growth, of enhancement of the quality of life, and of the stability of the economic and financial systems must be a driving imperative for the 21st Century. All this will require viable (and “safe and sound”) financial and commercial law systems of considerable sophistication and of high integrity and transparency.⁴

Moreover, it has become apparent since the breakdown of the Bretton Wood’s System in the early 1970s that financial markets around the world have become and are becoming more and more interconnected and interdependent. As such, many countries, especially developing, emerging, and transitioning economies, are finding themselves in a state of major transformation as to the nature and requirements of their economies and financial markets. The modern reality is that political and economic power comes, in part, from developing and sustaining viable and substantial economic and financial markets—markets that are becoming increasingly internationalized.⁵

Several preliminary observations on the critical importance of the future development of financial law and regulation around the world, and its relationship to the evolving notion of “international economic

4. See, e.g., Joseph J. Norton & Douglas Arner, *International Co-Operative Efforts and Implications for Law Reform*, in *BANK FAILURES AND BANK INSOLVENCY LAW IN ECONOMIES IN TRANSITION* (R. Lastra & H.N. Schiffman eds., 1999).

5. See e.g., Joseph J. Norton, *Financial Sector Reform And International Financial Crises: The Legal Challenges*, in *ESSAYS IN INTERNATIONAL FINANCIAL & ECONOMIC LAW*, (London Institute of International Banking and Development Law ed. 1998).

law,” can be made, particularly in light of the recent financial crises in East Asia, Russia, Brazil, and elsewhere bring this point home.⁶

A first observation, as will be discussed below, is that the relationship of law to financial markets and financial institutions is an evolving and diverse process entailing a rich matrix of private and public laws, of domestic, regional, and international laws (including “soft law”) and a mix of statutes, administrative regulations, and case law. This unfolding legal framework covers both traditional and segregated notions of particular types of financial institutions and broader, more integrated notions of “financial services” and “financial institutions.”⁷ As such, “international economic law” will need to become attuned and receptive to these dramatically and vastly changing notions, to the new legal and economic realities of the individual countries, to the general growing economic interdependence within the East Asia Region, and to the more general international financial market developments.

A second related observation, also addressed below, suggests that the future of domestic financial institutions and markets will and should continue to be influenced and shaped, in a significant measure, by external international and regional supervisory developments. These external pressures may well come to provide the strands for a gradual integration and convergence by “small-steps” respecting the financial systems and markets of individual sovereign nations, and (notwithstanding the current East Asian Financial Crises) should otherwise help foster, generally, greater transparency and stability in the financial markets, domestically, regionally, and internationally.⁸

III. THE EXPANDING REGULATORY COMPONENT OF “FINANCIAL LAW”

A most significant component of financial law in the 21st Century (whether in Asia, Africa, the Western Hemisphere, or the wider Europe) will involve, necessarily, an interdisciplinary and international conceptualization of how regulatory and marketplace forces can interconnect compatibly to provide an appropriate legal environment for the eventual melding of a *new partnership* among the various financial institution regulators themselves and then among these combined and cooperating

6. See Joseph J. Norton, *The Korean Financial Crises Reform and Positive Transformation: Is a Second “Han River Miracle” Possible?*, 27 GLOBAL ECON. REV. 3-36 (1998).

7. See generally ROSS CRANSTON, PRINCIPLES OF BANKING LAW (1997).

8. See e.g., Stanley Fischer, *Reforming World Finance, Lessons from a Crises*, THE ECONOMIST, October 3-9, 1998.

regulators, the financial institution industries, and the major international financial institutions.⁹

It is *not* proposed that the traditional relevance of private law aspects of financial law (e.g., regarding the bank-customer relationship and financial instruments) will no longer be of importance. To the contrary, private financial and commercial law aspects should be of increasing educational and practical importance. What is suggested, however, is that the private law dimension will have to be evaluated in the overall context of an expanding, interconnecting, and converging (nationally, regionally, and internationally) regulatory framework for financial institutions and financial services.¹⁰

A. The Backdrop

Historically, most governments and financial market regulators have operated on the premise that financial market stability requires limitations on competition and a segmented market structure that segregates international banks, securities firms, and insurance companies. In particular, the perception of the banking and securities industries as separate and distinct generally eased the supervisory oversight of these industries. This has occurred principally due to the clearly delineated and understood legal and market distinctions between these different types of financial institutions.¹¹

However, in the late 1970s, and particularly in the 1980s and now the 1990s, technological and financial innovation began to facilitate competition within and across these industry segments. This initiated the process of regulatory adaptation to *de facto* changes in market structure and financial institutions. Restrictions on permissible activities were gradually relaxed, and market access for domestic and foreign competitors expanded, resulting in net efficiency gains to the international financial system. Nonetheless, international banks still primarily engaged in traditional forms of intermediation, namely the business of taking money from investors and depositors and lending it to corporate and residential borrowers. Credit risk was the major risk incurred by these financial institutions, since interest rate risk could be managed by

9. See Joseph J. Norton and Christopher D. Olive, *The Ongoing Process of International Bank Regulatory and Supervisory Convergence: A New Regulatory Market "Partnership,"* 16 AM. REV. BANKING L. 227-309 (1997).

10. See generally Joseph J. Norton, *International Banking Law on the Threshold of the 21st Century*, in *ESSAYS IN INTERNATIONAL FINANCIAL & ECONOMIC LAW*, (London Institute of International Banking Finance and Development Law ed., 1996).

11. See generally ROY C. SMITH AND INGO WALTER, *GLOBAL BANKING* (1997).

ensuring that the contractual interest rate on the loaned funds varied with the cost of funds.¹²

In the mid-1980s, in the midst of the Lesser Developed Country ("LDC") sovereign debt crisis, the vulnerability of individual banks and the international financial system increased exponentially, and bank exposure to credit risk dominated the regulatory agenda.¹³ The LDC debt crisis (which in fact transformed itself into a World Debt crisis) led to international prudential efforts, centralized in the Basle Committee on Banking Supervision, to strengthen systemic defences to credit risk through the issuance of risk-based capital standards in the 1988 Capital Accord.¹⁴ The Capital Accord focussed on the credit risk of international banks because such banks, as the main providers of payment services, were the primary inter-connective media of economic transactions, and because liquidity and credit exposures were naturally concentrated within the banking system. In addition, banks normally channelled the intermediation of short-term funds into long-term non-marketable assets, thus making banks more susceptible to credit risk and public confidence problems than other institutions.¹⁵

B. *The Current Environment*

In the past decade, traditional bank intermediation has changed dramatically: large non-bank institutions (including securities firms, finance companies, insurance companies, pension funds, and other collective funds and trusts) have become major players in the intermediation process and have forced banks to expand their range of financial activities into the other previously segmented industries. Hence, in the 1990s international banks have been significantly expanding the scope of their activities into areas that directly impact

12. See Janet L. Yellen, Remarks at the Conference on Recent Developments in the Financial System, Jerome Levy Economic Institute of Bard College (Apr. 11, 1996) (transcript available in the LEXIS BANKING library).

13. See generally PROSPECTS FOR INTERNATIONAL LENDING AND RESCHEDULINGS (Joseph J. Norton ed., 1988); Carsten T. Ebenroth, *Innovations in LDC Debt Conversions*, in INTERNATIONAL FINANCE IN THE 1990S: CHALLENGES AND OPPORTUNITIES 32 (Joseph J. Norton & Raymond M. Auerback eds., 1993).

14. See Bank for International Settlements: Committee on Banking Regulations and Supervisory Practices, *International Convergence of Capital Measurement and Capital Standards*, 30 I.L.M. 967, 980-1017 (1991) [hereinafter *Capital Accord*].

15. See International Monetary Fund, *Capital Adequacy and Internal Risk Management*, in INTERNATIONAL CAPITAL MARKETS: DEVELOPMENTS, PROSPECTS, AND POLICY DEVELOPMENTS, 8 POL'Y ISSUES 135, 136-37 n.2 (1995); see also JOSEPH J. NORTON, DEVISING INTERNATIONAL BANK SUPERVISORY STANDARDS, 190-200 (explaining in detail the 1988 Capital Accord); see also *infra* note 18.

and/or reallocate credit risk, thereby exposing them to differentiating types of risk not previously under supervisory scrutiny.¹⁶

The expansion of banks into non-traditional activities has spawned the realization that financial risks could be desegregated, separately priced, and traded in global financial markets. This realization is having important implications for international financial market supervision and regulation. Particular types of risk are no longer confined to specific institutional categories. As such, financial institutions have come to recognize that unbundled risks can be recombined in ways reflecting the risk profiles of financial institutions that until recently have been characterized as separate and unique. This explosion of financial product innovation raises a host of new legal and practical issues (public and industry) that will need to be addressed within the expanding parameters of any new "International Financial Law."¹⁷

The recent Basle Committee amendments to credit risk-based capital requirements are of great importance to international financial institutions.¹⁸ However, these amendments have been arguably overshadowed by the coordinated but unbalanced efforts of international banking supervisors and securities regulators toward regulatory convergence for similar activities and in certain areas of risk management, particularly in the area of market risk. Yet, the globalization of financial activities leads inescapably to the need for greater communication, cooperation, and coordination among bank supervisors and securities regulators on a broader, international basis.¹⁹

IV. INTERNATIONAL FINANCIAL CONVERGENCE: BANKING AND SECURITIES

The process of international convergence is evolving through the concept of functional regulation (*i.e.*, the provision of similar regulatory and supervisory standards for similar activities that international banks and securities firms currently engage in on an increasingly cross-border basis). This concept is guiding banking supervisors and securities regu-

16. See, e.g., Andrew Crockett, *The Future of Banking Regulation*, EUROMONEY, Sept. 1995, at 272-73.

17. See generally John H. Jackson, *Regulatory International Economic Behaviors—Reflection on the Broader Settings of International Financial Markets and Institutions*, in *EMERGING FINANCIAL MARKETS AND THE ROLE OF INTERNATIONAL FINANCIAL ORGANIZATIONS 3* (J.J. Norton and M. Andenas eds., 1996).

18. See Basle Committee on Banking Supervision, *Basle Capital Accord: Treatment of Potential Exposure for Off-Balance Sheet Items* (Apr. 1995) [hereinafter *Capital Accord Amendment*].

19. See generally GEORGE SOROS, *THE CRISES OF GLOBAL CAPITALISM* (1998).

lators (e.g., those in the PRC and Hong Kong SAR)²⁰ to begin to coordinate joint efforts in order to better understand the banking and securities businesses, the corporate structures and attendant risks involved in each business, and the increasing complexities of non-traditional cross-border activities.²¹

A. *The New Forum*

Within the banking and securities industries, much of the international consultation among bank supervisors in recent years has been effectively handled through the Basle Committee. For securities firm concerns, the International Organisation of Securities Commissions ("IOSCO") has offered a similar international forum.²² For the insurance area, there is emerging the International Association of Insurance Supervisors ("IAIS").²³ For the accounting industry, there is the International Accounting Standards Committee ("IASC").²⁴ What is even more significant is the growing cooperation among these various international bodies as to international standards setting. Of particular note is the work of the Joint Forum on Financial Conglomerates.²⁵

Though the international convergence of standards and perspectives of the Basle Committee and IOSCO have been able successfully to produce a number of guiding principles in financial market regulation, this has occurred in direct response to the increasing realization that international banks and securities firms have the expertise and technological ability to engage in the full spectrum of financial activities and services anywhere in the world. Advances in telecommunications and computer technology provide banks and securities firms with new and more efficient opportunities to expand regionally, nationally, and globally in search of new financial activities, markets, and profits. In this respect,

20. See, e.g., Joseph J. Norton, *Towards an International Financial Centre for Greater China: Hong Kong and Infrastructure Reform*, 28 HONG KONG L.J. 209-229 (1998).

21. See generally Joseph J. Norton, *Structuring the Banking Regulators and Supervisors: Developed Country Experiences and Their Possible Implications for Latin America and the Developing Countries*, 4 NAFTA L. & BUS. REV. AM. 5-29 (1998).

22. For further information, see *IOSCO* (last visited March 17, 1999) <<http://www.iosco.org>>.

23. It is hoped that in the near future further information will be available at the *Bank of International Settlements* (visited March 17, 1999) <<http://www.bis.org>>, where IAIS is now located.

24. See *IASC* (visited March 17, 1999) <<http://www.iasc.org>> for further information.

25. The three Associations of bank, securities, and insurance supervisors collaborate through a "Joint Forum" with respect to issues arising from the rise of international conglomerate financial institutions. See the IOSCO website at <www.iosco.org> for further information on the Joint Forum. For an explanation of one of its recent joint consultative documents, see *infra* note 41.

the combined utilization of human expertise and technological innovation is resulting in intense international competition. This competition directs such institutions to seek out non-traditional risks in each respective business in pursuit of increased profits. Thus, the demarcation between banking and securities industries is becoming forever blurred, perhaps to the point where fundamental distinctions will no longer exist in some operational areas.²⁶

In terms of legal education, all this dictates a more coordinated study of banking and securities and other relevant areas of financial law: the broad umbrella is really one of "financial institutions," "financial markets," "financial institution and market law," and "public financial law." In addition, such study will require both a comparative law understanding of public and national financial law systems and an international understanding of the Basle/IOSCO processes. While much of the subject-matter will remain the realm of domestic law or "international soft-law," the subject-matter as a whole should become an increasingly important dimension of "international economic law."²⁷

B. Non-Traditional Systemic Risks

A new "International Financial Law" should also take into account the new risks within the financial system, as law can be used as a means for identifying and managing such risks. While financial innovations have provided new opportunities to operate efficiently and to manage and to control risks, they also created the potential for financial institutions to accumulate enormous losses in a short period of time. The recent failure of Barings Bank due to rapidly accumulated trading losses in exchange-traded derivatives is one most notable example of such intragroup contagion.²⁸ In addition, these innovations may also increase the possibility for non-traditional systemic risks that should be addressed by financial institutions and regulators together. These non-traditional systemic risks arise because enhanced linkages across national and international financial markets increase the volatility of capital flows and the potential for concentrated disturbances to be transmitted more broadly across institutional groups or markets. The increased linkages across markets and volatility in capital flows may

26. See Joseph J. Norton, *The Glass-Steagall Act and Related Bank Legislative Reform in the United States*, 14 B.F.L.R. 1-42 (1998) (citing examples of recent U.S. experiences).

27. See *infra* note 52.

28. For a more detailed analysis of the failure of Barings plc and its ramifications on international regulatory convergence, see J. Norton & Christopher D. Olive, *The Globalization of Financial Risks and International Supervision of Banks and Securities Firms: Lessons from the Barings Debacle*, 30 INT'L LAW. 305-23 (1996).

precipitate or trigger rapid intermarket contagion and thus systemic difficulties. The international ramifications from the Mexican liquidity crisis beginning in December 1994–February 1995 and the even more recent East Asian Financial Crises of 1997–1998 are glaring illustrations of this phenomenon.²⁹

There are four principal non-traditional areas of potential systemic risk present in the international financial system today that need to be addressed by bank regulators. Though the full analysis of these risks is outside the scope of this presentation, it is useful to address each in turn. These risks can only be addressed appropriately by financial institutions and international regulators working together in quasi-symbiotic “partnerships” (a general theme propounded by this essay).

Firstly, there is the threat that a second sovereign debt crisis will arise because of developing country default on securitized debt obligations. These concerns are exacerbated by the widely dispersed holdings of these obligations among institutional investors and by the fact that the terms and conditions on instruments such as Brady Bonds are not conducive to sovereign debt reschedulings or restructurings.³⁰

Secondly, there is the dramatically increased exposure to foreign exchange payment and settlement risk, otherwise known as “Herstatt Risk,” observed by the Bank for International Settlements (“BIS”) in a recent March 1996 report.³¹ The fact that the multicurrency clearing systems currently in existence are not subject to regulatory oversight intensifies concerns of such risks.

Thirdly, there is the potentially destabilizing effect of money laundering by criminal syndicates on the international financial system. Money laundering “contagion” can possibly arise as a systemic risk if financial institutions or financial communities (such as those in certain Latin American countries, Russia and Eastern Europe, or in China) are overcome with criminal influence and saturated with laundered funds. In short, the interests of international criminal syndicates may not exactly promote the preservation of the stability of the international financial system. If the influence of these groups permeates financial institutions or communities, any aspect of the international financial

29. See, e.g., Joseph J. Norton, *The Mexican Peso Crisis and the Future of Financial Integration in the Americas*, in *THE CHANGING WORLD OF INTERNATIONAL LAW IN THE TWENTY-FIRST CENTURY: A TRIBUTE TO THE LATE KENNETH R. SIMMONDS* (J.J. Norton, M. Andenas & M. Footer eds., 1998).

30. See generally Philip R. Power, *Sovereign Debt: The Rise of the Secondary Market and its Implications*, 64 *FORDHAM L. REV.* 2701 (1996).

31. See *BANK FOR INTERNATIONAL SETTLEMENTS, COMMITTEE ON PAYMENT AND SETTLEMENT SYSTEMS (CPSS), SETTLEMENT RISK IN FOREIGN EXCHANGE TRANSACTIONS* (Mar. 1996) (on file with author).

system could be at risk if financial obligations are ignored or institutions and governments become corrupted.³²

Fourthly, there is non-sovereign-related "cross-border financial crises contagion risk," as most recently evidenced by the East Asian Financial Crises. Addressing this fundamental problem, it has become clear that the "New Financial Architecture" will need to be heavily "law-based."³³

Notwithstanding these potential systemic risks, continued legislative or regulatory attempts to maintain segmented regulation between international banks and securities firms will only serve to shift activities to more favourable jurisdictions within the global financial community. In effect, the process of international regulatory convergence in banking supervision and securities regulation is not an attempt to restrict expansion into new activities or competition among financial institutions. Rather, the process is being driven internationally so that regulators may "catch up" with modern international financial market developments, which are coming about with an almost unnerving speed as a result of the accelerated rate of technological innovation.³⁴

Thus, technologically driven market reforms are precipitating revolutionary changes within the banking and securities industries on an international basis. In turn, changes in the methods by which international financial institutions should be supervised and/or regulated are being engendered. These changes are already happening to some degree on the international spectrum. This technological dimension is also something of key importance that will have to be factored into any future legal education in the economic and financial law crises.³⁵

The process of international convergence, however, has occurred (up to now) largely in a piecemeal and disorganised manner. Nonetheless, the convergence process assuredly marks the transition from fragmented, nationally-based regulatory arrangements in the banking and securities industries toward a system of international principles and standards. These principles will be applied in a functionally integrated global financial services industry that will encompass both banking and securities businesses and will have to be assimilated into any

32. *But see, e.g., Banks: Fraud and Crime* (J. Norton & J. Olsen eds., 2d. ed. Forthcoming 1999).

33. *See generally Group of Twenty-Two Systemically Significant Countries, REPORTS ON THE INTERNATIONAL FINANCIAL ARCHITECTURE* (Oct. 1998) (on file with author).

34. *See generally CROSS-BORDER ELECTRONIC BANKING* (J.J. Norton & C. Reed eds., 1994).

35. *See, e.g., Jane K. Winn, The Impact of the Internet on U.S. Regulation of Securities Markets*, 2 YRBK INT'L FIN'L & ECON. L. (1999).

“rethinking” of the teaching of banking law—perhaps as a species or subset of international economic law.

V. INTERNATIONAL SUPERVISORY COOPERATION AND INTERNATIONAL STANDARDS

This emerging financial consensus can be seen to be the result of two separate series of events since the collapse of the Bretton Woods system in 1972. These series of events can be classified along two axes, one based on the experience of the developed economies, and one based on experiences within emerging economies. First, the growth of international cooperation and the establishment of minimum standards in the area of regulation of financial institutions has come to be viewed as essential in order to maintain and strengthen the confidence and integrity of the international financial system. This trend is reflected in the evolving role of the Basle Committee on Banking Supervision as a response to various crises involving international financial institutions since the 1970s and the increasing importance and effectiveness of its pronouncements in the area of financial institutions regulation and supervision.³⁶ Further, international cooperation in this area continues to be of increasing importance to the developed economies as financial technological innovation and internationalisation continues at a rapid rate, as demonstrated by recent intense focus on the areas of derivatives and payment and settlement systems throughout the world.³⁷

The second strand of developing international consensus is the realization of the importance of domestic financial stability for developing countries, especially given their potential vulnerabilities to changes in capital flows within the international financial system. In many ways, this emerging consensus is the result of the 1980s Debt Crisis and the Mexican Peso Crisis of 1994–95, which is today being echoed in an all too substantial form by events in countries such as Thailand.³⁸ The consensus in this area is that in order to develop economically, emerging markets must have in place appropriate structures to guarantee financial stability, especially given the increasing mobility of international capital

36. See Basle Committee on Banking Supervision, *Core Principles for Effective Banking Supervision* (Sept. 1997), (visited Mar. 17, 1999) <<http://www.bis.org/publ/bcbs30A.pdf>>.

37. Cf. Douglas Arner, *An Analysis of International Support Packages in the Mexican and Asian Financial Crises*, J. BUS. L., July 1998, 380–396; Joseph J. Norton, *The Thai Financial Crises Delving behind the Facade of Financial Sector Reform and the Need for an Interdisciplinary Approach*, 28 THAMMASAT L.J. 246–76 (1998).

38. Cf. D. Arner, *The Mexican Peso Crisis of 1994–95: Implications for the Regulation of Financial Markets*, 2 NAFTA L&BUS. REV. AM., 28–69 (1996).

and the reliance of emerging markets on that capital to fund their own development processes.³⁹

As alluded to above, banking law is taking on an increasingly international overlay. Global consistency in the prudential regulation of the similar financial services and activities of international banks and securities firms can only be realized through enhanced initiatives in international supervisory coordination and cooperative information-sharing arrangements.⁴⁰ With respect to banking supervision, the Basle Committee has been the vehicle of international regulatory cooperation for banking supervisors and the driving force behind coordinated supervision for global markets. The Basle Committee has embraced the concepts of consolidated supervision and clear division of responsibilities between the home and host country supervisors for cross-border banking groups in this regard.⁴¹

With respect to securities regulation, IOSCO⁴² has been the collective forum for the development of international cooperation and information-sharing among securities regulators. Although IOSCO lacks the supervisory influence enjoyed by the G-10 members of the Basle Committee, the geographically broader-based IOSCO membership has issued several (in 1986, 1989, 1994, 1996, and 1998 respectively) resolutions on compliance with basic IOSCO principles on high regulatory standards, cooperation, and mutual assistance.⁴³ These IOSCO initiatives on international coordination and cooperative information-sharing have been carried out largely on a bilateral basis between national securities regulators in the form of memoranda of understanding ("MoUs").⁴⁴

39. See Joseph J. Norton, *International Co-Operative Efforts and Implications for Law Reform, e.g., in BANK FAILURES AND BANK INSOLVENCY LAW IN ECONOMIES IN TRANSITION* (R. Lastra and H.N. Shiffman eds., 1999).

40. See Rosa Maria Lastra, *Developments in International Banking Regulatory Cooperation*, 2 YRBK OF INT'L FIN'L AND ECON. L. 405-18 (1999).

41. See Joint Forum and Financial Conglomerates, *Supervision of Financial Conglomerates* (consultative doc., Feb. 1998) [hereafter JFFC]; see generally, George A. Walker, *The Law of Financial Conglomerates: The Next Generation*, 30 INT'L LAW. 57 (1996).

42. IOSCO, established in 1983, has roughly over 120 voting, affiliate, and associate members, who are primarily securities regulators, self-regulatory organizations, and related international organizations. The IOSCO Technical Committee, composed of developed country members, and development committees, composed of members from countries with emerging markets, are the two principal committees through which policies or recommendations are proposed.

43. See IOSCO (visited March 17, 1999) <www.iosco.org>, for available IOSCO resolutions.

44. For a list of IOSCO MoUs, see IOSCO (visited Mar. 17, 1999) <<http://www.iosco.org/iosco.html>>. See also Hendrick Jordaan, *IOSCO's Contributions to MOUs with Emerging Market Countries: An Analysis in Light of SEC Experiences*, 2 YRBK. INT'L FIN'L & ECON. L. ____ (forthcoming 1999).

Enhanced joint undertakings by the Basle Committee and IOSCO have had, and should continue to have, a significant, positive influence on the international convergence, coordination, and information-sharing processes and the financial sector reform within developing, emerging, and transitioning economies should reflect the continuing efforts of these two informal "international organizations."

The conclusion from analyses of both the recent Barings and Daiwa episodes, and the various supervisory initiatives that followed, is that there needs to be improved coordination and cooperation among banking supervisors and securities regulators.⁴⁵ This coordination may soon be achieved by a new panel of world financial regulators called the "Joint Forum" (comprised of officials from the Basle Committee, IOSCO and the IAIS)), which has agreed to convene, on a regular basis, to address more definitively issues related to the supervision of international financial conglomerates.⁴⁶

Importantly, given that a safe and efficient financial system is essential for the functioning of any economy, the Group of Seven (G-7) at their Lyon Summit in 1996, in the wake of the Mexican Peso Crisis of 1994-95, directed the international financial institutions, especially the IMF, the World Bank and the Basle Committee on Banking Supervision, to develop standards for financial regulation to be implemented in both developed and developing countries, as well as to develop solutions for domestic crises with international implications, such as the Mexican Crisis.⁴⁷

International coordination of banking and securities supervision should be complemented with increasing transparency in the operations, cross-border structure, and financial activities of international banks and securities firms (*i.e.*, international financial conglomerates). This can be achieved through supervisory guidance to international banks and securities firms to assist them in the development, implementation, and thorough enforcement of effective corporate structure, internal controls, and risk management programs. Such initiatives will further serve as preventive measures against intragroup contagion in times of financial stress.⁴⁸

45. See *supra* note 28.

46. See JFFC, *supra* note 41.

47. See *Report of the Group of Ten (G-10) Working Party on Financial Stability in Emerging Markets, Financial Stability in Emerging Market Economies: A Strategy for the Formulation, Adoption and Implementation of Sound Principles and Practices to Strengthen Financial Systems* 49 (April 1997) <<http://www.bis.org>>.

48. See Joint Forum, *supra* note 46.

VI. CONCLUDING OBSERVATIONS

In sum, the degree of international regulatory coordination and cooperation is intensifying through the Basle Committee, IOSCO, IAIC, IASC, the Joint Forum and the recently established Financial Stability Forum processes in response to the globalization of financial markets. The international coordination and cooperative information-sharing initiatives have been primarily led by supervisory authorities, and the private sector companies will need to accommodate these initiatives while ensuring the preservation of confidential information given to the regulators. The supervisory initiatives have been both bilateral and multilateral, and the geographic and institutional coverage has varied from specific rules to broadly drawn recommendations. This process is encouraging and needs to continue to develop.

As such, the need to foster further and to maintain international supervisory/regulatory standards will be even greater. To this end, a greater educational, administrative, and judicial understanding and appreciation of the increasing international regulatory dimensions of "financial law" will be required.

Also, one will need to study carefully the implications of how World Trade Organization ("WTO") liberalization of financial services will accommodate legitimate prudential supervisory concerns. Defining this nexus between trade "liberalization" and "safety and soundness" concerns for financial markets and institutions becomes a major, cooperative challenge for trade/financial services officials and financial authorities, on the multilateral, regional, and domestic levels.⁴⁹

Moreover, an integrated understanding of expanding regional approaches to financial sector development (*e.g.*, with the European Union⁵⁰ and NAFTA⁵¹) will be essential.

In all events, the new economic and political dynamics shaping our increasingly globalized environment, the diversity of the underlying cultures and related values, the disparities in legal systems and ap-

49. See generally John H. Jackson, *Regulating International Economic Behaviors - Reflections on the Broader Settings of International Financial Markets and Institutions*, in *EMERGING MARKETS AND THE ROLE OF INTERNATIONAL FINANCIAL ORGANIZATIONS* (J.J. Norton and M. Andenas eds., 1996); Mary E. Footer, *GATT and Foreign Banking as a Trade in Services*, in *INTERNATIONAL BANKING OPERATIONS AND PRACTICES: CURRENT DEVELOPMENTS* (J.J. Norton et al., eds. 1994).

50. See generally Michel Gruson, *Convergence of Bank Prudential Supervision Standards and Practices within the European Union*, in *ESSAYS IN INTERNATIONAL FINANCIAL AND ECONOMIC LAW* (London Institute of International Finance, Banking and Development Law ed., 1999).

51. See generally J. BELLO, A. HOLMER & J.J. NORTON, *NAFTA: A NEW FRONTIER IN INTERNATIONAL TRADE AND INVESTMENT IN THE AMERICAS* (1994).

proaches through the world, the sheer realities of the enormous changes that are occurring within Latin America, East Asia, Central and Eastern Europe, and Southern Africa especially, the ongoing need for viable financial sector law reforms, and the growing importance of international and regional cooperative efforts and of the role of international and regional financial and monetary institutions will all make significant legal impacts on the future scope for the teaching of "international economic law." One could categorize a good portion of these developments as "soft law," however, this does not diminish the legal significance and relevancy for setting new international "rules of the road" respecting financial markets and financial institutions (whether private, public or intergovernmental in nature) in the global environment of the 21st Century.⁵² As Professor Jackson foresaw a number of decades ago, "international law" is not a static notion restricted by history and traditional notions. "International law" is indeed a dynamic and evolving concept. While shaped, in part, by history and while rooted in traditional public international law notions, "international law" for our modern global society should be capable of embracing and "legally" responding to the dramatically changing nature and demands of our international economic, political and social environments.

Thank you, Professor Jackson, for providing us the intellectual light and the legal path for going forward!

52. On notion of "international soft law," see *Norton*, note 15 *supra*, at 255-62.