International University College of Turin (IUC)

At the End of the End of History.

Global Legal Standards:

Part of the Solution or Part of the Problem?

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This DRAFT will be presented at the Seminar *Global Standards in the 21st Century* organized by the G-8 Presidency in Rome at the Ministry of Economy and Finance and Villa Madama on the 11-12th of May 2009

International University College of Turin

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***Special thanks to the IUC MSc candidates*: Emanuele Ariano, Marco De Morpurgo, Tomaso Ferrando, Giulia Massobrio, Yacouba Sabere Mounkoro, Sara Palmas, Jasna Pocek, Ibrahim Shikaki, Francesco Vazzana; *to the IUC Student Dean* Jennifer Hilton; *to the Lanzhou student* Ding Cheng; *and to* Ignazio Castellucci (University of Macau)**

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INTRODUCTION

1. A Malthusian Picture.

Since September 2008, when the crisis started to hit hard in the United States, the ghost of Lord Keynes seems to have supplanted that of Von Hayek as the most cited hero of mainstream economics. In this Report, in order to justify and ground our policy claims, we wish to evoke Malthus a towering (in a way sinister) economist that should enter the hall of fame of those that from the past brutally point at the tremendous challenges in our way into the future.

This Report is not the work of economists, and it is certainly not grounded in the mainstream. Nevertheless, from the perspective of a small but highly cosmopolitan community of lawyers experienced in approaching economic issues, we beg global policy makers to think of the current crisis as a Malthusian one. It is not "only" about finance, nor is it only about economics or policy. We submit that the truth is much more uncomfortable and dramatic. The current Western standard of living is unsustainable. Should the "rest" share the model of development of the "west" our planet will simply not be capable of resisting the growth in consumption and pollution. (Some observers believe we would need five Earths!).

Within this fundamental setting of scarcity in resources, using the rhetoric of the "end of history" as the polar star for growth, development and ultimately happiness of the whole world is simply a cynical lie. Over time this lie has been supported by a thick ideological apparatus such as the one that even today proclaims its faith in technological innovation as a condition sufficient for survival. After twenty years, this fundamental lie should finally be recognized even by the "commanding heights" of the global economy. Technological innovation may be necessary but it is certainly not sufficient. There is no long term future outside of a radical cultural shift banning the self-serving Western perspective thus letting a new vision unfold. A future can be gained only harvesting all cultural inputs available out there. Either the future is going be plural and cosmopolitan or it will not be.

2. A Science of Exploitation.

As Carlo Cipolla once said, our Western-lead development experience can be equated to that of a very smart child that finds the key to the safe-box where generations before him had hidden a family treasure. The kid quickly specializes in the best technique to have fun spending all the money he has found. In the West, beginning with the Industrial Revolution, we became increasingly skilled in exploiting the treasure within a very short term horizon. We have even

invented economics as a "science" grounding such exploitation (which unfortunately has never been only physical but also human), and our legal institutions have been developed to that end. Individualized property rights, freedom of contracts, corporations as a nexus of contracts, fault liability and many other private law institutions enforced by a professionally trained judiciary have all been developed as the most efficient institutional setting possible. Societies that have not fully deployed this toolkit have been singled out as "lacking" the rule of law. The legal and institutional aspects of the Washington Consensus, "good governance" and the "rule of law" have been imposed by means of "conditionality" often accepted, perhaps in good faith, by the leadership of many peripheral countries.

3. The Bankruptcy of Two Political Interpretations of the Same Approach.

Socialism and Capitalism have been the two most important, and apparently opposite, political models through which modernity developed its exploitive skills and unsustainable consumption behaviors. The leading epiphany of the former has collapsed in 1989. Almost exactly 20 years later we may be witnessing the collapse of the latter. We have no business here to stress the staggering historical parallels between the political role of Secretary General Gorbachev of PCUS at the beginning of the end of the Soviet Empire and that of President Obama of the United States at "the end of the end of history" as we have titled our Report. But we have a strong argument to make that a new truly cosmopolitan approach to the law and legal institutions is needed; that the current dominating global vision of legality and institutions must declare "intellectual bankruptcy"; and that a new beginning based on a genuine sharing of this planet among all its living inhabitants requires a completely new vision of the function and role of the law.

We argue here for the beginning of a long, painful but necessary process aimed at the development of a legal system that is much less about creating an efficient backbone for an exploitive economy and much more about a vision of civilization, justice and respect where the laws of nature and those of the humans converge in a sustainable long term philosophy.

The bankruptcy of the current global institutional system is clearly exposed by data on global inequality. Suffice to think that some 45% of the global working force lives on less than two dollars a day. Law is about justice and sustainability. Global law is about global justice and sustainability. No lawyer can observe this catastrophic state of affairs without a mote of rebellion.

4. The Philosophy of This Report.

The aim of this Report is to translate such mote of outrage into some suggestions capable of making the law about the solution rather than about the problem as too often it has been in the modern historical experience.

From our premises some consequences follow: we will only offer suggestions that are truly cosmopolitan, and that try to take into consideration the interests of humankind and not that of discrete States or aggregate of States. States may well be instruments to implement a global policy and a global vision, and most likely they are the most powerful instruments we can deploy. Nevertheless they must be a mean, and not an end. Consequently, we must not assume that the interest of states and those of their citizens are necessarily aligned. There are poor people in rich countries and rich people in poor countries. What we aim at is beginning the path towards the urgent construction of a "people's rule of law" and not of a global legality serving state-based geo-political interests.

Cosmopolitanism requires a "dialogical dialogue" and the immediate abandoning of any feeling of superiority. The fact that a society is more technologically advanced does not imply that it is culturally superior.

Thus our effort has been to harvest "from the bottom up" a catalogue of sensitive issues that must be openly and humbly faced by the international elite to avoid coming up with more self-serving ideology. We submit that basic research is needed before jumping to the conclusion that global legal standards are useful or even only that they are possible.

The IUC Report is based on a general global approach in search of a new paradigm of globalization and social relations among the inhabitants of the world. The new paradigm is based on communication, long term trust and respect, rather than on economic, financial and military might.

5. A Grand Mirror Project for the People's Rule of Law.

Law, in both its local and global dimension, is mostly an intellectual construct. In a functional perspective, the one dominating today in the global conception, it is a public good, an infrastructure of communication between human groups as important as airlines or freeways. Despite the domination of this vision, we should not forget that law is also a cultural device, a common intellectual vocabulary (usually local in its nature) used to express the sense of justice shared within a discrete social group. This sense of justice shapes the local identities. Today we are living an intellectual earthquake that has destroyed the blind belief in law as a mere technological device. The challenge, beginning from the foundations of financial markets, all the way to the

building of a global legal system capable of re-gaining control over the economy, is to shape a global identity around a grand project of a global legal order. This project should be capable of making a sense of global justice emerge. And this new born cosmopolitan sense of justice should be deployed in organizing the institutional setting of the new millennium, after the "false start" of the end of history.

The fallen Soviet model served in the last twenty years as a negative model, mirroring which the "end of history" could design itself. Privatization, a light State with the demise of welfare institutions and of public bureaucracies, the demise of politics in favor of technocracy and professionalism, a free market economy ideology, competition as a constitutional value, the demise of protective labor law, the celebration of flexibility, deregulation, outsourcing, downsizing and financial innovation, the theory of comparative advantages and many other notions have been capable of conquering the stage because at the antipodes of Soviet socialism. Today's crisis will become a "civilizations saving" opportunity if we use the "the end of history" its single thought based on the Washington consensus as a mirror to learn from mistakes and develop a workable methodological platform for the daunting task that is ahead of us. Because it is an issue of global sustainability that motivates our work, ultimately an attempt to transmit this world to the generations that will follow us, the sustainable/unsustainable opposition might perhaps lead us in the current state of emergency to act quickly in the right direction, or at least to avoid moving in the wrong direction.

6. The Unsustainable Single Thought: Foundations of a Global Tragedy of the Commons.

The end of history has been characterized by a Western-centric single thought. It has, moreover, been characterized by much unilateralism by the most powerful States at the expenses of the weaker. We submit that both Western-centrism and unilateralism have been affecting the first policy reactions to the crisis. A tragedy of the commons is well in sight. In fact, the variety of un-coordinated domestic "stimulus packages" that have been made necessary by the U.S. unilateral approach have produced a rush to "business as usual" through encouraging consumption that goes exactly in the wrong direction. Like the over-grazing and over-fishing communities described in the famous paper by Garrett Harding, each country tries to stimulate as much as possible its own economy and to externalize the costs on everybody else. Indeed we should learn from the failures of the end of history that lower consumption and saving is a commendable attitude in the long run, and that only an agreed-upon gradual reduction and change of consumption habits, especially in G7 countries can avoid the "tragedy of the commons".

The rush to this tragic path leading to a foreseeable final crash has been triggered by ideological assumptions that today can be openly challenged even in high places, but that until a few months ago were political taboos whose infringement would have produced total marginalization. The end of history and its assumptions were simply an ideological manifesto of non sustainable development.

We can now openly submit that the model of world exploitation led by unlimited profit is no longer sustainable. We are now all aware that there is no such a thing as a "self-regulatory market"; markets are defined by law; laws are informed by values; prohibitions and incentives are crucial and unavoidable to take care of the long-term. The law should not be solely meant to advance the unprincipled animal spirits of the stronger market actors. The short term which leads to tremendous financial speculation is not sustainable. Incentives and regulations must point to the long term.

The single thought ethnocentric approach is not sustainable. The law should be cosmopolitan, harvesting all the "best practices" wherever they are located. In coping with the crisis we must think plural: "single-thought" solutions are not sustainable. Pluralism of solutions/ paradigms is sustainable; civilization, what ultimately the law should strive to save, is not "natural", but "historical" and "political".

7. The Priority of a More Equal Distribution.

Redistribution of resources from the rich to the poor, through taxation and other direct legal measures were taboo at the end of history. Economics was about efficiency, not about distribution. Today we know that the poverty of too many and the wealth concentrated in the hands of too few is not sustainable. Poverty, like finance, is highly mobile and of "global" quality. The denial of elementary material rights is not internationally sustainable from the legal, moral and economic perspective because it triggers biblical migratory fluxes that produce tremendous deprivation and losses. Sustainable global law must be inherently redistributive getting over that ideological taboo. These needs of long term redistribution must be the backbone of any regulation of global financial activity.

Both the Soviet experience and the end of history have failed because of their highly materialistic spirit. But the human experience is not only about the physicality of the world. It is not only about having but also about being. It is about conceptual and moral sustainability that eventually translates into institutional settings. This is why we can hope that new sustainable ideas will bring about new sustainable institutions.

The end of history banned genuinely critical thinking to develop a single thought that has been particularly infectious within the leading Economics departments especially in the United States. This is why today it is very important that genuine critical thinking be present in the international debate over the future global institutional setting. We simply cannot afford to assume that "the law" might be part of the solution before thoroughly considering that, mostly because of its pedigree of exploitive ethnocentrism, there are good reasons to believe that it has been part of the global problem. Moreover, the very idea of law has been re-invented at economist's image. This is not sustainable because it reduces the law into a mere technological tool and legal thinking into mere social engineering banning distribution from the radar screen.

Any attempt to redesign the global system, we argue, must now rethink the very foundations of the model of capitalism which, in the last two decades, has been legitimized by market fundamentalism, and whose drawbacks are finally beyond mainstream denial thanks to the present global crisis. The evidence of the failure of such a model is no more a question of ideology, of personal taste or political preferences. It is history itself which gives evidence of its failure.

8. Elements of a Sustainable Vision.

The global agenda should implement a reasonably utopian vision.

We venture to submit that the economic emergency makes it legitimate to advance at least some broad political guidelines, logically and organically linked with each other, and aiming at the safeguard of the weaker rings of the chain of global survival. In openly acknowledging our perspective we need to point at the following:

First, we side with the losers of social transformations.

Second, a different relationship between the local and the global dimension must be outlined. Attempts to impose global law (or regulation, or standards) from the top down by means of more or less violent use of conditionality has failed and must be abandoned. From the local to the global should be the direction of a legitimate legal flux that is potentially a solution, and not itself a problem.

Third, a genuinely cosmopolitan approach to globalization must grant to the periphery the same dignity of the center, and must place without hypocrisy responsibility where it belongs.

Fourth, a long-term policy vision of world economics and finance must take into account the dramatic threat to a natural and balanced evolution of the planet produced by technological development coupled with short term individualism.

Fifth, a capacity to outline a different timing for action must point out what must be done immediately, its limits, and the need to invest on the middle and long term horizons, in order to correct what are structural cyclical problems of the capitalist model of development that has prevailed in the near past.

Within these broad political beliefs we argue that the law should not serve as a mean to survive from crisis to crisis. Nor should it attempt to transfer as much as possible the social costs to the weaker majority of the people by socializing the losses and privatizing the gains. To the contrary, the law should serve to build new foundations of the world order, which will go in the direction of a sustainable and peaceful evolution of the planet. We are all living in the same home. There is no possibility for anybody to exit from this world; thus, we must stay all together and, if we wish to survive, we must look for what unites us and for what saves us, rather than for what divides us and what destroys us. Not an easy task, indeed. However, the only reasonable one if we wish to save the planet from global destruction and endless pains.

9. Sheltering the Innocent from the Consequences of the Crisis and Making the Culprit Disgorge the Gains.

In this broader perspective, the first task we are now facing is an urgent one: we need to avoid that the negative consequences of the current financial crisis keep spreading out, hitting even more the weaker parts of the global society. We need to propose a solution rapidly, answering to the short-run economic challenges faced by the crisis. Nevertheless, we shall not forget that this first 'rapid-response' solution to the crisis of the financial markets is just the first step of a long-run major political global project. It is thus imperative to overcame the logic of the ”socialization of costs and the privatization of benefits”, which has been the dominant pattern of corporate capitalism and which should make the critical observer aware of the fundamental continuity of market centrism, even in the current tragic juncture as witnessed by the already mentioned first unilateral reactions such as the “stimulus package”.

In approaching the current situation, the first and most urgent break with the Washington consensus must be found in the reconsideration of the relationship between capital and labor. A new governance of globalization and new models of corporate and fiscal governace are necessary to satisfy the needs of a fair distribution of the cooperative surplus. It is the law which needs to provide principles to distinguish between those that work for the community and those that work just for themselves. The era of the “trickle down” rhetoric that at the end of history has been deployed to legitimize, legally and ethically, the unlimited accumulation of fiscally irresponsible capital must be over. Accumulation in the hands of the very rich does not “naturally trickle to the poor” and this is true both within countries and across them. This is again a professional lie that

must be exposed. The era in which the law protects as if it were a fundamental human right the corporate multiplication of capital gains obtained by playing as in a Casino with the savings of honest and humble households and individuals is over.

There is a fundamental difference, and the global sense of justice can recognize it despite the staggering cultural variations of the global societies, between the savings of the hard working low and middle classes and the executive bonuses and stock options that are responsible of the doping of the international financial markets. Good principled law is about distinguishing and not hiding behind formalistic and biased visions of "the rule of law", such as those recently evoked by members of the Obama administration when telling that they could do nothing about the AIG executive bonuses being in a "rule of law" country that protects contracts.

10. Global Law is about Reconstructing the Public Sector and Protecting the Commons.

Global law, in whatever form and wherever produced, cannot be seen as an end in itself. It is a mean to protect interests that are worth being protected and that humankind collectively decides are worthy of such protection. The very fact of being an inhabitant of this planet, wherever located and no matter how humble in the circle of life, entitles all people to global respect and legal protection. This approach is reflected in the claim for a new broader vision of the commons and of the public goods. Not only individuals but also communities have rights. Not only humans but also nature, as recently recognized in the pivot experience of the new Ecuadorian Constitution. Not only current generations but also past generations are entitled to respect (cultural property protection). Future generations must be guaranteed a valuable inheritance and it is the law of today, if capable of restraining self-serving short-term visions, which might pose the political cultural and legal conditions for this protection to be effective. At the end of history, corporate corruptive behavior has determined the plunder of public property and its transfer by law in the private domain. Privatization and the rhetoric of superiority of the private sector have ben massively deployed and supported by mainstream legal and economic pundits, resulting in the transfer outside of any formal guarantee of massive amounts of the public treasure into private hands. This phenomenon affects not only tangible property but also most of the services and activities that are the province of the public sector because the logic of the profit is fundamentally incompatible with them. Welfare, social housing, education, healthcare, the care of the elderly but also prisons, energetic and foreign policy and even the war have been declared "up for grab" with massive transfers of public resources into corporate hands.

The long term consequences of these policies are devastating both in the industrial countries of the G7 and elsewhere. In the first context today there is simply no more public sector (with the

possible exception of the War machinery) capable of directly acting and "doing things". Public law has been reduced to a system of rule making aimed at guaranteeing "competition" in the private delivery of public services. State owned economic players have been delegitimized as inefficient and privatized. Their role of social stabilization control and ultimately long term economic order (stable employment, social benefits etc.) has been ignored. Even when a political decision is made that public intervention is needed, such as in front of the financial crisis, paradoxically and dramatically the funds to act are not given to public actors (now inexistent) but handed out to investment banks, law firms and other private actors (very often in conflict of interest) making them continuously stronger than public agencies, in a pattern of continuity with the end of history that must be stopped now. The fundamental problem is that today the global public sector is too weak not too strong compared to the private sector. There are no global agencies strong enough to assert their authority on global private actors, and in the development of such global "biting" public sector we should invest. In peripheral countries, such professional and strong public sector that requires resources both physical and human never developed. Its absence has been the most serious reason of the rampant corruption and global corporate plunder and the WB and IMF have been proactively engaged through conditionality to preclude it from developing.

At the end of the end of history, learning from these mistakes we should begin immediately an ambitious global process capable of re-publicize by means of the law, whatever has been privatized outside of very serious reasons. Reconstructing is harder than dismantling but the construction of a global public service (of course with local variations and articulations) is the most exciting challenge in making human capital unfold that is ahead of us. Doing so does not pollute and is at the core of a long term transformation capable of digging the many "have nots" out of poverty while simultaneously limiting the few "haves" in the accumulative frenzy, and thus reaching a sustainable world where it is possible and worth living.

This is why we need a fundamental rethinking of the very notion of rights, of public goods and of commons. It is only through the good public minded government of the public that we can find the resources to tame the excesses of the private greed.

11. Taking Political Ideological and Legal Control of Global Economy.

To be sure, this urgent plan to save human civilization(s) by means of global law requires the development and the acceptance in the West (especially of the G7 countries) of a different relationship between man and nature, between the individual and the community, between the haves and the have nots. In short we need the courage to declare bankrupt and overtake the Western liberal individualistic vision of freedom that has characterized the end of history and to revamp of an organic, communitarian, pluralistic, quality based approach to the political economy.

We need to begin a serious intellectual reconsideration of the myth of local and global "competition" and substitute it with a cosmopolitan and internationalist idea of "cooperation" and solidarity. A vision of brotherhood, solidarity, mutual help is still globally much more diffused than the extreme Western individualism and the survival of the fittest ideology of the end of history. Such vision makes life more worth to be lived and it is much more economically sustainable because it reduces the material needs those that can be satisfied only by exploiting and transforming energy.

One may find clear indications that a new transnational set of normative principles is needed. And to be sure what is really at stake is the establishment of a global legal system capable to control economic processes, rather than being controlled by them. The needs of justice and survival of nature and of the communities inhabiting the planet, expressing themselves by legal forces, should determine public action, and not the needs of capitalistic accumulation expressing itself by market forces.

Principles of justice, responsibility and long-term environmental protection, rather than short term economic contingency and strong interests must set the legal agenda. It could be argued that a new governance and bottom-up inclusive integration of knowledge-based economies (wherever located), which is crucial to the very survival of humankind, cannot happen without defining new terms of widely accepted standard of long term justice in the transnational context – hence the urgency to conceive legitimate transnational legal structures and possibly some apparatus of "superlegality".

The superlegal apparatus must refer to fundamental principles with which the behavior of political and economic players in the global scene must comply, and supply a series of standards and rules for evaluating the objectives and equanimity of the conduct of national and international actors, public and private. But rules and standards are not enough if not supported by a well articulated and organized (and therefore expensive) system of effective monitoring and enforcement.

12. The Political Demand for Change and Its Current Strength. A Global New Deal.

Voltaire once said that if we want good laws we must throw every single one that we had before in the trash-can and draft new ones. We are all too aware now, especially as lawyers, of the utopian and ultimately undesirable nature of this vision. Very thick institutional aggregates defeat the domain of the politically feasible and of legal fantasy. But let us still deploy it for once, because in revolutionary conditions such as the ones we might be living in now there is a need to think ahead of time.

The current financial crisis is a factor capable of producing a great change even in mainstream political positions across the world and at the international level. The losers of the social processes of the end of history are already taking the streets in the Western capitals. The desperate pressure on the wall of Fort West which is producing so much death and moral scandal might sooner rather than later be transformed from a humble begging of help into an organized and demographically winning assault. In the West millions of desperate and homeless poor might become a critical mass finally capable of politically organized assertion of their rights against the irresponsibility of the rich. When the pie is one, a huge slice in the hands of the few leaves to the many only leftovers. And the tipping point in which neither rhetoric nor political repression are sufficient to maintain such injustice might arrive very soon.

Avoiding this nightmare of violence should produce the political incentive for the powerful to get out very fast from the end of history and to start facing the political reality that a self serving dream cannot longer hide. This is why it is worth being intellectually courageous in proposing legal change. To be sure the need for a change in the colonial and neo-colonial international institutional order emerged from Bretton Woods and San Francisco has been "in the air" for quite long so far, but there was no effective political demand due to corruptive impact of capital on the electoral systems selecting the elites in the world. The crisis made the political demand for more justice finally effective. G7 countries have a choice. They can try to apply the "straight power" doctrine proposed by Secretary of State Kennan in 1946, according to which the defense of the privileges of the rich cannot afford to be impaired by democracy or rights talk and everything boils down to the brutal exercise of military might. Alternatively they can accept to enter among themselves and with the rest in a Global New Deal, in which the interests of all the inhabitants of the world come first. In fact, with the global success of the weapon production industry and with the diffusion of its products the latter can be the only real alternative.

13. De-Globalization is not the Solution. A Genuine Idea of Legal Globalization is Required.

At the end of history, with globalization the dominance of Western single thought over the Rest is not only illegitimate, unjust, or immoral - it is not even an economically, socially and environmentally sustainable solution the get out of the well of poverty and injustice. It is actually an all mighty agency of production of poverty and injustice. But processes of change cannot be stopped and de-globalization would not be a solution either.

Historically, the peoples of the world have been integrating into bigger and bigger communities and institutions (such as families, communities, villages, cities, states, and so on), so that our future history will be characterized by a growing important role of institutions at the global level.

This is why we do not have to avoid, even less to fear, integration, but we have to work in order to make it happen, being as sustainable and just as possible for everyone.

Given the need for global legal solutions, the crucial question is how and where to find them and how to implement them. Traditionally, legal answers to social problems generate from models elaborated in 'contexts of production' and exported to "contexts of reception" (with higher or lower degree of adaptation). Within this historical pattern, powerful and prestigious "producers" of global legal solutions, invariably located in the West, have been progressively closing their legal fantasy focusing only on their own highly professionalized "legal ways". Clear failures of such models in the contexts of reception have been blamed on lacks on the receiving side, not on the flawed nature of the "exported" legal artifact or on the cultural and political violence of the transplantation process. This is the essence of Western universalism – of the belief of the inherent superiority of the "rule of law" and of its individualized underpinnings.

Nor can one assume well intentioned naiveté in the process of Western legal expansion. Legalistic rhetoric has often been deployed with the conscious intention of pursuing the interests of a few over the many. Also on the receiving side ruling elites (not only in the periphery but also in semiperipheral settings as Europe or Japan) have been blindly convinced (having attended Western academic institutions where critical thinking is marginal) of the equation between technological and cultural\legal superiority thus promoting the reception of dominant legal ways. Moreover, sometimes receptors have been more or less forced to adopt external solutions through mechanisms of conditionality. Other times they have been - in good faith – simply fascinated by Western models of life. Very often the process takes simply the form of corruption of the power elites.

Nobody should read this Report as a denial of the fact that Western law has produced also some "good legal artifacts" such as the welfare state or the concept of relativism and plurality of values. But good legal artifacts (and we will discuss some in this Report) have been produced in many non-mainstream societies as well; more often than not they may create better long term incentives. Think about the role of workers in the former Yugoslavian corporate governance, or the variety of alternative visions of property in Andeans cultures, or the institutional settings that allow the social capital represented by elderly people be put to value in many African societies, or the legal institutions of solidarity and long term commitment in Islamic finance, or the open access to culture and social knowledge in the traditional Asian resistance to intellectual property rights.

The sustainable elements of all legal experiences no matter if dominant or recessive should be available, known and put in the conditions to contaminate each other. At the end of history single thought and Western hubris was the rule. Now a pluralistic and humble trial and error attitude should become dominant.

In the new international political paradigm that is about to begin, there is the need for elaborating global solutions with a new and different method. It is no more about following one leader and emulating it: it is about cooperating among each other and discussing all together in order to produce regulatory solutions that give the same dignity and respect to all cultures of the world and a fair distribution of the economic surpluses that an ordered economic oganization can yield. The direction and the criteria to evaluate regulatory solutions is their capacity to reduce global injustice and disparity and not only to stimulate growth and further unsustainable consumption.

Thus, in the new global legal paradigm we need to confront ourselves abandoning the idea that there is a single right 'way' forward. We must understand that each culture and each civilization is the most capable of finding the best solutions for itself locally; further, from a bottom up perspective each culture should contribute, like in an orchestra, to rethink a sustainable globalization.

14. The First Necessary Step at the G8: Debt Remission for the Poor.

Having abundantly reached the bottom of the moral and political well of injustice, the minority of humans that actually have enough to care about the crisis (if you spend your life in the Nairobi dump, or if you are a miner in a remote Chinese mine or a homeless harassed by the NYPD you do not care about the fate of Citybank or GM) now finds itself in front of a politically necessary opportunity to "legally" redesign the world before it is too late. Whether this "opportunity" is going to be a tragic joke or a serious commitment will become apparent very soon when the first necessary and immediate global legal steps have to be taken.

Some of these immediate steps do not require any legal expertise but only political resolve. The very first step that is now long overdue, and that will determine whether a path of long term "Fabian reforms" is at all worth trying, is the immediate complete and unconditioned remission of poor countries' debt. This remission - and this remission only - will produce sufficient economic pressure to reform the IMF and the World Bank. Once this is done at the next G8 summit, then it will be commendable and farsighted to continue a political worldwide legal discussion capable of giving a voice to everybody that lives on this planet. Such discussion might over time produce a new pluralist consensus for a sustainable legal control of the economy. Such new consensus must be a dramatic break with the Washington's one: we need global structural solutions and not, as so far it has been, globally exported oligarchic and ethnocentric interventions which exhaust their impact in the short run and lead us from crisis to crisis.

There is the immediate need to adjust the strong inequalities between the rich and the poor, which is largely the product of the legally unrestrained behavior of the economically powerful during a past of mistakes that we can no longer afford to replicate, but that we should know very

well in order to fully learn from it. At the end of the end of history, we must return to unbiased historical knowledge the role it deserves.

15. A New Forum for Deciding the New Start. Preparing the Global Economic Constitutional Convention.

Certainly the risks of a cynical deployment of rhetoric of change in the law for the purpose of maintaining a status quo of domination have been very present to everybody involved in the preparation of this Report. Previous episodes of such strategy by the World Bank in the legal domain are exposed in this Report. This is why the issue of a politically accountable global government is so crucial (and we use the idea of *government* and not of *governance* to stress the political stake).

This Report calls for the creation of a U.N. connected truly representative international institution in which all interests are equally represented, a sort of Constitutional Convention for the production of a globally legitimized economic constitution. Within such an institution, genuine discussion and policy-making would guarantee the representation of the interests of everyone. The preparation of such a Constitutional Convention should be entrusted already at the next G8 meeting to an international preparatory commission studying the tremendously complicated issues of global representation.

The rapid legal intervention on financial markets must be coordinated with a wider political and cultural project that must rethink globalization. Moving now in this direction requires tremendous courage and vision by those such as the G8 that have more to lose in the short run in a world of conflicts over increasingly scarce resources where the stake is survival. But the fundamental idea of this Report is that either we are all saved or we are all damned.

PART I

GLOBAL POLITICAL ECONOMY AND THE END OF HISTORY

1.1 Making the crisis an economic turning point is both an opportunity and a duty to safeguard a future for human civilization.

The current intensity of the economic crisis offers, to those lucky enough to be spared the suffering of poverty, an occasion (which is actually a duty) to approach in depth the question of long-term global sustainability - itself a notion to be handled with care. In fact, capitalism displays the capacity to change its form in order to maintain its fundamental substance of exploitive relationship between capital and labor. In a sense, this most important structural characteristic of capitalism keeps it *always* in a crisis. Therefore, what is at stake is the capacity to manage the next great transformation so that an environment compatible with the survival of human civilization is maintained. To do so, a *new institutional framework* for long-term global governance is indispensable.

1.2 The only way to make law sustainable and functional to the long-term solution of the economic crisis is to free it from technological and economic dependency. This requires consciousness of what is really new in the current phase and what to the contrary is an historical cycle.

Sustainability means that the fundamental function of an organized global political space should be to contrast the progressive reduction of civil society and social experience into the mere *cash nexus*. There is in fact a clear risk that the new institutional framework may end up allowing the final commodification of nature and of civil society. This is why it is so crucial to rescue politics and its most important instrument of mediation, law, from the current subordination to technology. This is why the new institutional framework should have the nature of nothing less than a global economic constitution.

Globalization is not a new phenomenon. The international expansionism of capital and the role of the State in this process were clear to Adam Smith and Karl Marx. Economic historians point at the 16th century and the take of the new world as the starting point of capital accumulation of global magnitude which in fact originated the industrial revolution. The first great globalization process was the attempt to exit the great depression originated by overproduction, which began in 1870.

After World War I, as an economic consequence of peace, the failure of the first globalization effort became clear with the global recession of the 1930s.

Europe and the US followed two different political options - in Europe Nazism and Fascism, in the United States Fordism. World War II defeated the first and exported the second to Europe. Fordism was a de-globalizing force. Its production of standardized mass production of durable commodities was aimed at the internal market. The distribution between capital and labor of the cooperative surplus needed to sustain demand - itself necessary for important long-term investments. Government, firms, families, the whole society needed long term horizons to sustain this form of economic organization.

The crisis of overproduction due to the diffusion of Fordism seems to explain the transformation of the 1980s, including the birth of the wave of globalization known as "the end of history" and the financial hegemony over the real economy. Fordism has failed in its attempt to solve the fundamental contradiction of capitalism created by the tendency toward reduction of the profit rate. As the previous experience of late 19th century has already taught us (and is a fortiori true today), economic globalization alone cannot be the answer.

What is new to the current crisis is that possibly capitalism has reached the borders of its geographical expansion so that for the first time human civilization can face the truth that we all live in the same home. A powerful apparatus of political decision-making is necessary to tackle the next wave of capitalist transformation whose face we do not know as yet but that it is most likely to be ugly if it is not tamed. It is in fact probable that - in the absence of possibilities of significant further physical expansion - capitalism will make an attempt toward the final commodification of the entire human experience and spaces.

The fact is that there is no exit from this world and capital cannot be the only decision-maker of the next "great transformation" because the cost of its short-term and short-sighted survival strategy is simply unsustainable for humankind. Its cost like global warming and climate change is not a natural phenomenon but it depends directly on human responsibility. To put the future in the hands of humankind there is the need of a new humanistic approach involving every aspect of civilization that can be deployed to resist the final commodification of the planet and its consequent inevitable destruction. As Max Horkheimer wrote as early as 1926 (and as was believed by Lord Keynes at the time), the truth of the matter is that our society possesses the technical and human means to abolish misery in its most brutal material form. We do not know of any time in history in which this possibility was as serious as today. It is only the proprietary structure that opposes its realization. So that, a fortiori today, it is from the property interests in the current global organization that we need to start.

1.3 A new strong form of political legitimacy is required for the law to tackle the titan of financial liquidity left at large. The global private proprietary system, guardian of a status quo locked in by international geo-political interests is the immense obstacle that politics must overcome.

Today the international financial system is virtually independent from the control of the system of central banks. Global unregulated liquidity – which has had an impressive growth in the last three decades – is by far greater than the sum of the reserves of all central banks taken together. This means that there is no possible political control by the nation states for lack of economic means. Nor is there any possible control from international institutions for lack of political force. The common global problem is how to assert a new public control over the proprietary structure of the global financial system.

The problem is common but not all the peoples of the world have the same role. Nor do they bear in the same way the responsibility and the effects of this "man made" situation. The excess of non-regulated liquidity is felt in a very different and more acute way by the people – for instance - living in sub-Saharan Africa compared to those living within the borders of Fortress Europe. But if we look for responsibility, the intensity ratio is the opposite. Global solutions have to be sought among a plurality of peoples with very different needs, very different power, very different responsibilities. Nevertheless, if we do not find common solutions we are all going to sink. For the very first time even self interested capitalists must admit that we really are interconnected, like an organism where single parts cannot save themselves while every other part degenerates.

How to face the problem of finding global solutions with so many different counterparts involved?

There is, first of all, a problem of timing. We need quick answers. But quick answers are very difficult to reach, given the complexity of the world scenario. Such a complexity is also due to another factor. We are not dealing with individuals or with groups of people. We are dealing with institutions. Institutions are legal entities. They show the rigidity and the path dependence typical of the legal order. And that makes the timing and the process even more difficult to deal with.

There is a global problem. The global problem has to be faced by trying to find a balance among contrasting interests. The goal we have to reach is a common goal, but in such a process each player acts in its own self-interest. A cooperative solution of the game is then extremely difficult to find. Just take China and the US, respectively the emerging and the declining major players in the global scenario. Do they have conflicting interests? They are both superpowers and they are not ready to give up on each other's requests. China is a great producer and exporter. It owns over 1/3 of the American Public Debt. Such debt - denominated in dollars - is deflating very quickly. China is going through a very intense, fast, difficult and highly unsustainable process of economic growth.

If it slows down it will have to face serious problems. Thus is not ready to reduce its carbon emissions and to lose on the value of its foreign assets and reserves. So it is in its self interest to sustain the unsustainable US economy and not to accept new and sound environmental regulations. The interaction between China's overproduction and US overconsumption is the Gordian knot that must be solved with the maximum urgency. How to solve this knot is made difficult by the very different situations in the world scenario and by the lack of a credible space of political mediation between such interests. There are rich countries and poor countries. There are rich people in poor countries and poor people in rich countries. There are poor countries with rich natural resources and rich countries with little natural resources. This makes the global picture extremely complicated. Financial markets are dependent from this framework and speculation thrives within it.

Some countries were for many years closed systems. They were not part of the global game of financial capitalism. Think of China or the former Soviet Union. The opening of their frontiers to capital provoked a great shock to the global balance, both in the financial and in the international trade systems. Speculation increased its business opportunities.

1.4 Today it is universally accepted that a monetary policy is indispensable, and that "money" is needed which is quintessentially "public" – i.e. which is not bound to any automatic market determination.

Seldom is it considered that the only monetary system wholly consistent with a pure market economy would be a system that fundamentally prevented any monetary policy. In fact, to avoid any intrusion of an extra-market public power in the (private) arena of trade, "money" should be inexorably bound to a commodity whose price is market-determined (Schumpeter, *History of Economic Analysis*).

However, even in those countries most informed by a fundamentalist market ideology (e.g.: US & UK), at least since the 1929 crisis nobody - apart from Hayek in his *Denationalization of Money* - has ever doubted that due to the inevitable imperfection of markets the production of money must be conferred on a "public power" whose discretion makes it possible to suitably administer "liquidity" and "lending of last resort". Nor has anyone ever doubted that this necessarily public production of money could – and often should – have a major effect on the redistribution of wealth.

Of course, insofar as a monetary policy is confined within the power boundaries of the public producer and administrator of money, its redistributive effect on wealth will be understood as politically legitimate. In fact, being the "absolute proprietor" of its own assets, a sovereign

community is entitled to have the "last word" on the allocation of those assets even by contradicting the market's "first word", either by means of taxation or through monetary policy proper.

However, when monetary policy wants to go beyond the boundaries of the nation-state to the "external" level of the international community, a radically new situation will arise which presents a dichotomy. On the one hand, international money with the same qualities of national public money is required to permit an international monetary policy able to determine "international liquidity" and "international lending of last resort". On the other hand, the nonexistence is acknowledged of a sovereign power with international political legitimacy to have the "last word" on the allocation and redistribution of global (non-national) assets.

Bretton Woods (1944) was the first attempt at a "world monetary constitution" to find a solution to the above-mentioned dichotomy. Its main characteristics are well known: on the one hand, (i) the exchange rate of all the currencies of the over 100 Bretton Woods countries is in some way tied to the US dollar, and (ii) in its turn, the US dollar is tied to the value of gold; on the other hand, to compensate for these unbending ties, (iii) two crucial powers were recognized to a supranational institution (IMF): a) a limited power to give credit in case of a country's non-structural imbalance of payments (i.e. when the country's lack of liquidity is not matched by its insolvency); and b) the power to re-establish the country's exchange rate in case of structural imbalance of payments.

The rationale behind Bretton Woods was: on the one hand, a common rule of law was established which applied to all the currencies in the world, including the hegemonic US dollar; on the other hand, the managing power of the IMF guaranteed a certain flexibility to the system. The external boundaries fixed to the exchange rates (eventually tied to gold) and their public and supranational management should have guaranteed the achievement of both the opposite goals of the stability of the international monetary system and the autonomy of national macroeconomic policies, and the IMF should have become the legal and political center for those goals to be achieved.

However, Bretton Woods presents an international monetary system which is actually separated from the financial system (Gilpin, *The Political Economy of International Relations*), with an international "public" money which is coupled by national "public" finance. In a global regime that did not allow for free capital mobility, each sovereign community enjoyed a certain macroeconomic autonomy – including an internationally controlled autonomy in monetary policy - while world trade could enjoy the benefits of a stable monetary system.

From the first half of the 1970s Bretton Woods was formally and actually demolished. Two key events took place in this respect: (i) the US unilaterally terminated the dollar-gold convertibility (1971-1973); and (ii) capital mobility was progressively freed worldwide, starting from US and UK

in the 1980s, and spreading to the whole world by the end of the century. These two events successfully undermined the "global political pact" signed at Bretton Woods under US hegemony but in a bipolar world.

1.5 Excesses of unregulated liquidity originated in the 1970s. They were a consequence of the oil crisis and the abandoning of the gold standard. They were exasperated, in preparation of the end of history by the IT revolution, the WTO system and the opening of new market frontiers in the East.

The long phase of high liquidity on the global markets has its origin in the 1970s, with the birth of the petrodollar and Eurodollar markets as a consequence of the unilateral abandoning of the gold standards which made the Bretton Woods system collapse. It was the first case of the creation of very large amounts of capital moving freely, with no control from the system of national central banks. The petrodollars were financial instruments which were created in order to buy oil in a period of very high oil prices and double digit inflation.

The "emancipation" of the dollar from any external ties gave the US what De Gaulle happened to define as an "exorbitant privilege", created by the combination of the initial Bretton Woods power to produce the money used in the international trade with the after-Bretton Woods freedom from international limits to that power. Today, unlike any other country, the US enjoy not only a complete freedom as to economic and monetary policy which has allowed them to flood the world market with inconvertible dollars, but also a complete freedom from controlling their balance of payments and ultimately their public debt. In terms of real economy, today the US can purchase goods and services from the rest of the world by giving in exchange a mere "promissory note" that will be honorable with other promissory notes *ad infinitum*. Basically, since their unilateral violation of the Bretton Woods agreement, the US cannot be insolvent, and do not have to care about the amount of their public debt. This new regime of *fiat money* is internationally tantamount to a transformation of the *rule of law* into the *ruler's law* (from *imperium iuris* to *ius imperii*).

Thus, when the oil crisis was over, the liquidity created did not disappear. Rather, it remained in the system of the richer national financial markets and it was mostly invested in their economies. Around such a massive amount of liquidity flowing around the international financial system a wide movement of currency speculation also began. To protect the stability of the monetary system at the beginning of the 1980s, the European Community began to work on the building up of the European Monetary System (EMS). The Maastricht Treaty represented the birth of what ten years later became the Euro system – a common monetary area with a common currency.

While monetary deregulation freed the US dollar from any external discipline - more clearly showing a function that has less to do with "markets" than with "power" - the deregulation of capital mobility and the consequent creation of global financial markets closed the circle. Huge amounts of freely mobile capital are now able to alter considerably the power relations between dominant and dominated economies, exposing even healthy dominated economies to monetary pressure and speculative attacks that can greatly modify the price of their primary goods and supplied labor.

Therefore, monetary deregulation and free capital mobility are two sides of a coin that during the 1970s and 80s transformed a global regime of (though weak) world rule of law into a global regime of monetary and financial imperialism masked by the ideology of a market economy which has been denied and contradicted by the actual behavior of hegemonic countries.

In other parts of the world global liquidity became the engine for sudden and fast economic growth. From the late 1970s China started to change its economic system, open up to trade and foreign investments, and grow very rapidly. In 1989 the Berlin Wall fell and another huge economic area was rapidly transformed into a market economy increasing the size and imposing new equilibriums to the global market. In 1995 the WTO trading system was established and the international trade increased very strongly.

So the entire world economy experienced major changes and fast growth due to the huge amount of money which was artificially created in the financial systems. In the 1990s a massive process of privatization all over the world increased the size of Stock Markets, thus producing further "materials" for financial growth. Households' savings were attracted towards the capital markets and away from government bonds. The fiscal discipline of the European Treaties and the competition policy implicit in the Euro system greatly increased the size and power of the private sector. The European model of mixed economy and welfare state – which had worked very successfully for over thirty years – started to be gradually put under attack thus weakening the only alternative model to the Anglo-American financial system left after the collapse of realized socialism.

In the meanwhile, new information technology (Internet) allowed for the globalization of the financial markets. The equity shift transferred into the hands a few ever larger financial institutions huge amounts of money. Financial arbitrage, also due to very low short-term interest rates in some region of the world (notably Japan), increased the creativity and speculation of financial institutions throughout the global system. Derivatives ceased to be useful systems of risk insurance and spread. Paradoxically, together with innovative financial products, they became the chips of a gigantic international casino.

Two were the principal distinctive features of this process. First, the global financial system was greatly independent from the control and regulation of national central banks. Second, the system was producing liquidity endogenously, like a snow ball. Since the liquidity given to creditors was smaller than the liquidity in the hands of the lenders (due to derivatives and arbitrage between short-term and medium and long-term durations) this unsustainable structure was made possible.

Such system was for over 15 years apparently beneficial to the economy. The people from the richest part of the world were able to buy goods and services (thank to the low cost of debt) from producers which could export goods and services at low cost (due to the exploitation of labor). This mechanism characterized the relationship between China and the US. But almost everywhere the richest citizens of the world could take advantage of the poorest. This pattern of post-colonial exploitation was somehow hidden by mainstream economists because countries like China, India and many others, could grow fast since they were importers of Western technologies. Even Western high-quality products in export-oriented economies such as Germany could take advantage of this feast, satisfying the doped consumption habits of increasing numbers of the very rich elites from regions fully included in the global economy who were capturing the sudden growth (Russia, Gulf Countries, Far East, Latin America). In fifteen years the world GDP doubled, producing an increase of the wealthy worldwide – from 600 million to 1,300 million - and a dramatic increase of the poorest.

1.6 In a long-term perspective cash injections in the system are like giving more drugs to an addicted patient. Cash injections are just bad policy driven by the very same interests that the law must tame.

Current crisis figures are quite dramatic: global financial markets have collapsed pulling into the panic the entire global real economy, and several billion dollars have been spent by some Western Governments and some international institutions in the attempt to save what is still possible to save. The US alone have approved several plans to bailout banks and buy toxic assets for a total amount of around five to seven trillion dollars: a huge amount of money, which, according to the followers of "business as usual", could re-establish confidence and let things restart smoothly.

Yet, once we compare them with the figures of the global financial markets, we will realize that these efforts, even assuming their good faith, are no more than grains of sand compared to the global financial markets and the global financial actors that the last twenty years of globalization have created.

Globalization of financial markets is a trend that is often discussed but rarely quantified. Although it is quite hard to have updated and global data concerning the size of the financial markets, it is

enough to give a look to 2006 figures to realize why the current meltdown is spreading its effects all around the world and so deeply: less than three years ago the total value of the world's financial assets intermediated through banks and securities markets reached $167 trillion, with a daily trade of $1.5 trillion, fifty times more than the export of goods and services, which annually totaled $6.1 trillion. And the relation will be the same if we compare the size of the global financial market with the global GDP: in 2006, more than seventy countries had financial assets that exceeded the value of their GDP, while the value of the assets traded in the markets and by official intermediaries was around 3.5 times higher than the global GDP.

If we consider that all these already astonishing figures do not take into consideration private markets, which include all the trades in assets that do not take place in regulated markets or do not pass through official intermediaries, and which were the first pillar of the system to collapse, we can easily understand why the financial meltdown immediately affected the real economy. Even if it is not easy to calculate the amount of this parallel and unregulated market, a recent Report (McKinsey 2006) estimated that it could amount to $477 trillion. Financial markets are a powerful giant with no rivals, especially if they can freely flow without impediments.

The growth of cross-border capital inflows and outflows is what better represented the new chaotic world, and took us to the situation we are living in. Without considering the flows of capital toward offshore centers, and without looking at the movements in the parallel private market, which are impossible to estimate, the 2006 annual value of such cross-border capital flows totaled $8.2 trillion – three times more than the level in 2002 and 2/3 than the annual global GDP - while the world's outstanding stock of such investments reached $74.5 trillion - a huge amount of money that freely moved from one country to another thanks to the removal of capital controls.

1.7 The uncontrolled growth of their public debt allows the US to redistribute the world's real resources and assets in favor of the US economy, through a policy whose logic is purely national.

For a hegemonic country the inconvertibility of money is tantamount to being freed from the budgetary limits of an ordinary debtor. Inconvertibility of money and unlimited freedom to get into debt are two sides of a coin that is in radical contradiction with the "market": (i) inconvertibility of the US dollar, (ii) growth of the US public debt, and (iii) redistribution of the world's assets in favor of the hegemonic nation by means of public expenditures are the three modes of the structural and constant obstruction to that "efficient allocation of resources" that the "market" should be promoting on a global scale. It is thanks to the US self-granted "monetary immunity" from any supranational *ius gentium* that emerging economies are forced to accept

promissory notes (inconvertible dollars) in exchange for real goods and services, and that the US can force the rest of the world to subscribe their public debt securities. In fact, since the US dollar is the worldwide accepted money in the international trade, emerging countries are forced to maintain monetary reserves in US dollars to protect themselves from world trade risks. Given that these reserves in inconvertible dollars do not yield any interest, emerging countries are then forced to buy US treasury bonds. This way, the US finds itself in the enviable position of a debtor that can dictate rules to its creditors. Thus, the US is at the same time the debtor and the arbitrator of the debt's value, in spite of any feasible credit-debt state of affairs which is assured by the existence of a third impartial guarantor.

Freedom from external control has allowed the US to "live beyond its means", i.e. to adopt a model of "growth without savings". Only, this protracted US imbalance of payments was eventually painfully paid by the rest of the world through the inevitable global financial crisis. Life beyond the hegemonic nation's means was made possible by breaking the Bretton Woods monetary agreement, which in its turn produced a distortion in the way world prices of goods and services are fixed (in US dollars). This distortion, while challenging the overall rationality not only of world trade prices but also of the value (in US dollars) of financial activities, successfully supported the excessive life style and expenses of the hegemonic nation. Consequently, there appears to be a close link between the monetary imperialism established by the US in the 1970s which ultimately resulted into free capital mobility and the current monetary and financial "bubble".

1.8 Free circulation of capital outside of any form of public control leads to unsustainable speculation. Binding restrictions on such free flows are necessary, urgent and comparably simple measures to be taken.

What the 1997 crisis taught, and no one learned, is that an explosive growth of cross-country flows increases volatility, which automatically raises the risks of long-term investing, creating the perfect incentive for investors to undertake short-term projects, then in turn contributes less to productivity growth than long-term investments, and is not able to stabilize unstable economies. Thanks to new technologies, the cost of cross-border trading has fallen to a fraction of what it was only some years ago, while the liberalization of markets has done the rest of the job: money can be poured into a country suddenly and rush out just as fast, and whoever does not have the chance to ride this fast car can only sit and stare at the ruins left behind.

In a 1997 conference, the South African President Nelson Mandela said that "the same mobility of the capital and the globalization of capital and other markets make it impossible for a country to pick up a national economic policy without taking into consideration the possible reply of the

markets". Globalization of capital has created a strict relationship between all the countries of the world, making it easier for wealthy investors to look for high yield in "emerging markets", and making the latter more and more dependent from the former, because no long-term investment is ever pursued. In such a scenario, and given the size of the financial market, how could a country (with the exception of the US) decide to fight against it? How could it spend reserve money and increase the public deficit? How could it challenge a system that wants a free market that regulates itself? A few seconds after, foreign investments would be withdrawn, and the country would find itself dried up and abandoned, incapable of dealing with its future, mainly because nothing has ever been planned to last until the future. This is not only contrary to the idea of the autonomy of countries, but to the principles themselves of sovereignty and democracy: financial markets are not only a question of money, they are a question of power, and nowadays they have too much power.

1.9 Environmental primacy and global welfare are the values that must guide a global economic constitution to overcome the lock in.

If we tried to understand the changes in the prices of bread, wheat, or rice, just by looking at the producers or at the distribution chain we would be mistaken. We are back to the original problem. The world is one and its size is limited. The growth of population and the rapid changes of its needs due to expanding consumption produce great imbalances made worse by financial speculation on the price chain.

Of course, the poorest people are the ones to suffer the most. But the rich countries are those that have the power. How are we going to find a balanced solution?

Every actor should be pushed to think in the long term. Resources are scarce and the world population is growing too fast. Environmental balance is an essential element of the survival of humankind. Will this be a sufficient incentive for the rich and powerful to begin the ambitious path towards a global economic constitution - a process that necessarily limits imperial ambition and sovereignty? And what should the fundamental ideas be around which to invite countries and people to sign in this process?

In the second half of the 19th century welfare state regimes were dominant in Western Europe and in many Communist countries. Then, at the end of history a global authoritarian model called corporate financial capitalism took over in a political and cultural revolution. In less than twenty years such transformation commodified human experience to a large extent and exported organized exploitation worldwide with the help of a thriving western-centric intellectual industry grounded in the short-term arrogance of mainstream economic theory. We should reverse this

trend and propose this reversal as the platform for a global economic constitution. The protection of the environment and *a public-minded universal welfare system* might thus become two leading values of the new humanism around which a global constitution should be drafted and signed by all nations of the world.

1.10 Discrete recognizable political choices have freed the wild beast of finance. Regaining political control over global financial and economic speculation is the ultimate aim of any attempt to use the law. A new international monetary system is urgently needed.

Over thirty years of accelerated exploitive economic growth followed the crisis of the Fordist model of production in the late 1970s. The new highly unsustainable pattern of accelerated exploitation was the consequence of the aggressive global expansion of unregulated financial capitalism. Many new regions of the world experienced such growth, with the consequent rise of the already discussed global unsustainability. At the same time, such growth excluded in terms of number of individuals a great majority of the world population. A growing number of people were left behind in rich countries because of the dismantling of welfare institutions.

A world market where prices of goods and financial activities can be freely manipulated either by the hegemonic country or by the hegemony of speculation will always be exposed to global crisis. Reforming the international monetary system entails an agreement involving all the main stakeholders (US, China, EU, Japan and other economies). This agreement must be on the overall allocation of global resources and assets (technology, land, labor), and must re-establish external boundaries to the production of "world money". These supranational legal boundaries must offer a solution to the dichotomy between international monetary stability and necessity of flexibility in national and regional economic policies. While this time we cannot resort to rigid or automatic limits like those that gold used to provide, the current monetary anarchy must be fought, which only masks a law of the jungle where the strongest prevail and the international community languishes.

Possible measures are: (i) A re-evaluation of the IMF as the core of a world central bank (as recently desired by both high representatives of China Central Bank and distinguished US economists). (ii) The institution of a mandatory supranational standard formed by regional currencies, including the US and EU currencies and a future (and futuristic) Asian currency. (iii) A new separation between a world currency that works only as a universal monetary unit of account (to be used by law in all international contracts and all transnational corporations' budgets) and a few regional currencies that work as actual "exchange intermediaries". (iv) The simultaneous

institution of a supranational authority (representative not only of the world wealth but also of the world population) with the power to determine on a current basis the exchange rates between the universal monetary unit of account and the actual national currencies. (v) An international agreement on the public debt of each country that while fixing rigorous limits allows for some flexibility in national economic policies.

While many are the possible tools for a monetary reform, they only have one goal: the establishment of a rule (*ius*) with which the whole global community must comply (including the strongest countries), which defines a link between the level of life style and the living means available to everyone.

In consequence, it is necessary to imagine the ways to pass from the ruler's law (*ius imperii*) that produced the current global crisis to a rule of law (*imperium iuris*) capable to re-establish a fruitful international co-operation.

Of course, we do not think that the world communities will comply with the monetary *ius cosmopoliticum* out of human righteousness and spontaneous preference for the "just" against the "strong". Nonetheless, we do believe that if the "strong" do not become more "just", they will eventually lose their strength.

1.11 Drastic steps to remedy unbalanced wealth distribution are needed even in the self interest of rich countries as admitted by institutions such as OECD, IMF, WB, WTO and ILO.

Wealth distribution is an indispensable starting point to rethink the concept of human development in the 21st century, as global imbalances are widely considered to be major factors behind the current economic crisis. There can be no dispute about the extraordinarily high levels of global inequality, which imposes a deep and serious analysis on the link between globalization of capital and its impact on the workforce. The global pattern of subordination of labor to capital is unsustainable and seriously impacts both developing and developed countries. In poor countries, the high unemployment rate puts the whole local workforce at the mercy of global capital. In rich countries, Western Europe for instance, wage moderation follows - despite the rise both in inflation and productivity - reducing purchasing power and creating increasingly insecure employment conditions.

This situation has been deemed problematic by all international agencies including those that are responsible for the policies that have mostly produced it. Considering the trend of the past decades, the OECD underlines that the gap between rich and poor and the number of people below the poverty line have both grown, and the increase is widespread, affecting 3/4 of OECD

countries. As regards the proposed solutions, both the WB and the IMF consider redistributive policies as a way to improve the income distribution in member countries. On the same line, the WTO underlines that the strength of the poverty-reducing effect of trade appears to be country-specific and will to a large extent depend on the policies accompanying trade reform. In its turn, the IMF stresses the fundamental role of income distribution in the achievement of social fabric and sustainable growth, as growth in the context of high income inequality is not likely to have a large impact on poverty reduction. Thus, the IMF promotes public subsidization of basic social services such as education and health, and specific targeted subsidy and transfer policies to increase consumption of the poorest groups and public works schemes to supplement incomes, with particular attention to the rural areas; moreover, during periods of macroeconomic instability social safety net programs may provide assistance to the non-poor that have fallen into poverty.

The WB asks for both theoretical rethinking ("global thinking") and practical action; the core objective is the achievement of "global progressivity" through the regulation of global transfers, the institution of a supranational taxation authority (with grants focused on Africa), limited country sovereignty with regard to the use of funds, transfers no longer from state to state but from global authority to citizens.

Regarding the increasing and irrational abyss between median workers salary and CEOs, the ILO underlines that such income inequality is both socially harmful and economically problematic, since it brings about escalating social conflict and makes low-income families likely to become increasingly indebted in order to fund their housing investment and consumption decisions.

To summarize the evaluations developed so far, the essential point that emerges is the ill-conceived nature of an answer limited to injecting money into the economy: an effective increase of equality in the distribution of wealth has to pass through a structural reconsideration of economic core principles, to make them compatible with social justice, equity, stability and sustainable long term. The only way to achieve such goals is to rebuild the hierarchy of fundamental values and institutions that are the basis of civil society: the primacy of politics and law over economics; that of real economy on finance; the primacy of real needs on consumption and accumulation.

1.12 *Thirty years of massive financial deregulation have produced results that must be redressed immediately. Wealth redistribution from the rich to the poor through the political process and the legal system cannot wait much longer. Structural limits must be set to avoid unsustainable injustice.*

Special attention must be dedicated to the ratio between median workers salary and CEOs in major industrialized countries. In the US in the period between 1980 and 2003, CEO compensation had a six-fold increase (attributed to the six-fold increase in market capitalization of large companies during that period, as well as to the explosion of stock-option compensation). Between 2003 and 2007, US executive managers' pay grew in real terms by a total of 45%, compared with a real pay increase of 15% in the case of the average executive, and less than 3% for the average American worker. Hence, by 2007, the average executive manager in the 15 largest US firms earned more than 500 times the average employee ("only" 300 times in 2003). Similar patterns can be observed in other countries such as Australia, Germany, Hong Kong, the Netherlands and South Africa.

All the studies conducted on the issue underline the discrepancy between how companies perform and what remuneration and bonuses CEOs get (a clear example of it is the case of AIG's bonuses). On this point, we may conclude that a stable and significant relation between pay and performance has yet to be established; where such exists, it may be expected to be country-specific, depending largely on a country's economic, institutional and cultural peculiarities. Even if such a relation were established the salary gap would still be abundantly questionable both on moral grounds and on overall sustainability.

1.13 Powerful pseudo-scientific and self-serving rhetoric has accompanied and facilitated this state of affairs. Wrongdoing individuals and institutions are part of the problem and cannot be expected to help in the solution.

The dominant rhetoric of global competition has produced vague concepts such as market flexibility and competitive performance to justify social uncertainty, lower households saving rates, and greater economic disparities. From the late 1970s capital has been thus justified by the economic mainstream in its relentless increase in its share of the cake of production and economic wealth at the expense of labor.

In the last three decades with the acceleration of globalization social and economic disparities have greatly increased, which is true of those related to the Indicator of Human Development proposed by Amartya Sen and recently introduced by the WB. Thinking of labor as a commodity rather than the core of human dignity and a crucial element of a well-balanced and peaceful

community is perhaps the single most dramatic ideological mistake that must now be relentlessly challenged. It is the law that should not allow labor to be considered just as any other commodity in the productive process.

1.14 The outstanding debt of all poor countries must be legally analyzed and evaluated according to ordinary private law principles. Cancellation of most of it will be a necessary consequence of analyzing it according to the "general principles" that are already a source of international law.

Among the enumerated sources of International law (Art. 34 of the Treaty establishing the International Court of Justice) we find the common principles of law recognized by "civilized nations". Such principles support the argument that the outstanding debt of poor countries is in most part not due since it was contracted in historically unconscionable conditions produced by past colonization and by sudden withdrawal of capital after decolonization. Hence, cancellation of most of the poor countries foreign debt would follow from plain application of legal principles which are already part of international law.

Some debts and loans were knowingly given by lenders to dictators or oppressive regimes (the so-called odious debts). In certain cases, lenders knew that money was going to be stolen through corruption. Certain payments refer to loans contracted to finance projects that failed because of bad advice or incompetence by the lenders, or had a dramatic impact over societies, environment and employment. Some debts were contracted with unfair terms, such as very high interest rates. Very often debt is contracted to repay other debt (the debt trap).

The Paris Club and all the other States that are in credit with developing countries must renounce their credit. At the same time, it is necessary to analyze all other credit by public and institutional actors, so as to stop non-legitimate credit like that granted to Sudan to buy weapons. The same applies to debts contracted with the lender knowing that there was a high probability of default, as in the case of those contracted with an interest of 150% by the Russian Government in the 1990s.

Most of the poor countries have debts with multilateral institutions - in particular, the WB, the IMF, and other regional development banks like the African Development Bank and the Inter-American Development Bank. However, the total share of credit owned by these institutions represents only 27% of the entire debt of developing countries, while commercial or private debts account for 52%, and bilateral debts (government debt held by another government, especially export-credit debt) for 21% of the total. Hence, a global debt policy should not only focus on the debt owed to multilateral institutions, but also on the debt contracted in bilateral agreements or

owed to private creditors. Particularly, the practice of vulture funds must be forbidden: these are private funds that acquire credits from countries and act against debtor countries in order to obtain the money and the due interests. To date, the international program for debt relief has brought to the cancellation of $88 billion through the HIPC (Heavily Indebted Poor Countries) and the MDRI (Multilateral Debt Relief Initiative). Both these plans that are run by creditors are not open to all the countries that face external debt, do not take in consideration the fundamental reasons supporting debt cancellation, do not take into consideration the injustice of the burden of the debt and the problem with odious debts, and have harmful conditions attached, such as inequitable reduction of public expenditure or privatization of national industries. This scenario is arbitrary and illegal. The solution to the debt problem is an integral part of any global attempt to put finance under some legal control.

1.15 Canceling the debt of poor countries costs a fraction of the current cash injection in the financial systems operated by rich countries.

In the Gleneagles meeting of June 2005, G8 countries agreed upon canceling the debt of the 18 poorest countries in the world, 14 of which are African. To date, this pledge has not yet become reality. Currently, a wider cancellation is urgently needed to release funds in developing countries, which can be used to approach the crisis providing some social protection to the most vulnerable as is being done in the North.

In 2006, the debt contracted by developing countries was calculated at around $1.5 trillion, around 20% of what the US have already planned to spend to re-launch their internal economy. If we considered the amount of money poured in the Western countries by governments and the global debt of developing countries, we would find new evidence that throughout economic history those who succeeded economically kicked away the ladder beneath to prevent the others from scrambling up behind. This attitude should be exposed and rejected. In the 52 poor “Jubilee 2000” countries, a total of 1 billion people bear a debt burden of £286 billion, which is less than the total net worth of the world's 21 richest individuals.

1.16 Debt is more than an economic fact. It has a direct effect over public expenditures and people’s quality of life.

Extrapolating from UNICEF data, as many as 5 million children and vulnerable adults may have lost their lives in sub-Saharan Africa as a result of the debt crisis since the late 1980s. The UN fears another 3 million children will die in the poorest countries of sub-Saharan Africa by 2015 - the target for Millennium Development Goals to cut poverty by half.

In this crisis, the developing world did not cause the problem. Bankers in developing countries were not lending irresponsibly to mortgage holders who were unlikely to meet their repayment obligations. The same reckless lending that created the developing world debt crisis in the 1980s is also behind the current financial crisis. The difference between the present and the past is that the entire world is facing a debt crisis, but there is a striking contrast in policy responses. While developing countries were left to suffer for decades, and are still left in the same situation notwithstanding the global character of the current drama, trillions of dollars have been pumped into the markets and to bail out banks in recent months. With traditional sources of finance drying up, export markets collapsing and a range of other economic impacts, the threat of a renewed debt crisis is very real (Jubilee 2000, A new debt crisis, March 2009).

The economic and financial effects will make it harder for some countries – especially those most dependent on exporting to developed economies in deep recession – to service their debts. They will simply have less money in the bank to pay out. Developing countries have contracted $660 billion short-term loans with a repayment date of one year or less: if any of these countries find themselves unable to repay these debts, they will have to look for refinancing or restructuring, options which not only are extremely difficult in a situation of global credit crisis, but which could force developing countries to accept “conditionalities” and high interest rates attached to these loans.

It is essential that apart from the debt relief, developed countries continue making progress towards giving 0.7% of national income as aid. New debt cancellation must be counted separately from donors’ aid commitments. This has been ratified in the Monterrey Consensus as principle of “additionality”. Countries should keep giving money, but in form of grants and not loans, and without inequitable conditionalities attached.

1.17 Not only legal and moral obligations but also self-interested long term political and economic reasons point at immediate debt cancellation as a pre-requisite to a sustainable international policy.

Because of the predatory nature of current debt situation, econometric studies show that a reduced reliance on external capital (including both equity and debt flows) is linked to higher economic growth, which collides with the standard view in most development and academic circles that access to external resources is a necessary condition for igniting growth in poor countries. This is, for example, the ideological starting point of the Paris Club, which claims that as debt results directly in future obligations for the borrower, this makes it necessary for the borrower to make sure it will, in the future, be in a position to repay its debt, notably through an

efficient use of the loans, in order to generate income that will be used to repay the debt. This is why debt is often considered as a development tool.

On December 31, 2007, the total debt of developing and emerging countries was estimated by the World Bank to be $ 3,357 billion, 52% of which are public and public guaranteed, while 48% is private debt not guaranteed by States. Of these, $660 billion are constituted by short-term debts already matured.

The role that multilateral institutions can directly play toward debt relief is small compared to what they could indirectly do by acting on the debt that poor countries "owe" to private creditors. Every year low income countries, the poorest of the planet, spend $34 billion in debt service. This is mainly the consequence of the debt trap, due to which very often governments have to borrow money (usually through short-term loans), in order to pay back previous and bigger loans. It has been calculated that developing countries spend $1.3 in debt services for every $1 they receive in grants. It is enough to think about Nigeria, whose original debt was around $5 billion, has paid about $16 billion, and still owes $28 billion. This can be seen in the case of Argentina, that before defaulting had an international debt that reached around $128 billion (2001), and normal interest plus premium amounted to $27 billion a year: the IMF offered a $20 billion bailout loan, which not only would have not solved the problem, but it would have increased the debt of the country.

The development of social capital is the most important form of long-term strategy to reach sustainability. The World Bank has calculated that with $ 10-15 billion per year during 15 years, it could be possible to grant the first cycle of education to all the children of the world. Compare this with the numbers offered before. One study of 10 African countries found a 40% increase in education spending and a 70% increase in health spending after just four years of debt relief. A study by the IMF economists in 2006 confirmed again that cutting poor countries' debt payments has a "significant" impact in terms of increasing social spending.

The increase of social spending is the only plausible solution to keep poor people from increasing their desperate attempts to reach the shores of the wealthy countries. Such desperate attempts are currently conducted with the humble attitude of searching some rescue and human understanding. Soon enough in even more desperate economic conditions might become a well justified hostile assault to the rich.

PART II

BEYOND THE END OF HISTORY,

ASSERTING THE PRIMACY OF THE LAW OVER ECONOMIC POWER

2.1 The United Nations offers the basic institutional structure to negotiate a Global Economic Constitutional Treaty. It has jurisdiction to do so. The General Assembly, comprised of 192 States, is the most legitimate body currently available to initiate the process.

Due to post-World War II origins, the main purpose of the UN is to "to maintain international peace and security", but we cannot overlook article 1.3 of the Charter, which states that one of the goals is "to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character". The broad nature of the second "mission" appears extremely important in the current situation of global economic and financial meltdown that undoubtedly represents an economic, social, cultural, and humanitarian problem.

Article 13.1 of the Charter identifies the General Assembly of the UN as the body in charge to "initiate studies and make recommendations for the purpose of: **a**. promoting international co-operation in the political field and encouraging the progressive development of international law and its codification; **b**. promoting international co-operation in the economic, social, cultural, educational, and health fields". The body where all the member states are represented, and where the vote of every country counts the same, could be the place to discuss a new international legal system of the financial markets and a new model of globalization, and it could encourage the creation of a new treaty of adoption of a Global Economic Constitution.

One must recall that the General Assembly does not have autonomous legislative power and its recommendations are not binding. Politics will therefore be the key to their implementation. According to article 18 of the Charter, a majority vote of the present and voting members would be sufficient to adopt in the domain of the economic order a declaration of principles like the 1948 Universal Declaration of Human Rights. To be sure, the issues of effective implementation would remain.

2.2 The United States have Ultimate Control over the UN and they exercise it through economic pressures. Thus, as an institution the United Nations lacks independence.

The paradox of the current situation and the real obstacles that need to be overcome are better shown if one compares the global budget of all the UN's system (estimated in $20 billion), or the UN's current annual regular budget (represented by mandatory contributions covering UN activities, staff and basic infrastructure at the UN headquarter), which has been recently reduced to $1.8 billion after several cuts, with the trillions that have been injected in private corporations bailout programs or toxic assets shopping.

The UN, its General Assembly and its specialized economic institutions could represent the perfect platform to implement public, democratic, and universal policies; yet, a reclassification of their power would be crucial to that effect. It is critical to reform the relationship between bodies such as ECOSOC/UNCTAD and the major powers in global politics and economy – allegedly, the Security Council, and the Bretton Woods Institutions (as well as the WTO).

There is one country which has played a fundamental role in establishing, building and shaping the UN: the United States. This dominant position stems from various factors: first of all the UN was originally the idea of US President Franklin Delano Roosevelt. It was also Roosevelt who suggested granting the veto power to the permanent members of the Security Council, while the US Senate and the US House of Representatives requested by unanimous votes to establish the UN headquarters in the US, and therefore were placed in New York thanks to a donation from John D. Rockfeller Jr.

The UN does not have independent financial sources, but they have to count on dues and donations by the member states. According to the contributive mechanism, every country has to participate to the UN budget. The US is the first contributor, with a share of around 22% of the annual budget that in fact should be higher since they account for about 30% of the global economy, but in 1995 the US unilaterally decided to limit its contributions. Being the highest contributor, the US can use money as a threat, which is exactly what it has done in the last decades as a reaction against the increased importance of the global South.

In fact, for many institutions like the Heritage Foundation, the UN had become the main vehicle to bring about a New International Economic Order (NIEO) that would replace the centrality of the United States and of their development models. Thus, taking advantage of the 1980s debt crisis of many developing countries, and of the structural adjustment programs of the World Bank and of the International Monetary Fund, the Unites States managed to exercise strong pressure over the UN, which, for example, resulted in the dismantling of the UN Center on Transnational Corporations, which had repeatedly accused multinational corporations of the exploitation of

people and natural resources; the abolition of the post of Director General for International Economic Cooperation and Development; the rejection of the program of debt forgiveness proposed during UNCTAD V in Belgrade.

Until now, the US economic power has been used to reduce the political discretion of the UN and impose some specific reforms invariably moving in the direction of curtailing UN power, personnel, and public information expenses by reduction of their budget. As of 1995, when UN officials advocated global taxes to address funding problems created by the huge amounts overdue by the US, the US Congress passed a law stipulating that the US would not pay its dues if global taxes were discussed in any UN venue.

The US is not solely responsible for keeping the UN under economic conditionality. Five other states were behind in their payments in fall of 2005 – Spain, Japan, China, Korea and Brazil - with global states' arrears amounting to 62% of the assessed budget. While some countries simply postponed the payment, others tried to use the economic contribution to achieve political aims, as to obtain a permanent seat in the Security Council. The first consequence of the huge UN credit toward rich countries is the reduction of activity, as demonstrated by the fact that during the two biennia 2004-2005 and 2006-2007, a fundamental branch of the UN, the United Nations Development Program (UNDP) was only able to perform about 20% of its total programmed activities without specific donor requirement. The current meltdown now risks imposing even more severe restrictions, which will ultimately threaten the achievement of the important Millennium Development Goals (MDGs).

2.3 Despite their lack of independence and democracy, the UN is in a comparatively better position to define the basic process leading to a global economic constitutional treaty.

The world is looking for an alternative, with international financial institutions such as the WB and IMF lacking political legitimacy and facing longtime criticism on their conditionality approaches with developing countries and on their general macroeconomic policies which are in part responsible for the current global economic crisis. Such institutions cannot be again the global financial regulators without significant change.

In this scenario, only the UN can guarantee universal participation and acceptance, since they provide the only forum where all states have a say, and - unlike the WB and IMF - a range of more transparent and accountable specialized economic institutions such as the Economic and Social Council (ECOSOC) and the United Nations Conference on Trade and Development (UNCTAD), or the new "Global Economic Council" suggested by Josef Stiglitz's UN advisory panel.

2.4 Both on the financial crisis and on the environmental issue the UN has proved long-sighted in its recent policy-making attempts. Its leadership in the search of a global economic and financial legality should be politically supported both by States and by civil society.

In its 2005 *World Economic and Social Survey*, the UN seemed to be the only "mainstream" international institution to warn against international capital flows. The 2005 report states that while standard economic theory argues that international private capital flows will make a major contribution to development to the extent that such capital will flow from capital-abundant developed countries to capital-scarce developing countries, "in recent years, reality has contradicted (…) this standard theory (…). For the last seven years, developing countries have transferred large amount of resources to developed countries. In addition to this, private capital flows to developing countries are highly concentrated in a group of large middle-income countries and are particularly insufficient for low-income and small countries."

More importantly, the UN report does not hide the fact that such capital flows have undoubtedly increased risks for financial crisis in both developing and developed countries: "private capital flows to developing countries have been highly volatile and reversible; as a consequence, they have been a major factor in causing developmentally costly currency and financial crises. Rather than smooth domestic expenditure, private capital flows seem to have contributed to making it more volatile." Moreover, the global stimulus package should bring no new debt, nor should conditions be attached to grants for developing countries: "Indeed, the package should enhance their ability to choose from a range of policy options including capital controls (which should be "re-legitimized" as essential crisis prevention and mitigation tools) and various counter-cyclical measures (…). This stimulus could also include debt relief from arrears accumulated over the previous decades."

Another positive aspect of UN institutions is their advocacy and implementation of green plans for several years. A very good example is the most recent report by the United Nations Environment Program (UNEP), which suggests that investments could revive the current downturn of the world economy and aid in fighting poverty, decreasing unemployment, and of course brawling climate change. The 2009 *Global Green New Deal* report suggests a total of $750 billion investment in "more energy efficient buildings, renewable energies, better transport, improved agriculture and measures to safeguard nature -- such as fresh water, forests or coral reefs". The report suggests taxing oil as a source for this investment. Countries of the Organization for Economic Cooperation and Development (OECD), which are considered wealthy nations, consume approximately 20 billion barrels a year: any taxing on such countries would go unnoticed, especially after oil prices

went from $140 in 2008 to the current price of $40 a barrel. If one were to put a five-year levy in OECD countries of $5 a barrel, one would generate $100 billion per year. This translates into roughly 3 cents per liter. The report emphasizes that even with all the “Environment Talk” by international institutions almost $220 billion is spent annually on agricultural subsidies while in return a marginal amount is going to reforesting. Moreover, the same amount of public investment is channeled to fossil fuel energy, while in return 2 billion people globally do not have electricity, oil or gas to cook food and provide heat and light.

Publications by UNEP are concentrating on the viability and feasibility of green investment, underlining its employment benefits. Last year, the comprehensive joint report *Green Jobs: Towards Decent Work in a Sustainable, Low-Carbon World”* established that there are new jobs created in many sectors of global economies in both developing and developed countries because of the changing patterns of employment and investment that have resulted from efforts to reduce climate change.

2.5 The initiative for a process leading to global and legitimized economic and financial legality should be placed within the Economic and Social Council.

The United Nations Economic and Social Council (ECOSOC) was originally created 63 years ago as a mechanism for global economic and financial policy-making. ECOSOC was founded as the principal organ to coordinate economic, social, and related work of 14 UN specialized agencies, functional commissions and 5 regional commissions The UN Charter in more than one article (mainly articles 57 and 63) specifies that specialized institutions such as the WB and IMF “shall be brought into relationship with the UN by entering into agreements to define the terms of the relationship, and that ECOSOC may coordinate the activities of the specialized agencies through consultation with and recommendations to such agencies.”, as recently restated in the 2009 *Strengthening the Relationship between ECOSOC and the Bretton Woods Institutions* report.

It is within ECOSOC that a first proposal to review the institutions of the global economy should be advanced, and then presented for debate at the General Assembly. While the UN Charter makes it clear that decisions taken by ECOSOC are not binding either on member states, or even on the specialized agencies of the United Nations System, nobody would dispute a specially granted (and funded) initiative role.

2.6 To be capable of governing the global financial system the law should be sovereign. Sovereign law is a political artifact not a technology.

Urgent fundamental measures such as cancelling the debt or returning to some external standards for currency “only” require some political resolve ultimately by the hegemonic power. To the contrary, a longer-term strategy aimed at developing more stable forms of legal accountability for economic and financial transactions must also face highly complex technical issues. Nevertheless, the technical nature of the legal discourse should not obfuscate the intimate relationship between law and the exercise of political sovereignty.

Very simply stated, any transnational legal regime requires some surrender of sovereignty. Consequently, what is at stake is there is first the political resolve to surrender such sovereignty. Secondly, the issue arises as to what kind of institutional structure is needed to make the best use of such sovereignty surrender.

Significant surrender of sovereignty is not an exception at the end of history. Much of the political transformations that have occurred in the last thirty years can be read as the rise of a corporate power strong enough to dominate even the political structure of the most powerful states. However the kind of surrender we need now must be in favor of some “public” entity capable to produce “law” (legal standards capable of controlling powerful global private and public actors) and which is itself ordered by “law”, in order to be legitimate and consequently effective. What is indispensable for any serious attempt to tackle the crisis is a demise of state sovereignty that does not work as “anti-law” like that of state power in front of the corporation. The demise of state sovereignty we need must be in favor of a public legislator capable to restore the force of law as a limiting device of unrestricted power whether public (like sovereign funds) or corporate.

While there are a variety of technical possibilities to exercise the amount of sovereignty actually ceded by sovereign states in favor of re-structuring a system of global building legality, there is no escaping the fact that such release of sovereignty should be real and that a system must be created to make it permanent. Any possibility of a unilateral exit strategy such as that of the US from the gold standard would make the system utterly useless. Any project of “global standards” that remains merely technical and which is not supported by tremendous political resolve and strengths would only be an unsustainable loss of time and a procrastination of the many urgent problems that humankind has to face. If such political resolve is reached we would then be in front of a process of global legal integration which might have a variety of degrees of depths, from a global economic constitution to the grant of jurisdiction of a court, to more nuanced and creative ideas to make a decentralized system of legitimate “people’s rule of law” emerge (see infra). Yet, we believe, the show of political resolve from the G8 should start from the two fundamental priorities previously outlined (external currency standard and cancellation of the debt).

In the last thirty years the connection between law and political sovereignty has been the object of a sustained attack aimed at the production of an idea of law that is technological rather than political. While it would be beyond the possibilities and the scope of this report to discuss the many strategies and the reasons behind this intellectual transformation, it is crucial here to make absolutely clear that the only kind of law that might serve some useful function in controlling a runaway financial system is one endowed with some global sovereign power that by essence must be political.

2.7 The nature of global law as a space without territory must be fully appreciated before attempting to use it as a solution to the financial crisis.

Global law is a very unfamiliar entity for the traditional jurist. Its peculiarity is not only that the whole world is its territory and that this very territory is "owned" by local political sovereigns each one carrying on local selfish interests. In fact the space of global law goes well beyond the global territory and moves into a non material space. In a sense its relationship with the "real law" is like that of finance with the "real economy". It is not just a physical contested and limited territory. It is a new imagined space. But this new imagined space communicates with the real one and determines its fate.

As in the past with the sea, today's mainstream constructs this imagined space as infinite. Its dimension is determined only by the possibilities of innovation and by the courage of the mariner. The so called economics of innovation, with its deep faith in individual creativity sets the paradigm of this optimistic belief. Be it "financial innovation" so much responsible for the global meltdown, be it "technological innovation" to produce energy, responsible thus far for putting into communication the food market and the energy market, the West seems to believe today in an unbounded future of growth and progress.

This different relationship between humans and the physical limits of the territory is the paradigm of global law: the law is not thought as stemming from sovereignty but rather from circulation.

The history of law offers an example of such a space, widely believed as non territorial and unlimited. The sea is an infinite space beyond sovereign control, an infinite space that allows every form of self-interested activity. A space of no obligation. A space of piracy and plunder. It comes at no surprise that the metaphor of piracy characterized the legal discussion of the global space "par excellence", the Internet.

Thinking global law is a challenge for the legal thought. The latter looses its traditional bearings, its tools allowing it to represent the law. It is in fact tempted by simply and purely projecting the idea of legal system through which we have been accustomed to learn the law. After Kelsen and Max

Weber, the law acquired its rationality as a system of rules, as rules are embedded within one another according to an order lying over a Grundnorm, at the same time foundation and hierarchical principle. Or, this is precisely what we must give up when approaching this global law, i.d. legal exchanges not organised by any system.

Differently from internal and international laws, global law does not posses a vocation to be a system. It cannot be thought as the internal law, and this makes us uneasy. To understand global law we should not depart, as we do for national law, from a "system", trying to master the rules' hierarchy, the Kelsenian pyramid. This is not a temporary imperfection, rather being one of the essential elements of global law.

2.8 The law must gain control of the global space. This is the most important political challenge of our era. There is an apparent tension between legitimacy and effectiveness that can be overcome only by limiting professionalism in favor of politics.

The issue is how to transform this space of piracy, which includes the space opened up by financial innovation, into a space controlled by the law. This is the main challenge for any attempt to use the law including the current hypothesis of global legal standards. As with pirates, the central issue of global law is that of effectiveness of control. It is a prerequisite of control to be able to trace, and to block the pirates in the seemingly unlimited space. Like for pirates, any legal enforcement strategy requires a solid base, such as a port, to be at all effective. And this is the key issue of the relationship between global law and local territorial enforcement that puts the physical limits of space once again at the center of the stage.

Formal organizations seems too ineffective to face the world's economic needs, and the more an international organization is legitimate (formal, transparent, accountable, based on cooperation among sovereign member-States), the less it can be effective; and the more it is effective (informal, flexible, fast, non-accountable, based on multiple, non-State actors), the less it can be legitimate. It is not a paradox, it is a quasi-necessity. The international environment has not found thus far its way to self-institutionalize, other maybe than by uncritical surrender of power to business-dominated organizations such as the WTO.

In such a scenario Global rules cannot be framed in a command-and-control scheme, but rather according to the incentives/disincentives dichotomy. Sanctions change their nature: less of judicial (and then also ethical) ones, more market-like –i.e. using both comparison (ranking, classification) and reputation (naming and shaming, whistle blowing) as forms of soft law. Both these systems

have in common the idea of sanctions refusing political and legal discretion in the enforcement: they must be both objective and automatic.

The users of this global law are not human beings, taken in their whole self, having aspirations and passions, made of interest and altruism, who are both the makers and the subjects of the law. Rather, the users are "professionals", and only their business activity is affected by this law. They are more expected to behave as rational actors, and global law is evaluated positively as long as it facilitates their rational activity.

Global law, in the mainstream vision, should facilitate professional communities, this is why it must be self-imposed, self-created, self serving. Globalization of law is a return to medieval-like "communities", professional or partial ones (and not total, all-encompassing as the Gemeinshaft). The life of those communities of professionals is in contrast to the self-calling " international community" which perhaps does not exist and which must now take responsibility for the global economic constitution-making process.

The political will seems odd within these circles, since it is perceived as an impurity in relation to the objective laws of the economy, which shall regulate the exchanges. The restructuring of the relations between economics and politics is then at the core of the solution of the crisis. Only the restructuring of such relationships can produce an effective decentralized and highly pluralistic people's rule of law.

Such a focus on political effectiveness is in contrast with the idea of universal law, which suffers from the contrary problem, as it is very thick in values but practically does not have institutional strengths. It may enjoy legitimate institutions – such as the International Criminal Court but its effectiveness is a problem. Universal law certainly has a mouth but a mouth with no teeth, speaking a lot but unable to bite.

2.9 At the global level the current dominant vision of the law has denied its political nature and frozen its capacity to work as an effective limit to exploitive growth.

Today the dominant vision of the law is the one created in the global "context of production" of legal ideology, i.e. the law schools and economics departments of the top Western, especially US universities. Here, the prevailing vision of the relationship between law and the economic system has been progressively subverted since the seventies of the last century. In a dramatic break with previous jurisprudence, law should not control but rather facilitate "the market" - an abstraction that nevertheless was capable of grounding the powerful ideology of the end of history.

The new globally dominant intellectual movement known as "law & economics" substituted an ambiguous notion of efficiency for that of justice. It also substituted a vision of law as a system of

incentives for that of a system of binding norms (carrot rather than stick). By so doing, economics - the dominant social science - was able to colonize legal thinking by seducing it with its highly sophisticated mathematical models, which made any traditional approach look irremediably obsolete.

Beginning in the 1990s, by a systematic organizational effort, such vision obtained a significant following even outside of the United States, and became the dominant approach of the International Financial Institutions, thus gaining a major policy impact. The Bretton Woods Institutions were in fact eager to adopt a vision of law as a form of neutral social engineering. The abandoning of the previous notion of an intimate connection between law and the political system allowed them to reach a level of political intervention that was banned by their original bylaws (and by Cold War equilibrium).

Ultimately, the result was the production of an idea of law which shares the universalism typical of economic theory (which is the same when studied in New York or in Bombay), and which is evaluated according to its capacity to prove "market friendly". A "one fits all" ideal type of efficient law whose role is that to "mimic" what an "efficient market" would do in the absence of obstacles to private transactions.

The impact of this conception gaining global mainstream status was the promotion of a seemingly neutral and technical legal apparatus capable to promote exploitive economic growth, often included as conditionality to obtaining grants and loans from the international financial institutions. According to this vision, an "efficient" legal system should facilitate rather than restrict "the market" (i.e. the expansion of the private sector aimed at the commodification of every aspect of social experience). Also, a concrete market in a given context should not necessarily be evaluated in terms of coherence with the values contained in the legal system. To the contrary, it is the legal system's values that are challenged and demoted as "inefficient" whenever not coherent with a simplistic and universalistic micro-economic vision of "the market".

This vision is very problematic and its ultimate result is to promote a legal system that does not bite. This vision is also the vehicle to allow a variety of ideological features and concrete policies (downsizing, outsourcing, flexibility, inefficiency of the public sector, incentive-based CEO compensation schemes, market-friendly tort reform, competition between legal orders, efficiency of soft law, and many others) to gain scientific status and be placed beyond critical discussion. We submit here that these policies are to a quite significant extent responsible for the failure of legal institutions to control the markets and to prevent the predatory economic behavior which was responsible for the crisis.

The very idea of legal standards as proposed today needs to be disentangled from an academic tradition - Law & Economics - whose Chicago-based mainstream contributed from the legal side to maintain the ill-conceived idea that "the market" (whatever this generalization means) is almost always capable to cure itself.

Short-term transaction-based efficiency cannot be a value for a long term sustainable plan to preserve human civilizations, being entirely grounded in western-centric assumptions and in the value of competition and economic performance. Every efficiency standard always makes whoever is willing to pay more prevail in the competition to control and exploit scarce resources. Clearly, willingness to pay is connected to the possibility to do so, with the consequence that it always sides with the stronger economic interest. Thus, the legal system becomes the mere technical backbone of a science of short-term exploitation rather than a complex and culturally specific device by which discrete human societies make their political will binding.
In the struggle to protect civil society from final commodification, such dominant vision of the law should be abandoned.

2.10 The mere substantive dichotomy "standards versus rules" cannot theoretically support the necessity to tackle the crisis by means of the law. Rather, attention should be paid to institutional arrangements.

The notion of "legal standards" is tributary of the jurisprudential approach discussed above. It implies an idea of a legal system that is either unwilling or incapable to make a clear decision of what is to be done in a given concrete-fact situation. Example of a rule is: speed limit, 50 mph. Example of a standard is: drive reasonably.
The idea that legal standards should be used to cope with the financial crisis implies that rules are not necessary or adequate. Nevertheless, one should consider that standards and rules are not substitutes for each other, but complements that reformers should be able to deploy in order to fine-tune legal systems: no legal structure can be based on a single kind of legal tool only. While a standard of good faith can be occasionally sufficient to avoid unconscionable practices (packaging high-risk derivatives as safe saving instruments is done only in bad faith) in certain fact situations clear rules are required (e.g., minimum capitalization requirements). Moreover, certainly standards but to a lesser extent also rules are mere words in need of "institutional interpretation", which implies the need to discuss which institutions, themselves located at a number of levels, should apply them.

2.11 Standards (or "principles") are highly generic normative propositions, while rules are specific. The choice among standards and rules entails important implications on both interpretation and enforcement.

According to the basic and most diffused jurisprudential distinction between rules and standards, rules are very specific normative propositions, applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision. In case of contrast

between two opposite rules governing the same set of fact, one should prevail and the other yield. It is the hierarchical (or power) relationship between the producers of the rules that would decide which one prevails. "Principles" (or "standards"), on the other hand, are highly generic normative propositions, applicable in a more-or-less fashion. They have a dimension that rules do not – the dimension of weight or importance: when principles collide, one who must resolve the conflict has to take into account the relative weight of each. Rules do not have such dimension. Of course, they may tolerate exceptions.

These features of standards and rules entail some important implications with regard to both interpretation and enforcement. Since interpretation is more discretionary for standards than for rules, the former must be interpreted by decision makers endowed with legitimacy for their discretion. Moreover, standards have limited binding power unless they are accompanied by enforcement mechanisms sharing a common culture.

For example, European Community Law Directives set uniform community-wide standards that the member states are free to implement according to their national legal style. Uniformity proved difficult to achieve because of discretionary interpretation in different national legal cultures. It took the relentless (and questionable from the point of view of legitimacy) effort of the European Court of Justice to transform directives into directly applicable rules capable of reaching the desired degree of uniformity. Of course, in Europe this process of interpretive transformation from "standards" to rules did not happen in a vacuum but it was accompanied by quite a substantive effort to create some traits of a common legal culture.

Thus, institutional arrangements such as judicial (or non-judicial) enforcement mechanisms are crucial in order to obtain some interpretive unity and an acceptable degree of effectiveness for legal standards.

2.12 Legal standards should only be adopted with a medium-long-term vision capable of considering a highly pluralistic enforcement and institutional framework. This scenario requires sustained investment in a legal and financial culture up to the task.

The adoption of legal tools for policy reform, and specifically for helping in the solution of the financial crisis, are likely to display even more serious problems than those generated by the plurality of legal experiences in Europe. The deep legal diversity that exists in the world must be considered and respected in the process of drafting (and even further along the line in that of searching for effective enforcement) in order to set a point of discontinuity with the ethnocentrism and the single thought that so far has characterized the relationship between the

local and the global dimension. In fact, effectiveness and implementation are highly context-dependent, which the systems of monitoring should take into consideration. Moreover, global finance is highly sophisticated and difficult to access even for legal culture, so that there will be a need to deploy (and even earlier to educate) a global class of officials trained in both law and finance.

The institutional framework in which such standards are supposed to operate, both at a national and a transnational level, should be carefully taken into consideration when planning their adoption. A mere set of legal standards unaccompanied by an institutional apparatus capable to begin the process to transform them into sound rules for the concrete issues may have some symbolic meaning in the very short term but no effect in the medium-long term. The adoption of legal standards should then be accompanied by a global agreement on which courts or agencies endowed with strong and penetrating supervisory powers should implement them. A strong process of judicial cooperation at the international level should also be favored, which might imply some form of culturally sensitive legal harmonization.

2.13 "Hard law" should be preferred to "soft law" in developing a legal structure capable to govern the market.

To keep the economy under control, law cannot be soft. Either the law is hard, keeping economic transaction under control (and potentially making them soft, acceptable and civilizing), or the economic relationship is hard and keeps soft law under its thumb, determining its form as well as its substance. Soft approaches, whose only power (if at all) is moral suasion, are functional to a legal and economic order in which the market governs the law rather than the other way around. In such an economic order, and under the shield of soft legality, aggressive and opportunistic market actors succeed in externalizing costs to society rather than facing the real cost of their market activity. Thus, in order to be successful, public legal institutions competing with strong economic actors need to be strong and highly effective. The stronger the actors, the stronger the institutions must be if individual or corporate short-term self interest is to be channeled or plainly limited for the welfare of everybody and in the long-term interest of human civilization. The challenge is how to make this hard law legitimate and truly cosmopolitan.

The "hard law v. soft law" dilemma does not coincide with the "standards v. rules" one. Standards and rules are only "words in need of institutional interpretation", which can be regarded as both "hard" or "soft" law depending on institutional arrangements which surround them (for instance, standards are often included in hard codes). What really matters are the institutional structure and the political processes rather than legal tools per se.

2.14 It is useless to create new rules or standards unless the issue of their effective enforcement is fully appreciated and steps are moved to guarantee it. The most urgent issue is returning privatized global rules and soft-law processes under public control.

It is useless to add grandiose declarations or universal principles as not only are they ineffective and often remain dead letter, but also as our existing legal panoply is already coherent. Care shall equally be taken when considering the creation of new instances (whether being international or supranational courts or institutions) which could add even new disorder to the existing system and increase its complexity outside of an overall legitimate general redesign of the system which could only be the product of a quasi-constitution-making effort. For the time being it seems more effective to have the plurality of systems already in place (national, international ones) work better, rather than continuing with the proliferation of systems and rules.

In the past 20 years the economic world has required more liberty, lesser controls, and a right to self-regulation. Political institutions under the pressure of the increasing power of economic actors, have often accepted veritable transfers of sovereignty. All this has provoked a deep "privatization" not only of many sectors of economic life but also of law-making pertaining to those sectors. Real bubbles are impermeable with respect to any institutional control (whether judiciary or political). This phenomenon is very important in the financial domain, and there is the risk of it expanding into other domains of crucial importance for contemporary society such as the one of intellectual property. For some time this process has certainly generated a great economic performance, however, in the long term this system faces destabilization as shown by the current situation. The lack of public controls becomes dysfunctional to the very economic system.

Consequently, the first aim to be pursued is to re-attract these quasi self-regulated spaces within the institutional (national or international) framework of the law.

2.15 The judicial function, even within the set limits of jurisdiction, can help in the global effort to develop established principles of fundamental liability and justice. A cosmopolitan exercise of coordinated judicial authority might facilitate this function.

Global law is very powerful, unnoticeably breeding in its own invisibility: very often it is about very technical, grey rules, not secret but so unattractive that few dare – including amongst the jurists – analyze them. Opacity and lack of transparence, like professionalism, are controlling process granting unrestricted power to strong economic actors. Hence, the importance of establishing

conditions that make it possible to question privatized legal standards and professionalized rules of the game; to force the open and clear formulation of otherwise inaccessible rules, ascertaining their substance, writing down their content, and hounding them out of their technical shelter. All of this requires putting enforcement back in the hands of the people through judicial and non-judicial means.

Global law as it currently stands must be challengeable before public courts, any public court available. This is a crucial condition, as there is more than an abstract risk of "justice" itself sharing the logic of privatization typical of the global economy. The unfolding of a 'global market of judicial services is already a reality, transforming law into a commodity like any other, a mere source of satisfaction for the profit motive. One should beware of proposals attempting to transfer the function of justice to the private sector by means of indiscriminate extension of international arbitration and the related liberal regime of circulation of awards. Globalization changes the nature of justice: if it remains a public good within the frontiers of a State, it becomes a private good in the new "invented space" due to the establishment of a real competitive market for private commercial disputes' resolution.

The legal monopoly of the State (and of political legitimacy) – its *jurisdictio* as much as its *imperium* – is dramatically restricted as the economic actors become masters of their own normative frontiers. It is then essential that the different judicial instances remain accessible for the citizen of the world in order to help developing from the bottom up principles of justice acceptable to all human kind.

It thus becomes crucial to provide access to all stakeholders, opening some forum for (economically subsidized) litigation to anybody potentially affected by acts or decisions triggering the justice motive of the civil plaintiff to react and struggle. Courts must be wide open, granting a path against injustice to everyone's resolve. Too much justice is always better than too little justice especially when sustained quantitative development is not seen as a value in itself. In the invented space of globalization this corresponds to a new use of the law open not only to the parties but to general stakeholders perhaps under liberal rules of of *amici curiae* as it is already the case for important cases of global competition law.

Despite obvious limits in a potential redistributive function, and despite being itself open to the excessive risks of over-professionalizing, and thus of Western hegemony, open jurisdiction displays some cosmopolitan features, being more likely to circulate across frontiers and especially being a partially empty power, i.e. it is filled with the arguments submitted to it. Unlike the executive power, it does not set its own agenda which does not mean it is empty of political bite but perhaps only that the political content of its decisions cuts across political preferences.

Such an expansion of public courts' accessibility to entertain global issues might eventually produce some collective elaboration, resulting from the work of several courts scattered around the globe who concur in defining rules and principles of global decency that reflect all decisions previously taken. This phenomenon, known as "the judges' dialogue", has been visible for several years and while certainly by itself it reflects the class and professional biases of judges, it might nonetheless introduce at least a degree of legal cosmopolitanism if the dialogue is not restricted to Western courts and perhaps even a forum of global legal resistance against the excesses of global capital.

2.16 Ex-post models of accountability for financial damages may be scarcely effective and difficult to organize.

No matter how a legal regime is produced and no matter its content, the issue of effectiveness must be approached. Here a tension immediately originates. On the one hand, a legal regime capable to assert control over our runaway global financial capitalism must be "global" in its reach because transnational economic actors cannot be controlled by means of a "national regime". On the other hand, a global top-down enforcement system is very difficult to conceive, potentially ineffective because of an overreaching global jurisdiction, and bound to reflect dominating value judgments, i.e. those shared only by the powerful policy-makers and their allied corporate lawyers. Too often international law simply fails to constrain the powerful (states as well as corporations) largely because of enforcement systems. We face either the lack of effective courts of international law (there are no such courts in the domain of transnational financial activity) or a failure of the chain of transmission of international law from its sources to the national courts as agencies of enforcement.

True, in abstract one could imagine setting up such a global court system with a broad jurisdictional reach, endowed with some special enforcement mechanisms and perhaps even with sufficient power to maintain jurisdiction over corporate actors. We submit in this Report that the problems that setting up such a system would pose are staggering, to the point of making it utterly unrealistic. To begin with, the setting up of such a system would share all the problems already experienced with the International Criminal Court. The cession of sovereignty and of control of such a system would certainly encourage the stronger global political actors to boycott its functioning. Secondly, even if an agreement would be reached by the strong political actors, a global court system would face tremendous problems created by the Western professional domination over international law, structurally incapable of recognizing the interests of the weaker actors. The very adversarial structure of adjudication understood as a zero-sum game with one winner and one loser is at the basis of some legal experiences but not of others. Moreover,

the alternative to adjudication that has emerged in the international legal practice, the so called *Alternative Dispute Resolution* or *International Dispute Settlement*, displays well identified problems in unbalance of power settings. On top of this, it is very difficult to have a new, more responsible conception of the law emerge from an international body of adjudication or from global rules and principles adjudicated by national courts of law. The usual issues of technical and linguistic diversity would most probably defeat any effectiveness of such standards in practice. Thus, international law for deep structural reasons seems irremediably bound to remain detached from the real life of the people, exposed to reflect the desires of the stronger actors that can afford to hire the skilled legal professionals capable of litigating at this level.

There is another important basic question that a traditional court-based approach to legal enforcement is incapable of solving. Almost invariably in any one of the cyclical financial crisis that seem to affect the expansion of global capitalism, the cages are locked when the animal has already escaped. Courts can react when the damage is already done and most often a non-judgment proof defendant is very difficult to find at that point. Bankruptcy is usually never the solution, being politically unfeasible in many cases (the famous "too big to fail" idea), especially when what follows bankruptcy is widespread unemployment or when a whole state economy is involved. This state of affairs produces tremendous incentives to transfers of public money to the private financial sector in a crisis situation, which in turn is an incentive to crisis-generating behaviors by the corporate management. In other words, courts structurally represent an "ex-post" solution, a liability rule protection that has proved too weak over and over again. Ex-post strong actors can bribe themselves out, almost invariably paying a fraction of the damage they have produced (G. Calabresi and D. Melamed, *Property Rules, Liability Rules, Inalienability*). Thus ex-ante regulation and the logic of authorization for potentially harmful activities are essential to avoid rather than to cure financial disasters.

2.17 Command and Control regulation at the global level may be both ineffective and politically very difficult to implement.

Command and control regulation is extremely problematic at the global level. It is in fact the ultimate example of a top-down political intervention badly in need of legitimacy to be at all effective. In the absence of politically accountable bodies such a regulation is unlikely to emerge, and if it emerges at all its effectiveness is likely to be minimal (think about the many international declarations on substantive rights, which are routinely entered upon but very poorly respected). True, the current "financial emergency" might offer us a "state of exception" capable of producing some global sovereignty, and perhaps the need to cure the global market unbalance (redistribution, balance of trade etc.) might offer some guideline. Nevertheless, technical

problems of such a regulatory model persist. Direct command and control regulation would require the development of a global bureaucracy to monitor it, which is a desirable long-time target in the process of a revamped globalization - but very hard to imagine as feasible at this point.

Some might indicate the variety of "open systems of coordination" explored at EU level as an alternative to global command and control regulation. These methods, despite having originated some hopes in the scholarly community because of the added value of "flexibility", are nevertheless highly at risk of being abused by strong actors. Moreover, the dialogue between very different state-based bureaucracies, already very difficult in Europe, is very hard to imagine at an even broader scale. The very notion of flexibility has to be explored in concrete power settings, and it seems that actual political accountability requires a simplification in decision-making authority rather that a proliferation of regulatory bodies. Thus, while on the one hand the open system of coordination is not centralized enough and disperses responsibility, on the other hand it is not decentralized enough to "spontaneously" reflect the sense of justice of the people and thus be legitimate.

To look for more alternatives capable of implementing an ex-ante control of the financial activity, one should first understand that in the real life of the law legitimacy does not only stem from an electoral process. In many settings today, and generally speaking in the domain of private law, the most important source of law is the "laboratory" of the life experience, the aggregate of relationships that economic actors formalize among themselves producing customs and binding institutional arrangements. This customary law is behind the development of commercial law from the middle ages, and even today a transnational *lex mercatoria* is produced outside of any top-down intervention of the political authority. There is no question that this spontaneous legal order is legitimate and as such corresponds to the broad idea of justice of the economic actors involved. In other words, legitimacy stems from decentralization, from the relational way in which individuals and groups relate to each other in a pattern of trading that in relatively equal power settings is capable of mediating between alternative visions of justice. Such standards of local decentralized justice should be enforced by a bottom-up approach whose effectiveness lies in its diffusion and coherence with the needs and perceptions of the people in the communities. We have called this model the "people's rule of law", a system of effective control on individual economic activity that reflects social justice. To reduce the potential catastrophic impact of individual's financial creativity on the sense of social justice (for example to avoid gambling with retirement assets or people's savings), one need to find an effective professional and decentralized ex-ante control of the legal acceptability of each proposed financial scheme.

2.18 The desirable gradual reduction in dangerous financial innovation can only be introduced with an effective ex-ante decentralized public-minded gate-keeping control.

Since financial creativity at the end of history has created too many tools useful only to those of the winning part of economic betting and speculation, it is now the time of a drastic reduction of the size of the economics of illusions. It is necessary to study a form of control over financial innovation that cannot be considered any more something desirable per se. Critics will say that such a control is at risk of stiffening financial and economic creativity with an impact on efficiency that the modern world cannot afford. Indeed such a critique is based in the mainstream, and any long-term vision of sustainability must now reject these arguments.

While it would be much beyond the domain of this Report to define the boundaries between acceptable and unacceptable financial practices, we can certainly point at a method - historically successful in many jurisdictions - which could be deployed to obtain some guarantees of security through ex-ante gate keeping. Since private signals such as those provided by rating agencies and accounting firms constitute a form of soft law that is very weak in the face of risks of a conflict of interest, and since the construction of a hierarchical system of commands and controls seems practically impossible to be organized, a mixed system seems to be what will better serve the current needs. Effective decentralized long-term controls over the legality of real-estate transactions have been obtained in certain jurisdictions more than in others by the presence of a millenniums old institution, the Latin Notary. It seems that such an ex-ante impartial and accurate legal control can be considered a global “best practice” potentially capable of guaranteeing security and coherence of economic behaviors with the variable local interpretations of a fair and sustainable global financial system.

2.19 In an attempt to re-establish a decentralized public control over private activity, the Latin Notary, a mixed public/private institution, serves the needs of a mixed society such as the global one.

In a broad functional perspective, the Latin Notary serves the aggregate function of one judge and two attorneys. Its institutional posture is always ex ante, since it serves the need of avoiding rather than curing economic losses. In a sense, its role is that of a legally trained “gatekeeper” with a discretionary power to decide the legal acceptability of a given legal form within a process of careful interpretation of the law. This process of interpretation happening ex ante with the active participation of the parties to the transaction is not different from that exercised by a judge ex post. However, while the interpretation ex post is carried on within the adversary conditions of

a pathological situation, the Notary ex ante interprets the law outside of the tension of the conflict assisting in the development of a people's rule of law. In certain legal systems the Notary's presence is not limited to the law of succession or of real estate planning; rather, it is present in corporate law, exercising a role of control in the interest of stake-holders that is often resented by Anglo-American attorneys.

The Notary is a mixed official. On the one hand, the Notary is a public officer endowed with power stemming from the State (but it could stem from an infra or super-state political entity). On the other hand, the Notary is a private professional with a non-hierarchical independent function. In transactions that require the presence of the Notary, this figure performs a double role. On the one hand, being independent and neutral, the Notary makes sure that the interests of the weaker party are protected and that there has been full understanding of the nature and consequences of the legal transaction entered upon (this would have been very useful in matters such as long-term adjustable sub-prime mortgages that share such a major responsibility for the current crisis). On the other hand, the Notary is a producer of public goods in the form of legal rules and standards incidentally stemming from the function of checking compatibility and incremental interpretation of the law. Because of its decentralized posture, very close to the bottom-up relational production of law, the Notary is in a very favorable position to interpret the needs of justice of society and of the parties to the transaction. The Notary serves in a dialogical dynamic with the parties involved in the transaction checking their private interest with the public interest represented by the respect of legal standards, thus helping to nurture what we have called in this Report the "people's rule of law". Being a public official, the Notary might perform an important role in tax enforcement thus generating significant income to the political institutions that deploy this figure.

2.20 The bottom-up production of people's rule of law could be facilitated by a globally organized professional group of easily accessible lawyers.

The institution of the Notary, which is currently diffused and known in many countries, from Europe to Latin America to China to many African countries, has been the target of tremendous ideological critiques at the "end of history", having been considered the product of a guild-minded mentality at odds with the development of an efficient market. No wonder that this form of control is resented by the strong financial institutions, allergic as they are to any form of effective "gate keeping". There is no business here in advocating any of the current variations in the organization of the Notary. Reforms might be in order to make such a profession serve the global needs. In certain systems, it might be necessary to look for functional substitutes. However, such a professional group, already organized at the international level, could be a feasible avenue of ex-

ante enforcement of global legal standards, capable of assisting in the evolution of an effective system of control that is legitimate from the perspective of a people's rule of law.

In the production of a "public good", such as legal structures reflecting the sense of justice of the people, it seems easier to train an international group of already existing professionals to obtain a diffused ex ante control, rather than implementing a new system of global courts attempting to cure the damage ex post. Moreover, the channels of professional communication between the self-interested professional members of such global guild accompanied by a long experience in organizing and maintaining a record of private transactions (perhaps in electronic form) can be very useful in the definition and organization of global systems of recording of financial transactions simply too difficult to obtain from the top down within reasonable time by a global public bureaucracy.

The global training of a selected number of professionals functioning on the model of the Latin Notary with the aim of introducing an ex-ante control of feasibility to a number of economic transactions might be a sound way to "slow down" financial markets and to keep them alive and prestigious only when effectively performing a desirable social function. It would also be a way to do so that respects local variations in legal sensitivity and could be organized in a relatively slow time with an eye to the long-term security of transactions.

2.21 Fixing the economic and power unbalance between the regulator and the regulated is a priority for any legal project aiming at effectiveness.

The problem of the strong comparative position of global private actors over the large majority of States is very serious. Even if global standards or rules were enacted aimed at limiting predatory behavior, their capacity of being enforced could be seriously undermined by the current subverted relationship of power between the private and the public sector. The corruptive nature of the financial capital over the political process is well documented in the literature both in "advanced" democracies and a fortiori in weaker political settings.

Moreover, the amount of state-based shelter needed by predatory financial activity is rather minimal because of the technological mobility of capital and of the de-territorialized nature of financial activity. In this perspective, the issue of "fiscal paradises" but more generally of "banking secret" is extremely serious and might make any legal attempt to react against the most egregious predatory practices extremely difficult for the very simple reason that these practices are most often "perfectly legal".

Even these few lines should be sufficient to see the difficulty in coping with the issue of the legality of financial predatory activity. Very soon we reach a whole aggregate of deeply entrenched issues

in which the law is actually the problem much more than the solution. The construction of globally defined and authentically legitimate legal standards of acceptability of financial behavior thus introduces us to the extremely difficult issue of the boundary between legality and illegality, and in particular of which authority should ascertain this boundary, and when and with what power to act.

While in the previous paragraphs we have suggested the need to make use of a highly decentralized and locally rooted system to make the boundary between legal and illegal financial activity rooted in a people's rule of law, the enforcement of such a boundary cannot be left to national authorities that are either too weak or too corrupt to effectively monitor predatory activity. True, it is naïve to think such a boundary as a clear-cut black-and-white divide between legitimate and illegitimate financial activities. Also, it would also be unrealistic to think that one authority could be charged with its ascertainment. The distinction between acceptable and unacceptable behavior is a cultural long-term project that requires the involvement of many actors (and a very strong role of education) in a complex relationship with each other. Regardless of all this, it is indubitable that effective enforcement requires a quite significant financial effort. The law does not work if it is not endowed with resources that make it stronger than those that it has to regulate.

From this perspective, in harvesting human experience, we can learn from quite a large number of past mistakes: in the United States, for example, the agencies of enforcement have traditionally been significantly under-funded. The strategy of creating an agency and then granting it an insufficient endowment serves the political purpose of showing some public mindedness but at the same time granting safe havens to the private crony interests that the newly created agencies should regulate. The most recent episode of such a strategy in the US, following the Enron scandal, has been the Accounting Profession Oversight Board introduced by the Sarbanes Oxley Act, presented as a radical solution to the problems of conflict of interests and then endowed with a budget comparable to that of a small-size academic law school. Similarly, chronic under-funding and understaffing has affected the SEC through its lifespan.

2.22 Consideration should be given to the possible development of a "global financial misconduct intelligence prosecution and police authority" as a first common effort towards the development of a global class of public-minded civil servants.

From the previous analysis a few consequences follow. First, a sustained international economic effort should be entered into in order to revamp the public sector as a regulator and enforcer, as

opposed to the private sector that should not be allowed to regulate or to enforce. The separation between the private and public sector should be regained to the extent that is necessary to avoid the endemic conflicts of interest that characterized predatory capitalism. While this certainly involves the strengthening of public authority on such highly dangerous private corporations such as those running the stock exchanges, it should perhaps involve forms of international control over such major centers of global financial activity such as the main stock exchanges, whose reach is certainly global and whose current regulation is to say the least highly unsatisfactory. To be sure, the tools to control speculation are extremely weak without such kind of public control. More generally, the current almost complete lack of control over crucial global actors such as the rating agencies, whose work as unaccountable "soft" legislators and gatekeepers determining much economic behavior in the current financial setting is highly questionable.

Such a revamping of the public sector should be guaranteed at the international level with systems of selection of global, independent, highly prestigious and qualified civil servants recruited on the basis of capacity and geographical representation. The presence of such public-minded civil servants shielded from corruption is an historical best practice from Imperial China to France to Japan. Again, such a project requires some long-term global investment in systems of legal and financial education capable of creating such a global class of public-minded lawyers/economists to be inserted in the regulatory and controlling authorities of all systems. The revamping of the public sector is perhaps the most expensive but also the most promising long-term strategy for any global model of sustainable development.

Only once the public sector is revamped can it be used as a system of proactive and reliable execution of a long-term plan of financial sustainability which, as we have seen in the Introduction to this Report, cannot be seriously conceived outside of a global plan of economic redistribution. Any such plan cannot be carried out without sufficient institutional strength and human capital to overcome the likely tremendous resistance from the strong economic actors. This is why serious plans of public money interventions in the economy cannot be outsourced to private law firms or investment banks without being defeated by the structural conflict of interest.

A global class of public servants is also required for the more immediate task of struggling against global financial predatory behavior. Just as international taskforces of soldiers under UN responsibility are sometimes used and sent to take care of international emergencies (this parallel does not imply that such model of intervention is deemed here useful, let alone desirable), the establishment of an international class of enforcers of the global financial legal order it may be immediately necessary. Such a global financial police force or prosecutorial authority should be endowed with great power of investigation, discovery of documents, files and other information (including power of deposition). Such a power is essential not only for the ex-post investigation of

discrete events, but also, which is most important for an effective global legal order, of ex-ante intelligence of extremely sophisticated schemes.

PART III

LEGAL STANDARDS FOR THE GLOBAL FINANCIAL MARKET

3.1 Each new crisis revealed a large number of holes in the global architectural framework. However, instead of creating a new coherent system, the global institutional framework is a complex, crisis-driven structure.

The current international architecture for financial market supervision and regulation is a complex network in which national authorities are paired by a plethora of private and public international and transnational bodies that have emerged since the 1970s. The system's evolution and its sophistication are crisis-driven. Not by chance, the beginning of cooperation between supervisory authorities dates back to the early 1970s, when the Herstatt Bank's failure sent shock waves through the world's financial markets and, subsequently, the G10 Central Banks' Governors decided to establish the Basel Committee for Banking Supervision.

After every crisis a new piece was added to the global puzzle. In 1944 and in 1945 the WB and IMF were respectively created. During the 1970s, new bodies were founded to set standards and to monitor different branches of financial markets. Thus, in 1973 the International Accounting Standard Board (IASB) was established, and in 1983 the International Organization of Securities Commissioners (IOSCO) was founded.

Subsequently in the late 1980s a further specialization was required and several "task forces" were created such as the Financial Action Task Force on Money Laundering (FATF), and the Committee on Payment and Settlement Systems (CPSS). In 1994 and in 1995, respectively, the International Association of Insurance Supervisors (IAIS) and the Egmont Group were created.

The overabundance of these bodies and the Asian crisis pushed policymakers to establish more trustworthy coordination mechanisms in order to ensure global stability. Hence, in 1996 the Joint Forum was established between IOSCO and IAIS, operating under the guidance of the Basel Committee. Moreover, in 1999 the Financial Stability Forum (FSF) and the Financial Stability Institute (FSI) were formed.

With the new millennium, other organizations were created to respond new social and economic needs. Accordingly, in 2004 the International Organization of Pension Supervisors (IOPS) was founded. Nonetheless, the most remarkable institutional implementation of these days is surely represented by the increased role of the European Union in defining a European Financial Market.

Ad hoc rulemaking procedures involving newly created committees were established - i.e. the Lamfalussy process, putting financial market regulation and harmonization at the top of European policymakers agenda, namely through the European Commission Financial Services Action Plan (FSAP).

While all these bodies and authorities often operate jointly in order to issue codes, guidelines, and best practices, the global order is a *plural order*, in the sense that there is neither unity nor homogeneity in its structure. All those organizations, indeed, independently from their administrative structure, participate in the (global) governance of financial markets. The standards they prescribe directly affect the national legislations, even if such a mechanism is totally extraneous to a law-making process grounded on democratic values, such as accountability and transparency. In this sense the global institutional framework is governed by an international order composed of heterogeneous bodies representing different interests and with overlapping scopes, aims, and memberships.

The fragmented scenario just presented is the result of a series of short-term policies mostly taken to solve specific needs and to provide a quick answer to a situation of distress.

3.2 A narrow regulatory culture has created a path-dependent mechanism in which every new legal arrangement was not designed to deal with the growing complexity and globalization of financial markets.

Even if any crisis might be understood as an occasion to revisit an outdated system, it appears that the current framework is locked in a self-perpetuating mechanism, in which every solution taken is shaped around specific regulatory culture.

In general terms, when a system is in distress a "menu of options" is considered by policymakers in order to respond to such a crisis. All reforms occurred after a crisis followed a pre-cast ideology. In this sense, the menu of possible choices was locked in by a dogma built over a set of principles rooted in market fundamentalism. Accordingly, because of this menu-dependence, and because situations of distress in financial markets are often perceived to be the result of supervisory failure, the international architecture – every time a crisis occurred – was enriched by a new organization, whose aim was not to deal with instability (because deemed as physiological), and whose scope of action was not involving free movements of capital (because such regulation is burdensome for international business).

When a legal system has to cope with a crisis, a change in the original structure might be required to provide an escape from the distressing situation. In financial markets, when scandals or crises emerge, an immediate answer is often needed to limit the impact on the real economy of such

events or simply to improve state's credibility. Thus, in order to block eventual systemic effects and to recover from the crisis, an immediate institutional response was instinctively provided, with the aim of instilling new trust in the supervisory structure. However, in urgency situations like financial distress, the dependence on existing cultural beliefs might impede the creation of new, more effective institutional frameworks.

In other words, if on the one hand an institutional response was expected, on the other hand the ideological background stifled any new attempt in providing a consistent and general revision of financial architecture. This approach determined the adoption of legal arrangements not coping with the growing interconnection and sophistication of capital markets. Considering the current situation, it is necessary to implement a genuinely new structural framework dealing with the externalities directly generated by excessive speculation. In this sense, only once the classical common beliefs are overruled can a reliable architectural framework for financial markets supervision be put in place.

3.3 All previous reforms were constructed around harmful dogmas, according to which: (i) crises are inevitable; (ii) markets are self-healing; (iii) crises are a domestic matter. Only by overriding such cultural grid of references a genuinely new approach can be designed.

It is commonly recognized that after a crisis or a shock, governments – even the most reluctant – strengthen their regulatory tights. As just explained, however, every new legal arrangement adopted in the aftermath of a crisis was determined by a narrow cultural grid of references, according to which: (i) crises are inevitable; (ii) markets are self-healing; (iii) crises are a domestic matter.

Are crises inevitable? It is often alleged that human beings are selfish, rent-seekers, and profit-maximizers; greed and self-indulgence is unavoidable behavior of our species. In this sense, crises cannot be really avoided and a certain amount of instability is required to get rid of "unhealthy" institutions, promote competition and create sound financial system (which eventually never occurred). Consequently, following this belief, the strategy to cope with crises could be well represented by the "let the fire burn" slogan.

Several studies have already explained the phases of every crisis. In accordance with the Financial Instability Hypothesis (FIH), over periods of protracted wealth, capitalist economies tend to move from a financial structure dominated by "hedge finance" (i.e. stable) to a structure that increasingly emphasizes "speculative" and "Ponzi finance" (i.e. unstable). It is clear that in this

historical time we are in the so-called "Minsky moment", in which the income-debt relation led us to a "Ponzi finance". The systemic consequences are evident even if not yet fully assessed.

Nevertheless, the fact that there is cyclical movement in the way financial markets (without a calibrated governmental intervention) generate instability has provided the ground for "wait and see" approach to financial crises. Although rescue packages are generally enacted as immediate response to the crises, the normative application of the "physiological argument" has contributed to block any attempt to redraw a consistent architectural framework.

Are markets self-healing? This question might appear odd in such an historical moment, in which is under everyone's eyes the daily governmental activity in attempting to heal the current economic meltdown. Nevertheless, the logical consequence of considering crises as physiological occurrences implies to believe that markets have the natural power to overcome instability; in other words, markets are auto-regulating. Exogenous regulatory actions (in a broader sense) are, thus, considered an inhibition to growth and competition. Even after recent scandals, it was said that market would respond without needing the implementation of new legislations. As a result, the Enron scandal became an example of market functioning and not a market failure.

Even if it is in the long run, the market's invisible hand may solve failures by its own endogenous mechanisms; nevertheless, it is obvious – as proven by historical evidence – that losses caused by market failures, may be unpredictable and disastrous in the short run. This makes public intervention necessary. The evolution of financial markets shows that countries are oriented towards regulatory solutions instead of deregulating, while free banking remains confined to some limited historical examples.

Furthermore, stronger waves of liberalization (which does not necessarily coincide with deregulation) of financial systems have occurred throughout financial history. Countries have sometimes lowered compulsory reserve requirements and entry barriers in the banking sector, governmental interference in credit allocation has been reduced, insurance companies and banks have been privatized, and several countries promoted the development of local stock markets encouraging the entry of foreign financial intermediaries. Nevertheless, several studies conducted by the WB have verified that an excessive financial liberalization, once it leads to deregulation, exerts an independent adverse effect on financial stability.

In the case of the current crisis, it appears that deficiencies in the regulatory and supervisory systems contributed in determining the current severe situation. The *shadow banking* system provides clear evidence. Non-bank mortgage lenders (such as hedge funds, investment vehicles, brokers, etc.) were operating like credit institutions: they borrowed very short-term and in liquid ways and they carried the risk, but unlike banks they were not subject to banking regulation and supervision, which implies they were more leveraged without a deposit insurance coverage and

they were not protected by systemic risk by central banks' lender-of-last-resort liquidity. The growing expansion of such a *de facto* unregulated system has aggravated the subprime mortgage crisis and contributed to transform the credit crunch into a global meltdown.

Are crises a domestic matter? This common belief is also addressed as the "house-in approach". This assumes that shocks are domestically originated and no internationally coordinated response is required if all countries enhance optimal policies. The *ex ante* consequences of such wisdom leads to prescribe general recipes for uninflationary policies to avoid global systemic imbalances. The *ex post* reaction (when a crisis still occurs) is the enactment of a series of measures to "isolate the contagion".

Although good domestic policies are an essential piece for the stability of the international system, this approach has often compromised any attempt to shape international arrangements in order to deal with what is deemed a mere domestic problem. In this sense the "reform of the international financial architecture" proposed by the G7 countries, and highly debated after the Asian-Russian crisis of the 1990s, was mainly conceived as an effort to strengthen financial systems in emerging market countries by adopting standards and codes.

There are at least two economic reasons that make any domestic-oriented approach to cope with crises a limited and potentially harmful device. Scholars have pointed out that since the 1973 crisis frequency has been double that of the Bretton Woods and classical gold standard periods, and matched only by the crisis-ridden 1920s and 1930s.

Precisely, the indicator that financial crises are not anymore a domestic matter only is the increased frequency in financial turmoil. Conventional thinking holds that risks are mainly local and routine, and they can be dealt with through a risk-based approach shaped upon previous experiences.

The first argument deals with the globalization process. The growing interconnection of markets and people characterizing this age emphazise the impact of any financial turbulence, thus making impossible to forecast any consequences. In this sense, the impact of a crisis tends to be unpredictably spreading out easily around the globe, like a pandemic infection. Moreover, the financial products' complexity (misunderstood by supervisors, banks, rate agencies and practitioners) makes it hard to predict consequences and losses. In this sense, previous experiences only provide a small hint to the future consequences. For this reason, a structural arrangement that is aimed at filling a gap is a solution born already outdated. The only certainty is that nowadays every spark might light a fire. Thus, a global net ensuring a reliable supervisory scheme has to be urgently put in place.

The second reason is more subtle. It is clear (and easily verifiable nowadays) that a failure of a bank in the US might indeed easily cause the failure of other healthy institutions in Europe and

elsewhere, by activating a subsequent chain reaction that will dramatically affect the real economy. However, there is another channel of contagion in crises: information. Financial instability generate negative externalities that my affect other markets not directly touched by the crises. In other words, after a crisis occurs, a second generation of crises (defined as "self-fulfilling"), might occur. Self-fulfilling crises on a fixed exchange rate occur when markets come to expect that a crisis will force the authorities to adopt new policies, or when a country simply fears some negative consequence might touch its market.

In these days (again leaving aside any ethical consideration about the different approaches), "isolating the fire" is simply nonsense, considering the scale and the severity of current crises.

3.4 Reframing the international architecture implies both the creation of a single, reliable and transparent framework for international bodies, and the establishment of a more consistent domestic architecture for national financial supervisors.

Both avoiding inconsistency among regulations set up by different bodies operating at the domestic level (but in different sectors) and at the international level is important. In this sense, the domestic architecture for financial markets supervision is a fundamental brick in the overall stability of financial markets.

The institutional design for financial supervision has become a major policy issue (especially after scandals or crises), and in some cases ending in structural reforms and animating public debate in a number of countries (just to mention some instances in the last decade of a new architectural regime: Belgium, France, Germany, Hungary, Netherlands, Singapore, United Kingdom). Increasing emphasis, even before the present crisis, was given to the architectural shape as a medium to implement the efficiency of regulation and supervision - although the literature in this field is poorly developed and it is merely relying on identifying the optimal number of authorities.

The need of a national consistent system has been stressed in several occasions. It appears that a bank operating in different European countries with cross-border and cross-sector operations (mainly between insurance and banking products) has to deal with 57 different authorities, which all have similar, but not identical, standards and procedures. Even more, the recent Basel 2 agreement in Europe allows for more than 300 differences among EU member states. The creation of a European Security Exchange Commission might be, accordingly, a project to be carefully analysed, though perhaps such an authority - to be at all effective - should be imagined at the global level, and funded very generously to learn from the failures of the US model.

The highly fragmented system has also played a crucial role in the subprime crisis in the US and in the spread of toxic assets around Europe. Such institutional framework, in fact, might induce hazardous behaviours. Firms may invest substantial resources to avoid a specific country's regulation, which would leave consumers no better-off and provoke social disadvantage. The shadow-banking phenomenon that emerged in the US is a clear example of avoiding bank regulations through the implementation of new derivative devices. Such practice falls into the broader definition of regulatory arbitrage. This typically could lead to "forum shopping", if companies choose the weakest regulatory regime in order to operate without strong transparency requirements or rigid supervisory standards, to the detriment of investors.

3.5 Every new authority should fully embrace the conceptual distinction between regulatory powers and supervisory tasks. Such distinction lies at the core of a system based on accountability and transparency principles.

Independent authorities (both at the national and international level) are not only entrusted with the power to enact specific rules: many of the above-mentioned international bodies do issue soft laws that might take the form of best practices and codes. Together with this rulemaking power, they have also the power to control the compliance of market participants with those rules. It is evident that a regulatory action will not be complete (nor credible) without an effective oversight mechanism, nor without adequate enforcement procedures. Considering the high volume of transactions, the number of participants and the involvement of end-consumers, the surveillance activity is a fundamental tool to ensure the transparency and the soundness of financial markets.

Two distinct but interconnected activities are performed by independent agencies: *regulation* and *supervision*. Generally, the terms are confused and the word "regulation" absorbs the concept of supervision. The conceptual distinction between regulatory activity and supervisory duty, even if both embedded in the same body, represents a fundamental logical step in defining a transparent, accountable, and reliable system. Regulation, therefore, consists of a legislative delegation allowing the specialized bodies to produce more detailed provisions. The very concept of delegation implies that the legislative power is performing an a-priori policy choice, which is enacted in its detail by other bodies. However, supervisory activities are related to the oversight performed by independent bodies once they are controlling the application of the relevant laws and regulations. Conceptually, therefore, this implies monitoring and enforcement activities.

In this sense, the administrative agencies' role, in which supervision and regulation converge, is a form of bureaucratic lawmaking that does not follow the democratic decision-making process, though it has a strong impact on the regulated sectors. Accordingly, accountability is a manner to

inject some democracy into such an important decision-making process. Thus, in line with the legal theory, accountability becomes a way to ensure a democratic mechanism of rule making.

By emphasizing and institutionally enforcing the conceptual distinction between regulation and supervision, it becomes clear that accountability can be both a way to ensure a democratic mechanism of rule making, and a means to ensure the fairness in supervisory activities. Accountability is precisely what legitimates quasi-legislative action that falls outside the parliamentary activity, and quasi-judiciary activity performed by administrative agencies.

Accordingly, accountability should be ensured at the *structural* level by establishing appointment and removal procedures for the head officials, assessment and evaluation mechanisms, and coordination procedures with other national and international bodies. Moreover, every new authority should clearly set up accountability mechanisms to cope with the *regulatory* dimension of its activity. Regulatory accountability consists of all those mechanisms directly devoted to counterbalancing the discretionary rulemaking powers. In this sense, the limits established by international laws and legal systems should be fully taken into account together with mechanisms fostering transparency and the right of participating, through public consultations in the rulemaking activity. Finally, the *supervisory* dimension should be addressed by a set of accountability mechanisms devoted to counterbalancing the individual decision making activity, i.e. the discretionary action that might affect individual rights or interests.

Having in mind a clear allocation of powers, the implementation of specific mechanisms to counterbalance such powers will immediately lead to a transparent and legitimate regulatory action in which procedures in the decision making actions are fully disclosed.

3.6 To shape a consistent framework for financial market supervision and regulation, financial instability should be directly addressed by setting up regional monitoring agencies and by taxing speculative capital flows.

Financial instability might be seen as a “public bad” (like pollution) generating non-pecuniary externalities. Though a certain degree of volatility can be accepted, an excessive volatility causes wide spread damages through an undefined number of people.

Such costs should be internalized, by shaping a system directly coping with a core characteristic of financial markets, i.e. the free movement of capital. Free movement of capital is advocated in terms of efficiency, welfare spread, and even a higher flexibility in case of shocks. However, it is true that a liberal approach to capital circulation generates instability. More precisely, the externalities generated by instability are flying with capital and they circulate around the globe.

The analysis of capital flows usually discerns between long-term (e.g. foreign direct investments or long-term loans) and short-term flows (short-terms loans or speculative investment). In the neoclassical approach, both flows are supposed to generate positive effects equilibrating the internal production (and consumption), and evening out the risk.

However, this view hardly explains those crises (e.g. Asian crisis) which are associated with the excessive liberalization of short-term capital flows. Moreover, the actual crisis proves that the liberalization of capital flows around the globe has amplified the externalities of financial instability. To internalize such costs, in a long-term perspective, two main actions can be adopted. At first, the architectural framework should include regional monitoring agencies, entrusted with the power to track capital flows; then, a tax policy to internalize short-term speculative flows should be adopted.

One of the main problems is to track flows and assets (toxic or healthy) circulating within a given geographic area. Accordingly, new regional authorities whose primary task is to track information over capital, cross-border operations and assets might be the first step towards a reliable network of international bodies constantly monitoring capital flows. Such bodies, which should not have sanctioning or rulemaking powers, might become the point of reference for national authorities, which indeed are carrying out the supervisory activity. In this sense, capital and financial products should be monitored and tracked not by a scattered system of rating agencies, but by an independent public body that might provide information to national or international authorities.

A similar system is, for instance, set up to fight money laundering and financial fraud. International mutual cooperation is crucial to combating the fraud globally. In this field, national agencies are acquiring the power to share information with their overseas partners enabling prosecution in multiple jurisdictions. This system is supported by a series of Financial Intelligent Units located around the world, whose primary task is to provide assistance to the national authorities. A similar solution might be adopted to track and assess capital flows circulating around the world.

Independent regional bodies, entrusted with the power to gather information, analyzing assets and practices have the positive effect to directly cope with what has turned out to be one of the main disadvantages of free movements of capital. In addition, capital flows can be restrained selectively by using Tobin taxes as successfully operating in different countries. Such tools discourage speculative short-term flows without harming efficient long-term capital flows.

The Tobin Tax has heated several debates since 1974, when James Tobin first formulated his proposal to tax currency transaction. However, this proposal – vividly discussed in several occasions and presented again by James Tobin as a contribution to the UNDP Human Development Report in 1994 – was blocked by the regulatory culture inspiring the lassez-faire approach that claimed to have weaker governmental intervention in the economy.

The rationale is to regulate short-term round trips, affecting negatively long-term investments, by adopting a uniform fixed tax for each transaction. As a result, short-term repeated operations will be heavily taxed and strongly discouraged.

By adopting a systemic approach necessary to cope with such a global crisis, a Tobin taxation mechanism could have beneficial consequences to the global financial stability by establishing a correct set of incentives that leads towards less speculative finance. While Tobin taxes were mainly considered as a tool to cope with the exploitation of emerging economies, in the actual situation they may become a general policy tool to internalize the externality generated by financial instability.

3.7 Decision-making depends on the institutional structure within which the decision is taken as a concrete exercise of power. Yet, since questioning economic policy as currently produced by the IMF and the WB goes beyond the purpose of this Report, the focus will only be on the IMF and the WB as producers of global law.

It would be pointless to add here yet another voice to the chorus that blames the IMF and the WB for the current global inequitable state of affairs. More important is to approach them as institutional producers of global law by fully emphasizing that most policy decisions are determined by the institutional structure in which they are taken. Both the WB and the IMF display the hierarchical structure of a corporation. Both of them were thought as agencies of economic policy and not of law-making. While the hierarchical structure has remained unchanged until today, the economic policy has been dramatically transformed, especially in the aftermath of the fall of the Soviet Union, when geo-political powers stopped to work as counter-forces to preclude legal intervention in contested political settings. The outcome of this altered context makes an institutional reform process of the WB and the IMF an unavoidable precondition for maintaining or expanding their function. Until such deep structural reform allows them to operate as systems of democratic governance subject to global checks and balances, their role should be marginalized since bad, self-serving, short-sighted policy will be the structurally unavoidable result.

In theory, the WB assists the governments of developing countries in implementing their own customized economic policies and developmental strategies, under what is now called the Comprehensive Development Framework (CDF), set in 1999, which includes the ideas of long-term development strategies, local stakeholder “ownership”, and ongoing supervision and evaluation. In practice the most important vehicle through which the WB exercises a law-making activity is the

so called "Structural Adjustment". These "adjustments" to the internal legal systems of assisted countries are necessary (so called conditionality) if they wish to access new loans or decrease interest rates on existing ones. Since the "end of history", Structural Adjustment Programs (SAP) in a regime of conditionality have been used to apply free market policies, such as privatization, deregulation, reduction of trade and capital barriers as well as opening up developing countries to exploitive foreign investment.

Structural Adjustment policies applied by the WB have affected negatively the fight against poverty in developing countries. Although the total number of conditions may have decreased because of sustained critique since the end of the last century, only non-legally binding conditions were dropped, while those legally binding remained unchanged. More than 71% of all grants and loans of the International Development Association (IDA) contained some sort of legally sensitive condition, such as price liberalization, privatization, public enterprise restructuring, abolition of commodity price regulation and subsidies, trade reforms and tariff reductions. Privatization has led to a shift in ownership from local governments to foreign investors in many cases, leading to employment cuts. Promotion of exports and trade liberalization are both trade policies of SAP that have led to ignoring domestic needs in favor of foreign markets (thus producing more unemployment). The imposition of user fees and the downsizing of government spending have reduced the main services available such as health and education services.

Hence, the pedigree of the WB in regard to the new necessary policies at the end of the end of history is very poor. For instance, the WB has played a role in several of the financial and economic crisis of the past - beginning as far back as the debt crisis in 1982. While forcing countries to remove any control over capital or exchange movements, the WB increased the phenomenon of capital flight, tax evasion and corruption. Throughout its lifetime, the WB has financed projects with severe negative effects on the environment especially in the areas of forestry, water and mining. The building of dams has displaced millions, many of them without sufficient compensation and resettlement steps, while forests have been opened up for commercial logging because of road projects.

Nor does it seem wise, considering its past performance, to rely on the IMF. The International Monetary Fund (IMF) was created at the Bretton Woods Conference in 1944 as a public entity whose unique scope was to maintain global economic stability. Originally, the IMF was created as an international institution - "democratic" in some sense, even if only the representatives of the winners of World War II gathered in Bretton Woods (1944). The IMF was based on the theory of the lack of aggregate demand formulated by Lord Keynes, and on the understanding that markets are flawed and that a depression is always behind the corner. Therefore, it was born as an institution that formally belonged to the entire global community, and whose aim was to prevent unassisted global markets from falling apart. However, well-known circumstances, mostly based

on political transformations that followed the abandoning of the gold standard, transformed the IMF into a supporter and guardian of the free and global market and of a laissez-faire approach of economic policy. Ironically, the IMF has been sponsoring economic and legal policies that are exactly the opposite of what it was originally conceived to sustain.

3.8 The IMF and the WB - albeit discrete institutions - are de facto highly integrated partners in the making and execution of the system of global financial deregulation that has severely limited the possibility of legitimized political actors to protect themselves against the spreading of the US crisis.

Born as two separate entities - even if created during the same Conference - the two institutions began working more closely with each other starting from the 1980s. The World Bank for the Reconstruction and Development, which until that moment had been exclusively involved in low-interest rate loans necessary to the realization of international projects, both public and private, became the operational arm of the IMF and the Washington Consensus policies.

The two headquarters, not far from one another, agreed on a new form of cooperative action, according to which the WB would have granted its loans only to those countries that had committed to implement a series of economic, financial and political reforms suggested by the IMF. This determined the birth of the tragically famous structural adjustment loans, and their legislative reforms generally based on the three watchwords of austerity, privatization and liberalization, and on the so-called cross-conditionality.

Given the current situation and its repercussions over the developing countries, the IMF-imposed conditionality concerning the liberalization of the banking system and of the financial markets, should be the object of some second guessing. In fact, one of the typical IMF conditions aims to create a unique and global financial market where capital and securities can flow from one country to another (or to an offshore heavens), without any barrier. Unfortunately, fast and widely unregulated liberalization of the banking system and of the financial markets without an appropriate set of rules and limits also makes the contagious effect of a financial crisis very difficult to limit. This “no rules no limits” policy prevailed because of its ability to increase the profit made by the big financial institutions and speculators. Regrettably, it had a very negative impact over the involved countries. It has been long generally known that, without going too far in the past, the 1994 Tequila crisis in Mexico, the 2001 crisis of Argentina, and the 1997 Asian crisis, were all mainly determined by the possibility for foreign capital to enter and exit without any difficulty. First, the free flow of financial capital makes it a fundamental part of the national

economies; then, its sudden withdrawal determines an immediate turmoil of the real economy with all the consequent suffering.

Confronted with this scenario, it is necessary to create institutional conditions that preclude the IMF from imposing the traditional and draconian conditions to its loans, especially to those provided in order to plug the effects of the global meltdown. Furthermore, the privatization and liberalization of the banking and financial sectors, which on average account for almost half of all privatization and liberalization conditions, are at the basis of the spreading of the current crisis so that once again a turning point is needed. Again, institutional conditions should be produced for a change. It is never too late to intervene responsibly. The last twenty years represent only a fraction of modern history, and the faster we act, the easier it will be to stop the ongoing process of self-destruction. Unfortunately, using the Fund outside of a thorough revision of its institutional decision making not only makes the same old policies inevitable, but also produces more self-serving double standards between rich and not-sufficiently-represented poor countries. The only foreseeable consequence of such fundamental continuity is the broadening of the gap that separates poor and rich countries, a scenario that could only lead to stronger global instability.

3.9 The organization of Special Drawing Rights is a short-term response. A more structured long-term institutional reform is necessary now.

One of the six pledges announced by the recent G-20 London summit is to give the IMF an extra $750 billion to distribute special drawing rights (SDRs). While some commentators have described this plan as a strong commitment to help countries whose economies run into trouble, a close look to the history and structure of this financial instrument suggests a certain amount of skepticism. Briefly speaking, SDRs are an international reserve asset whose value depends on a basket of currencies - a sort of credit line that can be allocated to member countries in proportion to their IMF quotas. The IMF created these quotas in 1969 to support the Bretton Woods fixed exchange-rate system, as a reserve that countries could use to buy their own currency in order to pop up its value when downward fluctuation so requires. Soon, as the fixed exchange-rate system collapsed, and all the countries started looking at the US dollar as a trustworthy currency that could be used to build up national reserves, SDRs were abandoned, and the US acquired the central role they have had during the last decades (see *supra* Part II). The scope of SDRs is, in any case, to reinforce national reserves: in fact, they are interest-free if untouched, while countries pay interest whenever SDRs are converted into hard currencies.

This reserve asset is not a new tool to fight back crises: SDRs were distributed in 1970-1972; again in 1979-1981; and proposed in September 1997, but in this last case the US, with their 16.75% of total votes in the IMF, imposed their veto. Now, the choice of SDRs undoubtedly has geopolitical

consequences, but unless something changes in the way they are managed and distributed, a change in the economic perspective will be extremely unlikely.

3.10 The international financial institutions should be reformed in a long-term perspective. Their current role shows the need of a degree of separation of power in any system of global representative government.

There is no doubt that through the "end of history" the role of the international financial institutions has been transformed into a role of unaccountable global economic legislator endowed with tremendous executive power through the leverage of economic conditionality, and outside of any possibility of judicial challenge. This institutional stance explains much of their policy in fostering the interests of the strongest (mostly US-based) transnational corporate power. Consequently, rethinking the role of the international financial institutions today requires a focus on their internal governance to foster representation and to limit the concentration of power.

The description of their voting quota and of their representativeness (or lack of it) shows that it is necessary to redistribute the number of votes that every member country has, because otherwise these institutions will continue to be undemocratic and unrepresentative bodies where corporate interests are imposed throughout the world.

It is structurally impossible for an institution that assigns the voting rights on the basis of the economic power of the member countries to create a new, fair, and widely accepted global system. Because of this impossibility many countries, like Venezuela, have already withdrawn from the institution, but that kind of decision is not what we need right now. To reshape world governance, we need to at least improve the existing institutional system into a new globalized and fair framework where there is an actual possibility for all countries to exercise political discretion rather than simply having to forcefully implement policy imposed from the top down.

To do so, the specific weight of the countries must be increased up to a level that should force the IMF and WB to take into full consideration all proposals and alternative visions - the requests and the needs of all the people of the world. While the first step should be to give a higher level of importance to the BRIC Countries (Brazil, Russia, India and China), the eventual goal is to establish a public international body that helps the poorest on the basis of their needs, independently and autonomously from the money deployed by the wealthier. The logic of the stronger cannot ground any legal system. Rather, what we need is a public international body that helps all countries on the basis of their needs. In this new logic, among the various proposals that have appeared in recent years is, for instance, the suggestion of a system which, like today, starts from a minimum amount of votes equal for each country (currently in the IMF, each country has 250

basic votes); then, another share of votes could be given on the basis of the population and its life conditions, attributing more votes where life conditions are lower and an external support is needed more; a third share of votes could be finally attributed on the basis of the size of the state economy in the global market. Such a combination, negotiated within the global economic constitution process, would annul the present US power of veto, reshuffling the current priorities and substituting the needs for the power, which is the first step toward a fairer and more equal world.

Moreover, from the legal perspective, one should also observe that the international financial institutions display another very strong structural problem, so that a change in the voting ratio while necessary would not be a sufficient precondition. Based on a hierarchical structure of governance shaped after the structure of a private corporation, and exercising a strong indirect de-facto global law-making power through the mechanism of conditionality, both the IMF and the WB display a severely counter-democratic posture. In a sense, they concentrate legislative (drafting of policies to be implemented through internal legal transformations of member states), executive (monitoring on the effectiveness of the implementation of the policy through tremendously powerful conditional means), and even judicial power (countries can challenge the execution of the policies only through mediation panels *internal* to the very same institutions).

Working out an effort of constitutional creativity aimed at making good of the shortcomings that we have briefly described would be a major aspect of the development of a global economic constitutional framework under the umbrella of the UN.

3.11 Before market liberalization, the Western financial system was based on the strict institutional partition between "banking" and "securities". Socio-economic evolution and technological innovation have favored the legal breaking up of market segregation and the creation of financial conglomerates and giant financial institutions.

The financial systems of most Western countries – starting from the 1930s and for almost six decades – were based on the strict institutional partition between "banking" and "securities" (*viz* between traditional banking activities on the one hand, and financial activities connected with the sell and purchase of negotiable financial instruments on the other). In the US, segregation was established by the well-known Glass Steagall Act and any country which adopted *de jure* or *de facto* a similar regulatory regime was denominated a "Glass-Steagall Country".

The rationales for segregation were the followings: (1) Banks and securities firms deal with risks which are structurally different requiring different know-how: the former manage credit and

interest risks bearing instruments, the latter deal mostly with market risks. (2) Consequently, the balance sheets of banks and securities firms are structurally different: banks' balance sheets have assets and liabilities which are not only illiquid, but also quite heterogeneous - mid-long term assets (credits) *versus* short-term liabilities (deposits). On the contrary, on balance sheets of securities firms we find assets and liabilities which are both liquid and, therefore, basically homogeneous. (3) Customers of the two types of institutions are socially different: banks sell their "products" (deposits on bank accounts) to lower income and less sophisticated customers (account holders); securities firms usually sell their "products" (financial instruments) to wealthier and more sophisticated investors.

The strict partition between banking and securities was mirrored (and it is partially still mirrored today) by a corresponding partition within the regulatory schemes adopted: the main objectives standing behind banking regulation were financial stability and prudential supervision, whereas, as far as securities firms are concerned, the main regulatory objectives were transparency and investors' protection. As a result, banking regulation was a body of imperative rules aimed at ensuring capital adequacy, effective public control and supervision (central banks or other public authorities were in charge of prudential supervision) and protection of the holders of banking accounts. To the contrary, securities regulation was based on the imposition of mandatory disclosure requirements in accordance with the logic of investors' self-protection.

In the last two/three decades, the traditional partition between banking and securities has been eroded. Behind this trend there are both technological and socio-economic reasons.

First, assets securitization has had an unprecedented growth in the last few years: the traditional households' financial savings in advanced economies until the end of the 1970s were still mostly held in the form of bank deposits, whereas nowadays financial sophisticated products are not only held by higher income classes of investors, but also by a growing number of much less informed individuals. Furthermore, technological innovation (development and management of complex data banks) has made it possible to convert traditionally illiquid bank assets into negotiable financial instruments to such an extent that also credits of modest entity (e.g. land credits, consumption credits etc.) are pooled and repackaged into financial instruments and then sold (the so called credit securitization). Hence, if up to ten years ago small business and households were mainly financed by banks, whilst long-term funding to big business was provided by securities firms, today we can state that this traditional compartmentalization has lost its accuracy.

In the 1990s, the original segmentation was gradually dismantled. In 1999, in the US the *Gramm-Leach-Bliley Act* abrogated the *Glass Steagall Act*; similarly in Europe, EC directives have followed the German model of "universal banks" (i.e. banks whose principal functions are not only to

receive demand deposits and provide short-term loans to families or mid-long-term loans to firms, but also to trade in securities, investment funds, private equity funds etc.).

In the last decade, also due to the liberalization of financial activities, we have witnessed: (i) the rise of "financial conglomerates", i.e. financial institutions supplying a range of financial services in the three traditional fields of finance (banking, securities, insurance; the so-called conglomeration process); (ii) the support of the European and American Antitrust Authorities to the consolidation of economic power in the hands of few large complex financial institutions (the so-called concentration process).

3.12 Unrestrained liberalization and market-friendly controls have contributed to the current financial crisis fostering and exacerbating conflicts of interests and pricing opacity.

The mere fact that currently financial conglomerates, in their quasi-oligopolistic position, can combine banking and securities activities exposes the financial system to several structural risks. One of the major risks is undoubtedly the conflict of interests. If, prior to liberalization, banks (to which trade in securities was forbidden) could only purchase financial instruments from third-party financial intermediaries, in the new liberalized regime, the same banks (which now are allowed to trade in securities directly or via other branches of the same financial conglomerate) can freely purchase, on behalf of their customers, their own financial instruments. In other words: prior to liberalization, banks could be considered as impartial disinterested third parties in contracts between securities firms and investors, and so they could act in the interests of weak parties; on the contrary, after deregulation, banks can sell and purchase their own financial products: it follows that they are more likely to act in a self-interested way instead of giving impartial information.

Western legislators have advocated a shift from the old paternalistic and imperative regulatory arrangements (i.e. the original segmentation of financial activities) to a modern, "market-friendly" technique of managing conflicts of interests (e.g. the *Markets in Financial Instruments Directive* - Mifid). Three general principles and tendencies emerged: (i) rules of conduct aimed at preventing conflicts of interests are to be developed "within" rather than "outside" the market; (ii) there is a duty to disclose an actual or potential conflict of interest; (iii) several activities that would normally create conflicts of interest are deemed permissible if authorized by customers who have been previously informed. We can see that regulators have leaned toward a *self-regulatory* model that could work some decades ago, when mainly qualified investors purchased financial instruments, but it is inadequate to face the current situation whereby financial instruments are widespread amongst common retail customers.

The breaking up of market segmentation and the adoption of a self-regulatory model based on disclosure requirements represent a dangerous attack to the functional pricing of financial activities. The mere fact that banks may act with a simple authorization of customers simultaneously as sellers on one side and as a buyers' intermediaries on the other implies that the pricing of financial instruments is someway distorted: it is not the result of arm's length transactions (i.e. transactions whereby the parties act independently and have equal information), and therefore it is easily maneuverable.

This happens especially for unlisted financial instruments that do not have an "official price". If the financial instrument involved in a conflict of interest transaction is a listed instrument, there is less room left for price manipulation. On the contrary, unlisted financial instruments that do not have an official price are to the highest degree at risk of price manipulation because financial institutions, acting at the same time as sellers (on their own behalf or as intermediaries) and as buyers, can freely set (*rectius* can freely manipulate) prices without any concern about the correspondence between the set price and the real market value - at least up to the moment when the veil of financial illusion will be lifted and the real value of those operation will be brought to light.

It is no accident that the majority of financial instruments that are closely involved in the ongoing financial crisis are the unlisted ones (e.g. securitized sub-primes and derivatives – especially credit derivatives – whose value is significantly above the GDP of Western countries). Mainly with reference to the unlisted financial instruments, the end of segregation between banking and securities has contributed to their uncontrolled introduction into the financial system without any real market price mechanism in place.

The lack of an effective market discipline, together with the "license to manipulate prices" given to financial intermediaries, produced adverse effects throughout the whole financial system. To the price manipulation of the financial instruments sold to customers, the parallel price manipulation corresponds of the same financial instruments on financial institutions balance sheets. A plausible objection might be that while price manipulation of financial products for circulation and to be sold to customers may have a logic (i.e. it is a fraudulent operation at the expense of consumers and to firms' advantage), to the contrary the manipulation of financial products that are placed on financial institutions balance sheets is a quite illogic and self-destructive behavior - such operations "make up" the balance sheets, but are easily detectable and very likely, at some point, to come to light. Actually, this would be true if those behaviors were rare and adopted by a single firm, but if the bad conduct is generalized, as it is, for a sort of "herding effect", no financial institution has incentives to abstain from such conducts for fear of facing the unfair competition of misbehaving competitors.

3.13 Mandatory disclosure remedies make information more extensively accessible and affordable to consumers, but they are not alone sufficient to address conflicts of interest and price manipulation.

The typical contract relation between firms/issuers and consumers/savers is characterized by an information asymmetry that market forces alone cannot address properly. The usual remedy adopted to address such market failures is to impose a mandatory disclosure regime (mandatory prospectuses, accounting disclosure etc.) so that the information is freely accessible to consumers/investors. If we consider that financial institutions often act in the face of conflicts of interest and that the only assets given as a guarantee for the fulfillment of the disclosure requirements are the same financial products sold to the public, it follows that they do not have incentives to provide all the relevant information. Hence, if we wish the mandatory disclosure remedy to be functional, the law must provide an adequate sanction in case of breach of the duty to inform, and mandatory disclosure of information must be imposed not only on issuers, but also on other parties that are supposed to act to guarantee a well-functioning financial environment (accounting auditors, intermediary institutions etc.).

The extension of the disclosure requirements to other subjects (e.g. auditors) would transform them into sort of investment advisors, providing investors with all the necessary information, thus leading to a progressive solution of the information asymmetry problem and to a more efficient pricing of financial products. A regulatory reform based on a pure mandatory disclosure regime with reference to listed financial instruments and on the legal prohibition of conflict of interests transactions with reference to unlisted ones would be a less intrusive kind of regulation - if compared to a new segmentation of the financial markets - and would undoubtedly represent a leap forward in the right direction. Nevertheless, disclosure rules are necessary, but not sufficient to address the problems in a correct and optimal way.

Disclosure regulation makes information more extensively accessible and affordable to investors - thus addressing the problem of accessibility of information - but the information provided might not be sufficient because the many small investors/savers often lack the expertise required to process the data properly. In other words: investors need not only professionals who provide information, but above all professionals who translate the provided information into prices in order to enable them to make good informed choices. To address the problem of the full understanding of information an “institutional buyer” of financial instruments is required who must be free from any form of conflict of interest.

3.14 In order to overcome role confusion, re-establishing market segmentation is a necessary step to effective reform.

Legal reform must have a new segregation of financial markets *à la Glass Steagall*: a reform that is willing to optimally address the problems deriving from conflicts of interest and price manipulation must look to a rigorous segmentation of financial activities, and therefore to a sharp distinction between sellers (firms and firms' intermediaries) on one hand and buyers (investors and investors' intermediaries) on the other.

Such legal reform, in order to be successful, should aim at, and end up with a tripartite compartmentalization of financial services industry into:

(i) traditional banking activities;

(ii) financial intermediation activities in the interests of firms (sellers);

(iii) financial intermediation activities in the interests of investors/savers (buyers).

Accordingly:

i. Traditional banks shall be allowed to combine their traditional "monetary functions" (i.e. collecting deposits and providing loans) with other financial activities (i.e. the management of individual investment portfolios) if and only if, in so doing, they do not risk any conflicts of interest (banks shall not be allowed to trade securities directly, but only on behalf of individual clients). As a result, we would have banks that could effectively address information asymmetry problems, not only by providing customers with all the necessary information, but also by helping them to process the given data;

ii. Securities firms that operate only in the interest of firms (i.e. merchant banks and private investment funds) shall act as professional issuers of financial instruments and shall be prevented from managing individual or collective portfolios (in order to avoid any form of conflict of interests). As a result, we would have those securities firms officially and legally recognized as buyers' counterparts or better as sellers' side intermediaries.

iii. Securities firms that operate only in the interest of investors/savers - collective investments undertakings, like pension funds, investment funds, etc. - shall act as professional buyers of financial instruments, and shall be legally banned from consulting sellers as well as from issuing their own financial products. As a result, we would have those securities firms officially and legally recognized as buyers' side intermediaries.

Such a reform is unquestionably ambitious, but not completely utopian, if we consider that in the current global crisis the role of regulators is crucial and market segmentation could indisputably

contribute to a more efficient and fair pricing of financial instruments, and to the general equilibrium of the global financial system.

3.15 The law should monitor the originate-to-distribute business model. Ex-ante legal control should be provided to guarantee the full understanding of the relationship.

The so-called originate-to-distribute model introduces a notable structural change in the relationship between the bank and the contractor of a loan. Such a model is based on a scheme according to which banks do not hold the credit assets they originate until maturity, but they distribute them to different types of investors through the issuance of structured finance products. The originate-to-distribute model was thought to have made the financial system more resilient by dispersing credit risk to a broad range of investors. Yet, it became itself perhaps a principal source of financial instability. Monitoring such transactions which produce a basic principal-agent problem, and determining in which cases they should and should not be acceptable is a crucial role of the law. Such transactions are fundamentally vulnerable to certain adverse behavior, since agents seek to maximize their benefits, while principals cannot fully observe and control the agents' actions. Thereby, without a legal framework forcing a different distribution of costs and benefits, the incentive for market participants to maximize their revenues may have the following effects: originators reduce their efforts in screening and/or monitoring borrowers and select originated assets in the event of their being sold to intermediaries; intermediaries' interests conflict with investors' objectives of balancing the risk/return trade-off; credit rating agencies (CRAs) are less willing to effect timely downgrades; and servicers are not inclined to adopt the most efficient measures with respect to non-performing loans. Moreover, investors may not have the proper incentives or the technical equipment to conduct their own risk assessment of structured finance products, thus relying excessively on external ratings and failing to play an effective disciplining role with respect to the other actors in the originate-to-distribute model.

3.16 Reviving securitization and its benefits requires deep structural change. However, the reform process does not need to start from scratch. It could draw on from safe and steady financial techniques, such as 'Pfandbriefe' and covered bonds.

Legal reform should address a variety of issues such as: the setting of the threshold of risk and ownership retaining by the originators (with no retention there are no appropriate incentives to

screen and/or monitor borrowers and to select assets to be sold to the intermediaries); setting standard contracts for the securitization transactions; enhancing "environmental" transparency of the transactions themselves (i.e. reducing conflicts of interest between originators, intermediaries, and credit rating agencies), determining the appropriate information to be disclosed, and establishing the centralization and timely dissemination of aggregated data.

The reform process does not need to start from scratch. It could draw on from safe and steady financial techniques, such as "Pfandbriefe" and covered bonds. As is well-known, "Pfandbrief" is a German-born securitization technique, whose first appearances date back to the late 18th century. The technique offers Pfandbrief investors a tight-knit safety net. Financial institutions must satisfy stringent requirements in order to receive a license to issue Pfandbriefe. Only a percentage (in German law: 60%) of the originators' mortgage lending value is eligible to be securitized and refinanceable through the Pfandbriefe. The outstanding Pfandbrief is covered by mortgages (or by public-sector loans) of at least an equal amount. These assets are entered into separate registers. In the event of an issuer's insolvency, the claims of the Pfandbrief creditors are privileged by a preferential right in respect to the assets entered into the registers. An obligation (statutorily imposed in Germany) to disclose the key data of the pools on a quarterly basis makes their composition transparent and comparable over time, thereby making it difficult for inferior quality loans to find their way into the Pfandbrief issuers' pools.

Before, and aside from the rise of the lucrative US model(s) of securitization, Pfandbriefe have provided banks (esp. German Banks) with cost-efficient secured financing for over 200 years. The same holds true for the younger covered bonds techniques.

Covered bonds have been developed in many European countries on the Pfandbrief model since the 1990s. They are characterized by the following common essential features which are achieved under special domestic legislations: (i) The bond is issued by – or bondholders otherwise have full recourse to – a credit institution which is subject to public supervision and regulation. (ii) The credit institution has the ongoing obligation to maintain sufficient assets in the cover pool to satisfy the claims of covered bondholders at all times. (iii) The obligations of the credit institution in respect to that of the cover pool are supervised by public or other independent bodies.

Covered bonds and Pfandbriefe are backed by identifiable and legally "ring-fenced" pools of loans. They remain on the balance sheet, so that the bank retains the ultimate credit risk and is encouraged to maintain loan quality. During the market turmoil, in particular until mid-September 2008, the relative resilience of covered bonds was demonstrated by the European Central Bank, especially once compared with other forms of asset-based finance – such as the US model of securitization – associated with the "originate-to-distribute" model. Moreover, the market for covered bond and Pfandbriefe is known for its comparatively high transparency standards (as

originators' organizations frequently calculate indices for the whole market and sub-indices), and does provide a less complex alternative to outright securitization.

When US authorities launched an initiative to encourage the use of the above European techniques by US banks, it was already too late.

3.17 In recent times, the growing complexity and interrelation of financial markets' segments has induced firms operating in various jurisdictions to establish financial conglomerates, in which the insurance business is conducted within the same group, alongside other financial activities, such as banking or financial intermediation.

Significant challenges have to be faced by prudential insurance regulation and supervision worldwide. For instance, in order to avoid double gearing of capital or the risk of contagion, a close collaboration and mutual understanding between different authorities (or different divisions within the same authority) in charge of the regulation and/or supervision of different financial markets' segments is required.

When financial conglomerates are also multinational groups, such difficulties are further exacerbated. The cross-sectoral and trans-national nature of modern financial-market players, in fact, greatly increases the risk of regulatory gaps and regulatory arbitrage. The case of the American International Group (AIG) tells us a lot, since the core insurance activities duly performed worldwide were "poisoned" by the catastrophic results of the US "financial arm" of the Group which issued - taking advantage of the fact that derivatives markets, unlike insurance markets, are mostly unregulated in the US - a high volume of credit default swaps (CDS) to European banks and other protection buyers without setting aside sufficient reserves to cover the undertaken credit risks.

On top of that, the core insurance function of risk pooling, diversification and spreading is greatly enhanced by the use of reinsurance and retrocession. Risk securitization, moreover, is yet another means to further spread the risks, and to increase the available financial capacity, especially with respect to the coverage of peak risks (e.g. catastrophic risks). Since the reinsurance, retrocession and risk securitization markets are global in nature, it is more and more often the case that risks are transferred across jurisdictional borders. The resulting complexity and interdependencies generate the need for a coordinated international and cross-sectoral regulatory and supervisory approach.

Key questions include:

- How best to achieve an effective global cross-sector coordination and information exchange between regulatory and supervisory authorities?
- To what extent are insurance companies still taking up risks from other segments of the financial markets (such as credit and/or liquidity risks from banks)? How are they managing such risks?
- To what extent are insurance companies taking into account the potential impact on their portfolio of global emerging risks, such as those posed by climate change and by the interdependence of critical networks?
- Will insurance companies that currently offer retirement products (such as annuities) be able to cope effectively with longevity risk worldwide and finally meet their obligations?

Furthermore, the transfer of insurance risks to capital markets via risk-linked securities poses additional regulatory and policy questions such as:

- Under what conditions and to what extent should insurance-sponsored SPVs be exempted from prudential regulation?
- Under what conditions and to what extent should insurance/reinsurance companies be allowed to take credit for risks ceded to investors via (on-shore and off-shore) securitized deals? Is there a risk or regulatory arbitrage?
- Under what conditions and to what extent should the development of a secondary market for risk-linked securities be encouraged? Are we comfortable with the idea that such risk-linked securities (covering e.g. catastrophic risks posed by natural hazards) could end up in the investment portfolio of households and individuals?

The relationship between the regulatory/supervisory authorities and the regulated/supervised entities is another key issue in this field. While it is certainly very important to establish a direct and close relationship with top management based on mutual understanding and trust, the risk of capture must be controlled. In this respect, the new wave of risk-based solvency standards (e.g. Solvency II in Europe), placing a high degree of reliance on internal risk models may pose additional questions such as:

- Are insurance regulators and supervisors in all relevant jurisdictions in a position to fully evaluate and appreciate the reliability of internal risk models?
- Are there significant information asymmetries that may undermine the effectiveness of supervisory activities?
- Is the risk of capture sufficiently controlled?

Insurance regulation, however, is not the only prudential regulation. There are a number of other areas in which the legal, regulatory and supervisory frameworks for insurance will play an increasingly important role to ensure the proper functioning of the market and to enhance market confidence.

Monitoring claims management practices, for instance, is a fundamental step: the fair, efficient and speedy adjustment of claims is essential to the protection of the interests of policy holders and insured parties, especially where the private insurance sector is taking up roles that should be played by the public sector (e.g. in the fields of health insurance, natural hazards insurance, retirement products).

3.18 Ensuring transparency of insurance contracts is another key objective of an effective legal and regulatory framework. However, one should be aware of the ideology according to which in every domain of life uncertainty private insurances are good substitute for public institutions.

As regards the retail insurance market is concerned, culture widely varies across jurisdictions and decisions made under uncertainty by prospective policy holders are very often affected by cognitive biases. While education and awareness campaigns in this field to introduce or strengthen a risk management culture are advisable, they certainly cannot allow the creeping reproduction of the caveat emptor principle. Potentially tricky insurance products should be banned by hard law.

Too often in the past, "sensible" risks were progressively shifted from the public budget to that of households and individuals on the assumption that private sector solutions, such as insurance, are available to cover such risks. While the availability of the private sector should never be a reason for the public sector to shrink, it is particularly important that at least the following measures aimed at limiting abusive profit-seeking private behavior are taken:

- explicit coordination schemes between the public sector and the private insurance sector (such as private-public partnerships) to ensure consistency with policy objectives, enhance the degree of reliability and trust, and achieve a clearer allocation of the respective duties and responsibilities;
- behavioral bias and systematic deviation from the rational-choice paradigm in the policy holders' decision-making process must be fully assessed by policymakers (the decision to purchase protection for their assets against natural hazards, for instance, is rarely made by individuals according to rational criteria). In this perspective, behavioral bias should be incorporated into policy analysis when setting up explicit coordination schemes.

3.19 With the financial crisis, rating agencies have come under repeated criticism, either for poor responsiveness and delays in modifying ratings in view of market developments, or for the abruptness of unexpected downgrades. Their role should be limited and their activity monitored.

Rating agencies function as private soft-law makers. Lack of legal instruments left such agencies free to compromise the quality of their processes in order to grab or defend market share in a booming environment, with the volumes and complexity of securitizations sharply on the rise in the years to 2007. Conflicts of interest in their relationships with their clients aggravated the situation.

In the US, a regulatory framework for credit rating agencies' activity exists since 1975, reinforced by the 2006 Credit Rating Agency Reform Act. The 2006 Act aimed to foster increased transparency, accountability, and competition in the credit rating agency industry for the benefit of investors. It enhanced the SEC's regulatory authority over rating agencies in several areas, requiring the SEC: to establish a registration process for credit rating agencies; to impose disclosure and filing requirements on credit rating agencies seeking registration; to prohibit certain activities of registered credit rating agencies; to censure, deny, suspend or revoke the NRSRO registration. Although this regulatory framework has not prevented the agencies from ill-performing their role, in 2008 the European Commission followed the US model through a proposal for a European regulation on credit rating agencies.

The point is that both the US and EU regulatory approaches content themselves with focusing on the lack of competition in the rating market, on the absence of transparency in rating processes, and on the conflicts of interest inherent in the rating process. Their implied assumption is that market discipline, in the form of fear of loss of reputation, does (or at least should) provide the right incentives for high-quality ratings. According to this school of thought – to which, to nobody's surprise, credit rating agencies fully adhere – investors and issuers can only accept reliable and serious agencies' conduct in the long run. Once again, the creed is that the market can always regulate itself.

3.20 The highly favorable legal regime shielding rating agencies from liability should be radically transformed. The possibility to establish an international not-for-profit public or quasi-public institution to carry on reliable rating should be explored.

The mere existence of many competitors does not guarantee quality unless there is something causing high-quality producers to benefit and low-quality producers to suffer. Despite this obvious point, so far regulatory authorities have focused on measures to improve rating agencies' incentives and to adjust investors' degree of reliance on agency ratings, and showed no interest in considering appropriate disincentives or constraints to rating agencies' misbehavior, and in devising or enhancing remedies providing direct relief for low-quality ratings.

Striking! Rating agencies are everywhere almost immune from any form of liability. In Europe there is no case law in point, while US courts have failed to recognize the *de facto* regulatory power of rating agencies within the market, equating their ratings to mere opinions, thereby imposing liability on the agencies only when they were found to cause the intentional harm.

Rating agencies should bear significant liability for their misconduct, where "significant" means that liability should be dependant on the negligent breach of a pre-determined (and revisable in the course of time) set of duties. Beyond stay or stop of the activity, agencies should be liable for compensation, disgorgement, and penalties, whose amount should be linked to a fixed multiple, and imposed not to benefit plaintiffs but to feed an international fund to be set up with the aim to compensate victims of financial entities that become insolvent and leave investors holding an empty bag. Third-party insurance coverage should be imposed upon the agencies, also to set a market user- friendly threshold for the agencies' choice to leave, or to keep playing into the market.

Finally, for the activities carried on by the rating agencies, which have a sweeping and truly global impact on the whole of the economies of states and inhabitants of the planet (and this should apply to any financial activity), there might be the case for contemplating a global public system either in the form of ex-ante sweeping controls or in the form of of independent organs made up of independent experts representing all the areas of the world where the activity at stake has had a harmful effect.

3.21 In the last couple of decades, the shareholder's model of corporate governance has gradually become the dominant mode of organizing listed corporations in the world. This structure is responsible for distorted incentives and weak regulation favoring shortsighted and often predatory corporate choices. This supremacy of optional contract-based law over regulation should be stopped and radically inverted.

Since the beginning of this century, there has been a movement of competitive convergence of corporate governance systems throughout the Western industrialized world. In our vision, such convergence must be understood as a rush to the bottom. It has displaced and marginalized other models of corporate governance structurally more effective in taming opportunistic and predatory corporate behavior.

The path of convergence was based on the common concept of a public corporation, which despite the apparent divergence had achieved a high degree of conceptual uniformity in all jurisdictions. However, institutional differences in governance, share ownership, capital markets, and business culture have been, and still are, quite significant. Four models have been competing with each other: (1) the manager-oriented model (US in the 1950s and 1960s); (2) the bank and labor-oriented model (Germany and Austria); (3) the State and family oriented model (Italy, France, Spain and Asia); (4) the shareholder-model (US and UK since the 1980s and gradually Continental Europe since the 1990s).

In the last decade, there has been an open debate on the shareholder model as corporate law's end of history. Some authors cited among the reasons for the supremacy of the shareholder model the followings: the weakness of all the alternative models; the competitive success of contemporary British and American firms; the growing influence worldwide of the academic disciplines of economics and finance; the diffusion of share ownership in developed countries, and the emergence of active shareholder representatives and interest groups in major jurisdictions; a superiority, as yet unproved, of diffused shareholder's structures over concentrated ones as far as cost of capital and value creation are concerned. We add to these considerations a number of factors which are fostering shareholder-style capitalism in European markets, such as: the homogenization of large firms' behavior (in accounting standards, corporate finance and strategic planning) due to influence of international investment houses, consulting firms and rating agencies (discussed supra) and to the de-listing of large European corporations on the New York and London Stock Exchanges; the growing number of strategic alliances, mergers and acquisitions among firms of different nationalities, including trans-national equity agreements, which are mostly based on international standards, where Anglo-American modes are dominant; privatization which greatly increased the number of European firms listed on national and

international markets, including former state-owned companies with very large market capitalization; a large participation of Anglo-American investors on the pan-European equity markets; last, but not least, the equity shift of private portfolios from governments bonds into equity investments, which has gradually introduced an Anglo-American-style equity culture among European investors.

Disagreement continues among scholars on the timing and modalities of the global process of Americanization of corporate structure and governance through the periphery and semi-periphery. Clearly, the current crisis should lead to *very serious* questioning on the soundness of the dominant model of corporate governance, which has been behind much of the unrestrained predatory activity, including the trend to over-compensate the managers. Naturally, a whole academic industry mostly active in top US research institutions has provided mainstream scholarly legitimacy for this rush to the bottom, exporting its vision to weaker geo-political contexts through World Bank's development reports.

As well known, Anglo-American globalized corporate governance puts the maximization of the shareholder's value at the centre of the stage. This model is "light" and contractual in its form. It has been described as a mere "nexus of contracts" – which conceives efficiency primarily as the maximization of value of the firms' shares. "The firm" must be preferred to "the market" as a place of production only on efficiency grounds.

Such a model is characterized generally by a total absence of social responsibility. The management is contractually linked only to the shareholders and not to the workers and the social context of the activity. The firm is abstract, its playground is the world - its efficient strategy is to mimic a zero transaction-cost market. All of this is incompatible with a social reality made of real people in real settings, to whom you might owe a long-term commitment. The only counterpart is the consumer - another abstract reduction of the human experience into a one-shot deal of selling and buying. The "shortermism" that has characterized the managers' behavior in the last few years naturally follows from this conception.

The managers of the firm are "winners" if they maximize the value of the shares, which is directly related to their huge bonuses and stock options. Labor is a mere input in the process of maximizing the value for the shareholders. The firm is efficient if it minimizes the cost of labor (and other social or environmental costs) by discharging such cost directly on the community, and minimizes the cost of capital under the logic of share-value maximization.

For some scholars of the law and economics paradigm, such a model represents "the end of history in corporate law". Indeed, during the global process of privatization at the end of history the Anglo-American model of corporate governance was transplanted in most European, Latin American and Asian settings. This light model turned out to be a failure, not only for the economy

and society as a whole, but also for the long-term value of the firms themselves. We therefore need to rethink the very foundations of such a conceptual apparatus ultimately based on the dominance of incentives over regulation.

3.22 Short from obeying the logic of economic democracy, the public company structure actually encourages the concentration of irresponsible power. The system of "public companies" in the UK is run by a group of few major financial institutions; individuals and households have no direct role in the governance of the system.

At the end of history, within the massive effort to privatize global economies the "public company" was represented as the best of all possible worlds. Its destiny would be to achieve the so-called "shareholders' society", where millions of citizens played an active part in the strategic choices of the firms, through a democratic mechanism of votes in the general assemblies and by nominating their representatives to the boards of directors. In this "dream", an aggregate of selfish individuals would actually work for the public good (represented by economic growth) because of their direct holding of shares and of quotes of investment funds, insurance companies, and pension funds. Shareholders were then supposed to be part of the life of the firms via two possible actions: either by "voice" (representation in the governance of firms), or by "exit" (by selling the shares of firms which were "badly" run).

Why did this "dream" turned out to be a nightmare? First, the shareholders are not "citizens" of the firm. They do not have any real interest, let alone competence, to have a voice in the managerial and strategic choices of the firms. Their only real interest is in the value of their investments (or pensions). Second, even where there is a genuinely diffused shareholding structure, through systems of collection of voting rights, the decisions on the governance of the listed companies in the US-UK are in the hands of the few - no more than 10-15 very large financial institutions, which are related to each others through a system of cross-holdings. The system works in a way very close to the typical logic of British clubs. Power always tends to be concentrated at the top. Whenever a firm is going through a major strategic choice, or is not run according to a given vision, this group of financial institutions enters into the shareholding base of the firm to take control for a limited time span, until the "change" (of management or of strategic direction) is made. The following step is obviously to cash in the capital gains by selling the controlling stakes. Recent empirical studies on the temporal evolutions of shareholdings' structures on the London FTSE have confirmed the workings of such a mechanism, showing how a much increased institutional ownership of UK equities has come mainly at the expense of the direct holdings of individuals.

3.23 Very different models of ownership structure of the systems of large corporations characterized the rise and decline of 20th-century State-owned enterprises in Europe. Basic structural elements of that experience, dismantled in the privatization frenzy at the end of history, should be used in the new public intervention required to overcome the negative effects of the crisis.

The end of history was characterized by major privatization programs. A large part of the industry and banks belonging to States was transferred to capital markets. A profound transformation in the role of the State in the economy occurred in most industrialized countries.

Mixed-economy systems began to emerge in Europe in the 1920s and 1930s, mainly in France, Italy, Spain and Great Britain to save some major firms from bankruptcy after the 1929 international financial crisis. Afterwards, however, their role gained importance and eventually became an essential mechanism of 20th-century European economy. The underlying common belief was that the State should take responsibility for national industrial growth. One of the main arguments was that infant industries in major sectors (steel and iron, telecommunications, energy, infrastructures, aerospace, defense and, in general, high technology) needed greater investments and managerial capacity than private capitalists and capital markets alone could provide. It was also widely believed that a certain amount of protection of new industries had to be provided by the State before exposing them to international competition, and some infringement of the liberal rules of international economy was necessary if structural conditions for the "take-off" were to arise. Accordingly, in his *National Self-Sufficiency* (1933), John Maynard Keynes declared his personal, moral and intellectual disassociation from 19th-century theories on free trade, and helped mercantilist logic regain a new dignity.

After the Second World War, a second wave of nationalization of the main European economies occurred, with added social goals such as full employment. So, the tendency of modern capitalism to introduce planning elements in the running of the economy offered updated instruments for economic post-war nationalism. At this point, however, interventionism also aimed at making national monopolists competitive on the international markets, since they were thought to be ready for it. As well as using macroeconomic instruments to protect the economy (control on prices, on foreign exchange, and on the discount rate), major European governments established a panoply of industrial/political tools to bolster growth, such as subsidies, public job orders, mergers of various national firms working in areas of national interest, control of foreign investments, a reduction of export fees, and so on, in order to favour reconstruction and new industrial growth.

In many European countries, state holdings included industries of basic and strategic importance, such as energy and transport services. Moreover, public ownership was not confined to the State.

Lower public authorities also owned (and still do) enterprises. Examples are the Länder of Austria and Germany, the Regions in Italy, and local authorities virtually everywhere.

The Public Enterprise system in Europe was a very successful model until the end of the 1970s. Its dismantling was less the product of a wise evaluation of pros and cons, than of an ideological turning point. From the mid-1980s on, privatization became mainstream all over Europe. The European Union played a crucial role in fostering privatization, with its free-trade politics at the basis of the formation of a single European market that supplied all the countries with a common conceptual picture and neo-liberal theoretical paradigm. While the Rome's Treaty left each country free to decide on whether companies should be publicly or privately owned, the principal economic reasons for the choice of public ownership were successfully challenged. This conceptual picture - borrowed from the experience of the US and the UK, and strengthened by the European Commission's increasing role in anti-trust policy - caused the transformation of ownership systems and financial markets in all European countries. Since the State was variously prevented from helping companies, companies turned to private capital markets. Moreover, public ownership was thought to render the international alliances games more difficult and contribute to the under-valuation of state-owned companies' stocks. A number of other factors had paved the way for privatization: the excessive costs of social security that weighed heavily on a public financial balance already in deficit; the internal crisis of the public enterprise; the enforcement of European competition policy; the wide belief that the private insurance business could provide social welfare.

3.24 The case of self-management schemes in former Yougoslavia - overstretched for ideological reasons - shows that even desirable ideologies need to be appreciated in practice. Like neo-liberal orthodoxy in Western Europe, self management was put above critique and consequently produced paradoxical results.

We now know, "at the end of the end of history", that many sectors that were hastily privatized – especially in the public utilities, in the large strategic corporations and in the banking systems – did not deliver the promises emphatically claimed by the neo-liberal supporters of the privatization process. The time certainly is now to rethink the role of the public sector in the large and medium industrial and financial corporations, and to introduce some structural factors that might avoid the waste of the massive amount of public money that is currently introduced into the system.

Creative legal structures must be conceived of only after acquiring full knowledge of the large menu of options available to create a system of corporate governance capable of reflecting the

needs of stability and long-term quality-based sustainable development. To do so, the menu should be wide open and include experiences that, in the decade of market fundamentalism, were transformed into taboos. From such an exercise of humble reflection on a too hastily condemned past, we can learn something important for a long-term future.

Of course, every institutional experience must be appraised in its own context. Let us look briefly to a governance model which comes from the examples of Tito's Yugoslavia. For decades, it was possible to experience a rather fervent response to the Soviet type political system and economy. Labor's self determination was put at the center of the scene. Labeling the Soviet system as "State capitalism", Tito and his followers put on their flag "self-management", and the idea that decisions should always be crafted by those who are directly concerned. Hence, there were worker's self-management and "organizations of associated labor" instead of corporations or State enterprises. Participation as an indispensable element of human dignity was also stressed: people who participate in decision-makings will not be reduced into robots, incapable of facing unexpected circumstances requiring flexibility and creativity.

The experience of a law student might show how self management, a subject regularly thought in law school would work in practice. Teachers decided about the curriculum, teaching load, appointments, deans; teachers – together with staff, including janitors and cleaners – decided about salaries, reconstruction of the building, and many other things. Materials were prepared for meetings, and students were supposed to read them. Had they participated at all meetings – and had they read all materials – this would have taken not much less than a third of their working time. But students, as any other social group, were also a part of the self-management structure of the building where they lived, and they were supposed to attend meetings at which it was decided on most efficient ways of handling garbage collection, repairs, installation of TV antennas, and on many other emerging problems. Students were also a part of a self-management structure deciding on research priorities and channeling of funds. There were such "self-management communities of interest for scientific research" at provincial level (e.g. Vojvodina), at regional level (e.g. Serbia), and at State level (Yugoslavia). Everybody was also a part of the self-management structure in the part of the town where they lived, part of the self-management structure of the school of their children – and part of many other self-management structures. According to certain calculations, each citizen would have needed between 23 to 28 hours per day just to observe all self-management rights and duties. But it was hardly possible to raise such a question. You had to believe in self-management (rather than to analyze it seriously).

It is difficult to know whether it would have been possible to organize self-management in an efficient way while remaining within the realm of rational time. The question had to be raised in order to be addressed, which did not happen at the time. As structural problems were not spelled

out and faced, self-management was to a large extent hijacked. Rights that in principle belonged to the "self-managers" (the owners) were mostly exercised by the managers and the party.

Quite paradoxically, the same happened to the ideology of market fundamentalism until the current crisis. People believe in it – instead of analyzing it seriously. People believe in the rationality of a mechanism (particularly when it is juxtaposed to Soviet type communism after the fall of the Berlin Wall), without even trying to comprehend its actual structure. We needed a disaster in order to give some room for doubt. In addition to disasters, we need dissidents. (This is also something we all learned under communism.)

It has been obvious for some time that present day capitalism displays severe structural irrationalities. Also obvious is that it is impossible to get any improvement if one continues to be in denial of such irrationalities. (Just as under communism, where "taking away from the kulaks" was the paradigm of rationalization – even when there were no more kulaks, and when bureaucracy presented a rampant irrationality.) Let's briefly look into the paradigmatic case of Bob Nardelli, the former CEO of Home Depot based in Atlanta. He took over in 2000, and since the first year yielded some difficulties, he resorted to the pattern of rationalization that was dominant (in Yugoslavia, they would have said "which was on the party line"), and turned to "downsizing". This meant the firing of about 200 employees (including many cashiers). The yearly salary of these employees was between $20,000 and 25,000. Hence, his rationalizations saved about 5 millions. This may make some sense, until compared with his CEO salary, which was $156 million per year - equivalent to about 6,000 Home Depot workplaces. Had his salary been reduced to a still outrageous 150 million, there would have been no need to fire anyone. (Also, Nardelli was probably more responsible for the bad year than the cashiers.) But downsizing CEO salaries (rather than jobs) would not have been in accordance with the "party line", hence was not an option – just as reducing bureaucracy for the sake of rationalization was not an option under Stalin. When Nardelli was fired in 2006, he received a severance payment of 210 million. He later wound up in the automobile industry, as a top manager of Chrysler.

Since last year the irrationalities are less hidden, and it seems that the "party line" is not as unimpeachable as it used to be. What has become an issue is that Wall Street distributed $18 billion in bonuses in 2008. This is actually the equivalent of more than half a million jobs. Furthermore, this was not a one-year event (in 2007 Wall Street distributed bonuses for $32.7 billion). In the experience with self-management, corrections and rationalizations were hardly possible, because this would have presumed spelling out and facing irrationalities. We hope this will be possible this time around. Our knowledge is limited (probably even more limited than with regard to self-management), but let us try to contribute by way of spelling out some ideas.

3.25 A significant number of irrationalities affecting the current corporate governance structure are located in property theory - especially in the paradigm of individuals' rationality when following their self interests. To this, it is usually added that the interests of the owners are in line with the interests of the consumers.

Let us mention a few stumbling blocks that make the functioning of the dominant model of corporate governance difficult in present times: Can the owners do what they want? Not really. A key issue closely linked with (the chances of) rationalization is the balance of rights and duties between owners and managers. Increasing shareholder's power is one of the proposals already on the table, and it deserves attention. While it is not entirely clear whether the interests of the owners are necessarily in line with rationality, it has become clear that the interests of the managers are often not – at least not within the present regulatory framework. In his lecture to the Columbia Law School Federalist Society on November 24, 2008, Judge Posner stated that boards of directors are hardly reliable agents of shareholders, and pointed out that managers were actually acting rationally (in line with their own interests) while leading corporations towards disaster. It is obvious that these premises have to be changed. If incentives are misaligned, this should be perceived as a systemic irrationality rather than an expression of freedom.

It is also important to observe that in those (not many) cases in which outraged shareholders tried to obtain some legal remedy against managers, the existing legal framework made this often impossible. In the (in)famous Walt Disney company Derivate Litigation case, the shareholders sued the managers for breach of fiduciary duty by way of choosing a most unsuccessful CEO – and for giving him after 14 months a $140 million severance payment. The Delaware Court found that there was no remedy under the existing rules. An interesting (although not really persuasive) thought in this judgment was that one cannot and should not measure corporate behavior *ex post* with those more demanding standards that were shaped after the ENRON and World Com scandals. In his statement of reasons, Judge Chandler was quite apologetic, but this did not change his position. His judgment was confirmed by the Supreme Court of Delaware.

The truth of the matter is that owners are neither informed nor qualified enough to make decisions within the corporate structure. Corporate structures and ways of dealing are getting more and more complicated, and less and less transparent. One of the essential findings of the Powers Committee which analyzed the circumstances of the ENRON scandal was that ENRON did not make its activities transparent and understandable for those who read financial reports. In sum, owners simply did not understand what was going on. Hence, even if they had power to make decisions, they were not in a position to do so. What is even more important is that this was not just a bizarre idiosyncratic situation. Lack of transparency and lack of preconditions for

comprehension is quite typical. This leads to a situation in which the majority of decisions are guided by fashion, or belief (or "party line"), by "heard mentality", rather than by rational choice. It is difficult to see how capitalism can be rational if the owners are deprived of the opportunity of making rational choices. Making corporate dealings fully transparent and understandable is probably not possible. A considerable improvement of the present situation by way of legal norms is probably possible.

Today, a huge number of owners are simply unaware of their ownership. People have portfolios, which tend to be diversified, and which are handled by agents and banks. Shares in these portfolios are, of course, proofs of ownership, and the owners will gain or loose money as a consequence of their ownership. But typically they do not really know what is exactly in their portfolio – and even less do they feel entitled or obliged to act as "real" owners. This type of ownership covers a considerable territory of the economy. It is clear that the mythology of ownership-based rationality has no soundness in this territory.

This circumstance puts again into focus the power of managers, and the issue of control over managers, when a significant part of the owners does not even have a voice (because they are not even aware of ownership). A recent article in the Washington Post claims that many companies (including Google) allowed executives to exchange sharply depreciated stock options for new awards with more generous terms. The article mentions that "the companies argue" that this is "necessary to retain and motivate personnel". The question is: Who actually articulated this concern? Who are "the companies"? The owners?

One could link to this question another one. Has the number of fired unsuccessful executives come anywhere near to being proportionate to the disastrous results accomplished by them? Again, who are the companies?

We would also like to raise a different (though not unrelated) issue. Two years ago, a new course at the International Business Law Program of the Central European University in Budapest was introduced. The title of the course was "Human Rights in Corporations". It has been a very positive experience, and we would like to suggest that such a course should be an element of law school curriculum. Corporations have obviously become important and powerful enough to determine one's life and human rights. Contemporary human rights problems cannot be fully analyzed if they are only perceived in juxtaposition with States. And, as we have already mentioned many times in this report, education is the key element in any long term endeavor.

In fact, one of the main shortcomings of the shareholder's value model of capitalism is its short-term horizon. It is important to introduce a long-term view of bank/industry relationship and corporate governance. To do so, it is essential to restructure the best of all historically tested models, be it the European social model of capitalism or the self management model of the

former socialist world. Sustained investment in a global social capital may produce the kind of mix that is desirable for the challenges of this century.

3.26 The process of labor commodification, reflected in its legal organization, was exacerbated at the end of history. There is a global urgency to reverse this process.

The weaker the legal system, the less capable it is to tame the process of commodification of human beings. Globalization has exacerbated this process. Cheap labor stuck in poor countries by the artificially produced barriers of immigration law is today one of the most important inputs of the global productive process. Not only powerful economic forces but also many different legal strategies have facilitated this process, whose result is to transform a large portion of the global society into objects of production rather than subjects and human beings.

3.27 The separation of labor law from commercial law institutionalizes a division of the cooperative surplus that is unfair and unsustainable. Any benefits of financial capital mobility must always be synergized with the realities of social capital mobility.

From the economic perspective the productive process within a firm is a cooperative effort. Its hierarchical organization and the always increasing tendency to outsourcing of the activity into very competitive markets which require quick decision-making have produced an almost watertight distinction between decision makers (the management and the corporate organs) and subordinates, which as any other productive factors are the object of the decision. Commercial law and labor law have consequently reflected this separation, the former being devoted mostly to the process of corporate decision making, while the latter dealing mostly with the issue of "protecting" these human factors of production while at the same time guaranteeing the "flexibility" of the labor market - striking a balance that should avoid class conflict to disrupt production.

What lawyers see as "labor law" today is generally confined to the regulatory structures that define and organize collective bargaining among various sub-groups of employees and employers. Some systems distinguish labor law from employment law as regulating the respective rights of individual employees and their employer. All capitalist legal systems reinforce the distinction between subjects and objects of the economic decision making by distinguishing labor law from corporate and commercial law, as regulating the organization of capital in various enterprises entities.

There are two structural principles that are needed to guide a forward-thinking integration of modern economic law, especially with regard to labor and corporate law. The first is that the benefits of financial capital mobility must always be synergized with the realities of social capital mobility. Even if, and this an empirical question, increases in financial capital mobility yield marginal increases in economic efficiency and growth, this has to be weighed against the distributive meaningfulness of such returns, but more importantly against the time-series specific impacts on quality of life that such mobility generates through economic instability. In short, Schumpeter's creative destruction taken to its extreme logic yields a life that is chaotic, uncertain, and ultimately undesirable. If the degree of financial capital mobility is used to define the regulatory logic of an economic system, it will invariably generate economic conditions that exceed the adaptive capacity of social capital, and consistently lead to the traumatic shocks people are facing around the world.

At the same time, the classic distinction between holders of labor and capital itself must be rejected as a structural principle that is again neither ontologically necessary nor socially desirable. The critical distinction between corporate and labor law is predicated on the incredible inequality in financial capital distribution during the 20th century. While certain institutional investors, most notably pension funds, represent accumulations of individual financial capital, they have neither acted nor invested with substantial deviation from any other economic actor. Because of the overall systemic logic, such actors have failed to promote conditions of economic justice and are not truly accountable to their individual constituents. A closer practical integration of labor and capital is the key to promote sustainable, community-driven wealth as well as a more effective internalization of enterprise externalities. Here, the two principles mutually reinforce each other: increasing integration between labor and capital in the wider sense serves to effectively and productively reconcile financial capital mobility and social capital mobility.

3.28 Alternatives aiming at the birth of a sustainable global economic law should be explored. Systems of co-decision, profit sharing and employees' ownership structurally facilitate long-term sustainable corporate decision making.

There are four extant regulatory alternatives that have been either marginalized in the mainstream labor/corporate law dichotomy, or de-emphasized in the last few decades of excessive transfers of regulatory power from public to private actors. Such alternatives have to be considered as better practices to be implemented by global labor law.

The first and least radical alternative is a shift away from the focus on collective bargaining on the individual corporate level (which is the global tendency given the trade unions' increased weakness) towards global industry-based bargaining units. While still problematic - given its

perpetuation of the labor/corporate conceptual distinction - a large-scale social negotiation can in some way address real issues of long-term sustainability and quality of life for people. This represents in various shades the most successful traditional collective bargaining arrangements, including the effectively national-level bargaining in Scandinavia and the industry-level bargaining in pre-1996 Australia.

Moving progressively out of the traditional labor law paradigm is the proliferation of effective systems of corporate co-determination – giving workers or unions a real vote in corporate decision-making. For a long time an aspect of German corporate governance, co-determination has been fiercely resisted globally and not just as part of the recent trends in economic politics, but throughout the 20th century (the fate of the EC's Fifth Directive on Company Law illustrates this well). By diversifying the stakeholders in corporate decision-making, co-determination adds another powerful actor to monitor intra-firm management as well as alter the longitudinal-time horizons of corporate decision making. Both of these dynamics militate against exactly the type of insular, short-term cognitive fallacies that helped generate the current financial crisis, while underlining the necessity of strongly linking economic production to people's welfare instead of considering it an end in itself. This critically subverts the labor/corporate law distinction by creating a more holistic, and realistic, regulatory scheme that more broadly addresses the effects and justifications for enterprise activity.

The next two regulatory possibilities seek a more radical break from the traditional labor law paradigm. The first is the robust promotion or mandated provision of scheduled profit sharing and workplace reinvestment. A primary assumption of traditional labor law was that wages were the static outcome of the bargaining process grounded in the inherent antagonism between employee and employer. This grew out of assumptions in classic political economy related to bargaining power and static profit pools. Furthermore, it created the justificatory illusion that wages defer all enterprise risk to capital, while in fact they contribute to systemic economic instability by removing employees from intra-firm monitoring and decision-making, and towards managerial agents with increasingly short-term time horizons. Coupled with limited liability for capital investment, a lack of profit-sharing moves most people into a context where they cyclically suffer the harshest practical consequences of economic downturns and the least benefit of economic upturns, witnessed by the growing rates of global and national inequality and wage stagnation in developed economies. Moreover, the advantages of profit sharing for enterprise activity are increased when at least some profit sharing is encouraged in workplace reinvestment. However, this also exposes the limitations of profit sharing when decoupled from direct governance mechanisms such as co-determination, as the diversification issues related to 401(k)'s have recently exposed in the US.

The final and more coherent expansion of the profit-sharing option is the promotion of systemic employee corporate ownership. This option largely vitiates the labor/capital distinction by creating an economic reality where capital itself it distributed equally enough, so that the labor/capital distinction is obviated on the individual level. Employee ownership itself has been an often-heated subject of analysis that joins in debate, though mostly in disagreement, contemporary labor law and corporate law scholars. A great deal of this debate concerns the theoretical intra-firm efficiency of employee-owned corporations – which at least for the time being has ended in an empirical stalemate over quite small marginal effects. In addition, most of the abstract or theoretical criticism of employee ownership generated in the debate, especially in regards to diversification, has either been empirically unsubstantiated or refuted in practice. However, on the political level employee ownership has often had a much less problematic fate. Employee Stock Ownership Plans or ESOP's in the US and abroad have attracted a great deal of attention largely because the idea of the citizen-owner cuts across traditional divisions in economic politics.

Yet, existing forms of employee ownership and ESOPs have been quite limited in their ability to represent a coherent alternative to the traditional labor/corporate law distinction. This is directly due to the fact that little in current labor or corporate law doctrine is tailored to regulate employee-owned corporations. The mainstream conclusion among most corporate law scholars is that the often heterogeneous interests in such firms are intractably inefficient. This conclusion is amiss because it holds up efficiency as the only value that enterprise activity serves, today that those heterogeneous interests in corporate decision making are increasingly desirable for sustainable, long-term growth, but also for preventing the type of unchecked groupthink that creates economic bubbles. Defenders of employee ownership are often caught up in old ideological debates over whether they are good or bad, and not what makes them good or better. It is exactly the necessary process of research and experimentation in employee ownership that speaks to the need for mechanisms for agglomerating local economic successes and failures into a more global regulatory discussion.

The reduction of labor to a mere productive input (and of laborers to a commodity) is responsible for the growing global disparity, a problem whose solution is crucial to a stable and sustainable human future. Legal ideology - including that reflected in global organizations such as the ILO - institutionalized this view of the labor relationship by limiting itself to a reactive protection against the most outrageous abuses. This legal approach should be questioned. The more we can unshackle our law from the conceptual legacy of the 20th century the better off we will be for facing the new challenges of the 21st century and beyond.

3.29 Long-Term Investors should be the objects of much institutional attention, given their potentially stabilizing role. Such investors should find an adequate position in any new global financial architecture in order to support them with specific policy decisions and incentives.

From a purely financial point of view, a long-term investor can be defined as an investor who believes that markets will rise over a long period of time, and hopes that this long-term trend will offset short-term price volatility; the opposite of a long-term investor would be a short-term trader, who will hope to profit from market volatility by buying assets at a low price and selling them at a higher price within a short period of time.

There is a concrete institutional possibility to overcome the current prevalence of choices determined by short-term strategies in favor of more long-term oriented responsible forms of corporate investment. As is always the case, such a result can in principle be reached by working on the incentives, by introducing regulation, or by focusing on the institutional structure of the decision-maker. This last structural aspect should be modulated according to specific vocation and nature of the "Long-Term Investors", which requires some taxonomic scheme to handle potentially very different global institutional actors. We may have private, public and private/public Long-Term Investors, and each category may have different legal and structural constraints; different policy objectives; therefore different asset allocation models. For example, Long-Term Investors may hold controlling shares in strategic corporations for general national long-term interests; or for achieving specific policy goals related to sectors such as energy and climate change, infrastructure, transport, defense, R&D, education, cultural heritage, and the like.

From a legal perspective, a crucial topic is the desirability of particular corporate governance and general legal settings – as well as accounting standards and techniques – for different types of Long-Term Investors like those that operate in the public sector, but also institutional investors such as Sovereign Wealth Funds, and Hedge Funds. New legal standards may require more segmentation (separation) of credit and financial institutions, which may pair with corporate governance, accounting and legal constraints on different classes of Long-Term Investors.

Long-term investors are, in fact, prepared to accept risks that short-term investors are unwilling to take - they are prepared, for example, to invest a large part of their wealth in equity portfolios and to finance infrastructures, the profitability of which can only be measured over a very long period, but which might be essential for a sustainable future; they stabilize markets and are prepared to smooth their gains and losses over time, and publish high quality long-term oriented information; they can adopt a counter-cyclical approach, as long as this is measured over the time horizon of their investments.

Long-term investors can be conceptualized as agents carrying on a long-term plan or vision of their principal. The relationship with the principal, shareholder or public authority, must be focused above all on preserving the long-term character of the investor, and particularly the permanence and stability of its liabilities. Special corporate governance rules, legal and accounting constraints and/or incentives may also be necessary.

In the case of a private-sector principal, the relationship should be expressed in the accounting and prudential framework, which must reflect the investor's desire to consider his investment as long-term in nature. If the principal is in the public sector, the State as a shareholder must undertake to guarantee the credibility of the investment through a legal framework, which clearly describes the medium-term contractual relationships. It may also maintain long-term control of corporations for strategic reasons of national interest, such as industrial policy, international cooperation, special needs of certain economically disadvantaged areas of the territory, and achievement of social and environmental goals.

Against the background of future discussions on the necessary changes to international financial regulations, we believe that it is both necessary and urgent to define a regulatory regime for long-term investors that is both stable and appropriate to their mission.

CONCLUSIONS

The law is not a technology. It is not a mere system of social engineering. It is not an abstract set of black letters that can be objectively followed or interpreted. The law lives an intimate, inextricable relationship with the society, the culture and the system of political economy it has to govern and from which it is governed. The law must be assisted by power in order to function as a vehicle to frame society and to materialize the collective will.

The global economic and financial system is not a technology. It is not an object of observation, which follows general scientific laws capable of being described by abstract models. The financial system is not a playground where the smartest guys in the room should be free to bet with other people's money.

Both law and the economic system must be understood as deeply political artifacts, through which human forces driven by particular - most often - opposite interests shape their future. Global finance is like war waged with different means. The attempt to maintain some financial stability through the legal system is the purpose of a system of ***global legal standards for the 21st century***.

Such a proposal, brave and ambitious, must however face the challenge of real life - of the concrete circumstances of the current phase of development. Above all it has to prove its own good faith. The political economy of the current times has entered a phase of crisis serious enough to force even the most powerful among the political actors to second-guess most of the ideology of the end of history. This report has attempted to assist in a process of self critique that must be fully carried out as a pre-condition to look for some new global order through the law.

We had no claim whatsoever of being complete. Our task was only to expose from the perspective of the "real life of the law" a variety of false assumptions, of concrete problems in the chaotic global legal architecture. We have also pointed at some priorities that cannot be procrastinated if capitalism credibly wishes to be the human social system for a future. These priorities, particularly the immediate and complete remission of the debt of poor countries, are the fundamental test of the good faith in attempting to re-establish a global order through the law.

To understand how the political economy of the law might develop after the crisis, we should be aware of where we are coming from. Historical memory of the past is essential to imagining a long-term future. The eternal present is one of the components of the disordered present.

In a famous book of some years ago, Michel Albert claimed that the end of the Cold War would have opened a competition between two different conceptions of capitalist development, European Social capitalism and what he called the Neo-American model. The end of history was

characterized by the triumph of the latter. The historical development of the European capitalist system (which deserves attention as the most advanced experiment in legal integration of foreign sovereigns) seems to confirm the triumph of privatized corporate capitalism as a deep aspect of the current era - the single most important aspect that has determined the global financial crisis.

We observe in fact a clear partition of post-World War II European economic history into two distinct phases. The first goes from about 1950 through the 1970s. The second arrives to the current day. The main feature of the first period was mixed economy, within which strong states interacted with weak, still mostly local, markets. The second period has been characterized by an integrated market economy within the hegemony of private corporate actors. All European countries, albeit differing in speed and intensity, have designed and implemented major structural reforms since the mid-1980s, thus favoring these actors. This period has featured weaker states and stronger corporate actors. Even evaluated in its own terms, it would be difficult to consider this historical unfolding as a progress or an evolution. Remarkable growth rates and almost full employment rates were the characteristics of the first phase, known as the Golden Age. By contrast, sluggish performance in terms of both output and employment, have dominated the second phase. Average real GDP growth in European countries was 4.6% in the period between 1950 and 73 and a mere 2% in the period between 1980 and 2001. Exceptionally low unemployment rates prevailed in the first period, while the highest rates of unemployment ever experienced since the Great Depression characterize the present. In a recent book, Robert Reich offers a similar picture of the United States, the center and “context of production” of the worldly dominant model. In the crib of the Washington Consensus we must appreciate an incremental decline of the institutional structures of a capitalist system respectful of public order, and the triumph of a corporate super-capitalism whose social and even economic performance is nevertheless quite poor. Reich also points at an earlier Golden Age.

Under these conditions it is very tempting to point at the golden past as humanists pointed at ancient Greece. Such an approach would be reactionary and as such utterly unrealistic. The current crisis deeply questions the paradigm of the end of history, an ideal convergence of all the countries of the world towards a model that Guy Debord very critically named the “integrated spectacle” born from the ashes of the bi-polar world. We cannot indicate one or the other model of development of the past as a recipe for the future. They were both an expression of the same logic of physical exploitation of the world that it is the necessity of our time to overcome. But we must learn from past mistakes as well as from the best ideals and practices that the past conveys to us. The future is not in a single thought, neither in politics nor in the law. The future belongs, if at all, to pluralism, hybridization, dialogue and mutual respect.

This crisis puts those of us who still have not understood it in front of incontrovertible facts: we have just one planet; human societies are all interconnected; and no discrete human group no

matter how rich, powerful or technologically advanced, can behave as if it were alone on earth, and as if the entire planet were the object of its ownership and sovereignty. We can guarantee a future for our species only if we are humble enough to tap every legal and institutional experience that may propose some reasonable solution for the complex aggregate of issues that must be approached. This attitude would be the only hope to solve for the first time in history (within history, not outside or at the end of it) the daunting problem of a sustainable society where the necessary conditions exist for the ideals of “liberté, egalité, fraternité” to unfold.

The law, the economic system, or the financial system, are all means to allow the dignity and the gifts of humans as well as of nature to survive and prosper. The law should provide an order to all of this, or at least should not serve the disorder that precludes the ultimate end of a society based on peace and respect from being achieved.

Another crucial point that we have emphasized in this Report is that the law, in order to be able to govern finance (and more generally the economic system) should be based on a collective, public political authority. It should not be functional to the profit motive of any private individual or corporation. It should be structured to serve the public good. It should find its life in the public spirited justice motive of each and every individual in different societies. The nature of law as a public good is perhaps its only universally-recognized structural character. The privatization of law at the service of narrow special interests is its single most important degeneration supported by the ideological construction of the end of history. This degeneration must be cured. Either the law is a public good serving the public interest (i.e. the interest of stability, order and justice towards everybody that enters in contact with it) or it is not law. The legal standards for the 21st century must be a public good produced by a highly-inclusive global political process. Otherwise, they are not going to be law, but just another source of disorder and plunder.

The knowledge of the past and the critical appreciation of the present can bring us into the future. A future that itself must belong to everybody - and no one should live in the illusion that it can be privatized in the interest of some (the rich and the powerful market-dominant minority). Global law cannot be seen as an end in itself, but as a means to protect interests that humankind collectively decides are worth of protection. This approach is reflected in the fundamental claim of this Report for a new broader vision of the commons and of the public goods.

It is imperative to re-think access to the public and common resources, starting from the “commons”. Not only individuals but also communities have rights; not only humans but also nature has rights, as recently recognized by Article 10 of the Ecuadorian Constitution of 2008. Hence, a reflection is urgent on the process of progressive corrosion and reduction of common resources worldwide, and the recurrent privatization of public goods through sale or private management that seems to be a structural consequence of the global triumph of corporate

capitalism at the end of history. In fact, as long as the State was holding a dominant role in the essential public services, it was not of immediate need to distinguish common from public goods. However, starting from the 1990s, the situation changed when the management of these goods gradually passed to private entities (corporations) in many countries, leaving in the hands of public institutions (only if at all) the formal ownership of the goods, and an undefined and most always weak power of control and external regulation. As a consequence, almost everywhere, the dominant interpretation of competition and efficiency has marginalized the interests of the local territories and communities, and the social aim of public services; it has emphasized growth and development offered by multinational corporate and financial investments in complete oblivion of their social costs.

To be sure, both in industrial and in poor countries, the possibility to realize big business in situations of natural monopolies, through the exploitation of the goods of collective property and the involvement of multinational corporations is very attractive for the political elites. The weakness of the present regulatory framework and global institutional systems is in no little part caused by an outdated conceptual framework, which is unable to respond to the new demands of an ordered management and regulation of collective long-term interests of communities and future generations. It is thus necessary to define new categories capable to take into consideration the rights of human civilization as a common good in the broadest sense.

In the outlined perspective, the “Commons” are goods that, beyond their property title might be public or even private (think of a forest), fulfil by natural vocation social and economic and survival interests of the very same community of humans and nature. Hence, commons belong to all individuals, and the law must protect and preserve them for the benefit of future generations. There are daunting legal issues open to preserve goods that are predominantly of the natural and cultural heritage, like the rivers, streams and springs, lakes and other waters, air, parks, forests and wooded areas, mountainous areas of high altitude, glaciers and perennial snows, beaches and stretches of coastline declared an environmental reserve, wildlife and flora, and finally archaeological, cultural, environmental and other protected landscape areas.

In other words, all such and other commons, beyond the title of property, are characterized by a destination of general utility. Therefore, they are goods instrumental to the achievement of economic-social and territorial cohesion and the fulfilment of fundamental rights. As a result, the sound management of these goods should be able to “enrich” the community and territory of reference within the logic of solidarity and social justice.

Most often private or public economic, financial and development activity endangers the commons. To be apt to serve the needs of the 21th century, global legal standards must be capable of protecting the commons by developing within their structure a grammar capable of

handling these very concrete issues - always serving as a reminder that one world is a gigantic common and the final tragedy is a most likely possibility.