



September 2022

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### Recommended Citation

Ahmed, Sanaa (2022) "The Politics of Financial Regulation," *Socio-Legal Review*: Vol. 11: Iss. 1, Article 2.  
Available at: <https://repository.nls.ac.in/slr/vol11/iss1/2>

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# THE POLITICS OF FINANCIAL REGULATION

Sanaa Ahmed\*

*In a world where the dominant dynamic of economic regulation is one of deregulation,<sup>1</sup> financial-sector standards such as prudential regulations, accounting standards, as well as the regulation of corruption, securities, and money laundering have been ratcheted up and most countries have complied meekly. Why?*

*The answer to this question lies in the 'how'. This paper argues that the increasing currency of global standards and regulations are an indication of the pervasive nature of control exercised by the regulators. By setting up a protective, technicality-centred discourse around financial regulation, the regulators characterise it as an essentially technical and apolitical matter, and use the characterisation to infer legitimacy for themselves as disinterested and skilled technicians. It is argued that the nature of regulation – the structuring of a regulatory web, the governance structures of regulatory institutions, as well as the enforcement mechanisms deployed – preclude any meaningful*

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1 I rely on Braithwaite & Drahos' understanding of 'regulation' as an umbrella term for rules, norms, standards and guidelines. Financial regulation, as Braithwaite & Drahos see it, pertains primarily to the regulation of banks and non-bank financial institutions, money laundering, companies and securities firms, insurance, and taxation. They do recognise, however, that the procedural application of such regulation also brings standards related to accounting, auditing, corporate governance, and payments systems into the ambit of financial regulation. Comparatively, the joint IMF-World Bank Financial Sector Assessment programme also adds data dissemination, fiscal transparency, insolvency and creditor rights, monetary, and financial policy transparency to this list as standards and codes that must be monitored for effective regulation of financial systems. Braithwaite & Drahos' use of the term 'deregulation' contrasts with that of other authors such as Hardt and Negri who argue that free markets do not feature *less* political control and intervention but merely those of a different kind. The process would then qualify as 're-regulation'. See JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* (2000); MICHAEL HARDT & ANTONIO NEGRI, *MULTITUDE* 168 (2004).

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*accountability. This paper submits that this control is symptomatic of a new kind of political control and contends that its aims must be interrogated.*

### INTRODUCTION

The most remarkable feature of global financial regulation<sup>2</sup> is the difficulty in holding any one institution or regulator responsible for it. There is a vast and rich body of literature interrogating the normative commitments, the underlying ideology, and the politics informing the governance of the global political economy.<sup>3</sup> Contemporary scholarship has problematised various aspects of global economic governance, its components – international trade and investment, development, and debt – as well as its implications for the subaltern: who is regulating whom, on whose behalf, why and how, and to what effect. In each instance, the implementing institutions and the authors of regulation, such as the World Trade Organisation (WTO), International Financial Institutions (IFIs) or transnational corporations, as well as the interests they represent, are easily identifiable. There is a distinct body of ‘rules’ with clearly defined consequences for non-compliance. There is a fierce debate on and contestation of the regulatory power wielded by these organisations, as well as their enforcement capabilities. Finally, the debilitating economic, social, and political consequences of these decisions are widely recognised. Animating these debates are concerns regarding the accountability, legitimacy, and transparency of these institutions and their decision-making processes, as well as the consequent impact on national sovereignty and democracy in the developing South.

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2 Braithwaite & Drahos define the globalisation of financial regulation as “the spread of some set of regulatory norms”. See BRAITHWAITE & DRAHOS, *supra* note 1, at 8. As they see it, globalisation operates at the level of specific rules and at the level of general principles. Distinguishing principles and standards are the facts that standards are used as measures of conduct and can have a high level of specificity. See BRAITHWAITE & DRAHOS, *supra* note 1, at 19. The scope of this article, however, precludes such a distinction.

3 See generally Saskia Sassen, Sundhya Pahuja, Sol Picciotto, Stephen Gill, David Schneiderman, and James Thuo Gathhi. ‘Global political economy’ here is understood as the interaction of the market and actors such as states, multinational corporations and international organisations. See ROBERT GILPIN, *GLOBAL POLITICAL ECONOMY: UNDERSTANDING THE INTERNATIONAL ECONOMIC ORDER* (2001).

Despite being a crucial component of international trade, global financial regulation has thus far escaped similar, significant, and sustained problematisation.<sup>4</sup> This is partly due to its nature – it is hard to identify a single author and locate specific interests within multiple global regulatory bodies, harder to contest voluntary standards, and meaningless to resist where there is neither overt enforcement nor penalty.

However, the most significant impediment to meaningful debate about financial regulation stems primarily from the protective discourse surrounding it. This discourse characterises financial regulation as an essentially technical and apolitical matter. Consequently, global regulators and standard-setting bodies emerge as disinterested and skilled technicians, not established political actors with well-entrenched interests who assert power to achieve their own objectives.

This discourse then persuades the few critics of financial regulation, as well as the regulated, to side with the regulatory agencies. Most seem convinced that regulation is good, more regulation is better, and the drafting of ‘necessary’ technical procedures to prevent financial contagion<sup>5</sup> or systemic risk<sup>6</sup> is best left to the global experts. Dissent is mostly limited to the *form* – transparency, accountability,

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4 For useful discussions on financial regulation, *see generally*, Julia Black, Chris Brummer, Emily Lee, Rolf Weber and Antonio Segura-Serrano.

5 Contagion occurs when cross-border capital flows transmit economic shocks. Contagion may be divided into two forms: economic contagion, which occurs through trade and investment flows, and pure contagion, which arises from changing risk appetite among investors and can lead to reverse capital flows from emerging markets. *See* KERN ALEXANDER ET AL., GLOBAL GOVERNANCE OF FINANCIAL SYSTEMS: THE LEGAL AND ECONOMIC REGULATION OF SYSTEMIC RISK (2005).

6 Precise definitions of systemic risk are hard to come by, although, as the phrase suggests, the phenomenon has to do with the risk posed to the functioning of the financial system. Wilmarth, for example, defines it as “the risk that the failure of a major financial institution will severely disrupt the financial system and will have adverse ‘spill over’ effects on the general economy”. *See* Arthur E. Wilmarth, *Controlling systemic risk in an era of financial consolidation*, (2002), <http://www.imf.org/external/np/leg/sem/2002/cdmfl/eng/wilmar.pdf>; comparatively, Alexander *et al.* define systemic risk as “arising from the mispricing of risk in financial markets, which often means that risk is under-priced in relation to its costs and that the under pricing of risk results in too much of it being created in financial markets” can arise from problems with payment and settlement systems or from some type of financial failure that induces a macroeconomic crisis. *See* ALEXANDER ET AL., *supra* note 5, at 23. Systemic risk inherent to international banking includes global systemic risk (the risk that the failure of one significant bank will cause the collapse of the entire banking system); safety and solvency risks that arise

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*et al'* – rather than the substance of regulation; to the procedural difficulties in operation rather than governance itself.<sup>8</sup>

This paper argues that this two-fold convergence between various national regulatory regimes, as well as the alignment of the proponents and critics is symptomatic of a carefully concealed and insidious power. To quote Hardt and Negri in a different context, “[not] *less* political control but merely a *different kind* of political control”.<sup>9</sup>

The study of global financial regulation as a technique of power is fascinating, precisely because the regulators, regulations, and the processes of decision-making are as ‘flawed’ as those of international trade, or multilateral lending. But, a prudential regulation<sup>10</sup> proposed by the Basel Committee on Banking Supervision (Basel Committee) still lacks the emotive resonance or the proclivity towards being contested of a WTO-endorsed TRIPs regime or an IMF-sponsored conditionality. The ‘illegitimacy’ of the incumbent regime has not impeded, let alone prevented, increasing convergence of ‘minimum’ regulatory standards.

However, the increasing currency of financial-sector standards, such as prudential regulations, accounting standards, as well as the regulation of corruption, securities, and money laundering are not a testament to their inherent salubriousness but to

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from imprudent lending and trading activity, and the risks to depositors through the lack of adequate bank insurance. Systemic risk matters because high levels can lead to bank failures, which can, in turn, pose a threat to the financial system and the broader economy. This is because banks play an important role in payments and clearing systems; bank failures have an underlying potential for a bank run; and the threat of contagion due to the interconnected nature of banks. *Ex ante* measures to manage systemic risk include capital adequacy requirements, large exposure limits and limitations on lending while *ex post* measures include deposit insurance and the lender of last resort function.

7 See, for example, Michele Frantianni & John Pattison, *International Financial Architecture and International Financial Standards*, 579 ANNALS AM. ACAD. POL. & SOC. SCI. 183 (2002).

8 For a lucid account of the procedural problems with global financial governance, see Jonathan Ward, *The New Basel Accord and Developing Countries: Problems and Alternatives*, CAMBRIDGE UNIVERSITY (2002), <http://www.cerf.cam.ac.uk/publications/files/Ward04.pdf>, and ALEXANDER ET AL., *supra* note 5.

9 HARDT & NEGRI, *supra* note 1, at 168.

10 The purpose of prudential regulations is to help banks and other non-bank financial intermediaries manage various types of risk such as credit, concentration, market, settlement, liquidity and operational risk. ALEXANDER ET AL., *supra* note 5, at 24.

the pervasive nature of control exercised. This discipline is both external (as enforced by the official sector<sup>11</sup> and the market) and internal (the self-disciplining involved in complying with international ‘best practices’<sup>12</sup>). Compliance is secured through the use of sophisticated disciplinary techniques such as watch listing,<sup>13</sup> conditionality,<sup>14</sup> and intrusive surveillance,<sup>15</sup> not unwieldy and obvious enforcement mechanisms such as trade sanctions, or withheld loans.

This paper is structured into three sections. Part 1 advances the normative argument of why financial regulation qualifies as a political, and not a technical issue, while Part 2 offers a historical overview of the evolution of global financial markets and regulation. Part 3 then moves into a discussion of the specific features of contemporary regulation that enable regulators to exercise stringent control and effect the global harmonisation of rules, regulations and standards. It is argued that the unproven utility of financial regulation, the democratic deficit in the devising of regulation, coupled with the pervasive nature exercised by regulators make it necessary to examine whether global financial regulation is really as worthwhile a project as it is made out to be.

## I. FINANCIAL REGULATION: POLITICAL OR TECHNICAL?

Financial regulation matters. Regulatory rules for financial intermediaries define the relationship between the stock of financial assets and overall liquidity. This, in turn, affects aggregate demand, output, employment, and the spending ability of individuals, firms, and governments.<sup>16</sup> A bank forced to adhere to higher capital adequacy requirements<sup>17</sup> lends less to individuals, businesses, and the government for ploughing into the productive economy. Fewer goods are produced, fewer jobs are created, and fewer roads are built. A bourse with overly stringent criteria for listing limits the ability of firms to raise capital, thereby constraining the

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11 The phrase refers to the IMF and World Bank as distinguished from the private sector.

12 Antony Anghie, *Time present and Time Past: Globalisation, International Financial Institutions and the Third World*, 32 N.Y.U. J. INT’L L. & POL. 243, 286 (2000).

13 BRAITHWAITE & DRAHOS, *supra* note 1, at 28.

14 Sundhya Pahuja, *Technologies of Empire: IMF Conditionality and the Reinscription of the North/South Divide*, 13 LEIDEN JOURNAL OF INTERNATIONAL LAW 749 (2000).

15 ALEXANDER ET AL., *supra* note 5, at 36.

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amount they consume and produce, the number of people they employ, and so on. A country featured on the Financial Action Task Force (FATF) blacklist finds it difficult to make payments to its trading partners,<sup>18</sup> which limits the amount of capital goods it can import. Financial factors are thus at the core of overall economic performance.<sup>19</sup> Consequently, as Picciotto argues, they have “(re)distributional consequences or implications”<sup>20</sup> far beyond what is envisaged by a “technicist view of social management”.<sup>21</sup>

Contemporary global financial regulation is problematic on both the conceptual and the operational level. On the conceptual level, as Picciotto reasons, regulations which impact “livelihoods, health and living standards” are necessarily political in character. As such, assigning their formulation to an unelected ‘technical’ body runs counter to democratic practices.<sup>22</sup> Secondly, despite deep official sector inroads on state sovereignty in many developing countries, economic policy formation and finance ministries are still essentially ‘political’. Why should financial policies and central banks then be segregated from politics, especially when regulation affects the *prospects* of democracy as well?<sup>23</sup>

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16 ALEXANDER ET AL., *supra* note 5, at 5.

17 A capital adequacy ratio is the amount of capital that financial institutions are required to maintain against their outstanding loans. This is not to be confused with reserve requirements, which are the amount of money a financial institution must hold against the deposits made by its customers. The former is a provision against risk while the latter is a provisioning for expected losses (for example, bad loans). CARs are prescribed by the Basel Committee, while the reserve requirements are usually specified by central banks.

18 This is because dollar payments around the world are cleared through New York and banks there are ‘discouraged’ from doing business with FATF-categorised Non Cooperative Countries and Territories (NCCTs) or otherwise ‘undesirable’ countries. For example, a Citibanker confessed that his bank was “actively discouraging” its people from opening correspondent accounts from Pakistan even though Pakistan is not an NCCT. Interview with an employee of Citibank, in London, (January, 2005).

19 ALEXANDER ET AL., *supra* note 5, at 5.

20 Sol Picciotto, *Liberalisation and Democratisation: the Forum and the Hearth in the Era of Cosmopolitan Post-Industrial Capitalism*, 63 LAW & CONTEMP. PROBS. 157, 177 (2000).

21 *Id.*, at 160.

22 These include the principles of transparency, accountability and legitimacy etc.

23 Robert P. Delonis, *International Financial Standards and Codes: Mandatory Regulation Without Representation*, 36 N.Y.U. J. INT’L L. & POL 563, 623 (2004). She is referring particularly to the water riots in Cochabamba.

## II. THE EVOLUTION OF GLOBAL FINANCIAL MARKETS

The justification for the depoliticised nature of financial regulation can be located in the process of its historical evolution. The rapid globalisation of banks and financial markets during the 1960s and 1970s were not accompanied by a corresponding harmonisation of regulatory standards<sup>24</sup> until the German bank, Bankhaus Herstatt folded in 1974.

The demise of the Bretton Woods system in the early 1970s was significant for the banking sector in that it resulted in the privatisation of foreign exchange risk.<sup>25</sup> The private sector, in turn, pressured governments for greater liberalisation and fewer capital controls. But Herstatt demonstrated the downside of this greater interconnectedness.<sup>26</sup> The bank was overexposed in the foreign currency market and speculative activities regarding the movement of the dollar rate created crippling losses. Had the German regulators not decided to honour Herstatt's obligations, five banks in the US would have folded as a result.<sup>27</sup> At the same time, the British-Israel Bank in London was closed for insolvency problems and the Franklin National Bank in the US followed suit soon after.<sup>28</sup> Like the German authorities, the US Federal Reserve also had to step in to guarantee the bank's failed short-term forex commitments in order to prevent the crisis from spreading.<sup>29</sup> Systemic risk and contagion had been born.

The bank failures were widely attributed to the lack of an adequate regulatory structure which could protect against financial risk.<sup>30</sup> The cross-border lending

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24 BRAITHWAITE & DRAHOS, *supra* note 1, at 103.

25 In the absence of a fixed exchange rate system, banks with a high degree of concentration in the area of foreign trade payments were vulnerable to the vagaries of the foreign exchange (forex) markets. *Bank failures in mature economies*, BANK FOR INTERNATIONAL SETTLEMENTS, BASEL, [http://www.bis.org/publ/bcbs\\_wp13.pdf](http://www.bis.org/publ/bcbs_wp13.pdf). To minimise potential losses from forex dealings, banks plumped for hedging strategies involving the diversification of assets into multiple currencies and the creation of portfolios held in foreign and offshore jurisdictions. ALEXANDER ET AL., *supra* note 5, at 22.

26 Fratianni & Pattison, *supra* note 7, at 184.

27 ALEXANDER ET AL., *supra* note 5, at 22.

28 For the period 1980-95, Fratianni & Pattison estimate an average rate of banking crises at 1.44 a year. Fratianni & Pattison, *supra* note 7, at 184.

29 ALEXANDER ET AL., *supra* note 5, at 22.

30 ALEXANDER ET AL., *supra* note 5, at 22.



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and borrowing activities of multinational banks had created a two fold problem. First, since no single regulator had jurisdiction over the entire international banking system,<sup>31</sup> they found it difficult to manage systemic risk on their own.<sup>32</sup> Secondly, regulators usually had poor quality information regarding the international operations of domestic banks.<sup>33</sup>

To address the collective action and information problems described above, the G-10 regulators and central bankers met at Basel in 1975 to form the Basel Committee for Banking Supervision. This was the first global standard-setting body. The self-confessed initial aim was to “close gaps in the supervisory net”<sup>34</sup> through international cooperation but the “wider objective” was to “improve *supervisory understanding* and the *quality* of banking supervision”.<sup>35</sup> These goals were to be met by exchanging information on national supervisory arrangements; improving the “effectiveness of techniques for supervising international banking business”; and setting minimum supervisory standards in “desirable” areas.<sup>36</sup> The resulting Basel Concordat was a set of “voluntary, legally non-binding, international standards and rules of prudential supervision for the regulation of financial institutions, payment systems and foreign exchange markets” designed to apply to just the G-10 countries.<sup>37</sup>

### III. THE PRESENT FACE OF REGULATION: THINK LOCAL, ACT GLOBAL

Three aspects of contemporary global financial regulation require particular explication: the politics informing their devise; the prevalent means of effecting

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31 BRAITHWAITE & DRAHOS, *supra* note 1, at 103.

32 This is because of high transaction costs and undefined property rights. ALEXANDER ET AL., *supra* note 5, at 34.

33 BRAITHWAITE & DRAHOS, *supra* note 1, at 103.

34 This was based on two basic principles: to ensure that no banking establishment “escaped” supervision, and that this supervision is “adequate”. Apart from the decidedly criminal connotations of the use of the word escape, it also needs to be remembered that first, Basel didn’t apply to apply all banks then and second, “adequate” was also decided by the G-10. *A Brief History of the Basel Committee*, BANK FOR INTERNATIONAL SETTLEMENTS, <http://www.bis.org/bcbs/history.pdf>.

33 *Id.* (emphasis added).

36 *Supra* note 34.

37 ALEXANDER ET AL., *supra* note 5, at 35.

regulatory convergence; and the consequent impact on accountability. Each aspect is discussed in greater detail in the sub-sections that follow.

First, the phrase ‘think local, act global’ is employed in two senses here. First, it refers to the politicisation of global regulation – the transfiguration of a domestic political agenda into a global one. In its second sense, it refers to the assumption of *global* regulatory control by region-specific regulators and describes how that control is exercised and propagated. Put another way, the devise of global regulation is not a linear process and the assumption of worldwide standard setting responsibilities by region-specific regulatory agencies is just one part of that process.

Secondly, a significant method of effecting regulatory convergence has multiple agencies simultaneously issuing similar, overlapping regulations that are more often than not, replicas of each other. Enabling these processes are the governance structures of these agencies, which show a preponderance of powerful members from the global North. Also relevant here is a discussion of the multiple enforcement mechanisms employed to give effect to the standards. It is the complex interplay of all these factors *simultaneously* that makes ‘global’ regulation possible.

The final sub-section elaborates on the fact that the combined operation of the above also makes it impossible to enforce accountability in global financial regulation and carries important consequences for global governance.

### **The Politicisation of Regulation**

The USA and the Basel Committee are good examples of how domestic policy imperatives can be brought to bear on global standards. The *modus operandi* for the committee was to evolve an informal consensus on a ‘best practice’ – a commitment the committee still honours – and allow members the freedom to implement it according to the peculiarities of their national systems.<sup>38</sup> Although the term ‘best practice’ carries connotations of neutrality and technical superiority, the standards and guidelines issued by the committee were as deeply politicised as any other. The first illustration of how a ‘best practice’ could be moulded according to domestic political imperatives came in 1988.

The 1980s were a bad time for the banking industry in the USA. The Federal Deposit Insurance Corporation had to resolve some 1,650 federally insured banks and the Savings and Loans crisis of the early 1980s saw the failure of 1,320 financial

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institutions.<sup>39</sup> Widespread public agitation in the wake of these crises prompted the US Congress to pass a law in 1983 requiring banking agencies to ensure that all banks were adequately capitalised.<sup>40</sup> The Savings and Loans crisis data suggested that “adequate” was eight per cent of the outstanding loan amount and that was the number the Congress endorsed.

The move allayed the fears of the electorate but made the banking constituency extremely unhappy. American bankers argued that the mandatory capital adequacy requirements placed them at a distinct disadvantage to foreign banks.<sup>41</sup> The US obligingly carried these concerns to the 1988 Basel Committee meeting and, despite strong opposition from other countries, succeeded in foisting the higher standards onto all members by a revision of the Concordat.<sup>42</sup>

The move was subsequently justified primarily in technical terms. Higher capital adequacy requirements, the committee reasoned, would “strengthen stability” since capital in international banks was being eroded at a time crises were increasing.<sup>43</sup> Since the directive was worded in the language of neoliberalism – the move was projected to eliminate “competitive inequality arising from differences in national capital requirements”<sup>44</sup> – even the ‘secondary’ motive of maintaining the competitiveness of US banks became more palatable.

This victory was important because it introduced finance trends that were to characterise regulatory initiatives in subsequent years. First, it showed that global

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39 The latter alone cost the government some 151 billion dollars in bailout packages. *Supra* note 25.

40 Accordingly, the Office of the Comptroller of the Currency and the Federal Reserve set minimum capital requirements for the multinational banks. *Id.*

41 GILPIN, *supra* note 3, at 275. This is because banks subject to higher capital adequacy requirements have less money to lend than those with lower CARs. This, of course, means that the better capitalised banks make less profit than the others.

42 GILPIN, *supra* note 3.

43 Interestingly, the implementation of the higher capitalisation requirements subverted the touted objective of stability. The prescribed capital adequacy ratio for short-term loans was a significantly lower two per cent of outstanding loans. As a corollary to this directive, most banks started focusing on short-term lending which, apart from the economic detriment (economic growth usually accompanies long-term, productive investments) also introduced more volatility into the banking system through an increase in speculative activities and time mismatches between assets and liabilities of borrowers (that is, loans would typically mature before the investments). *Supra* note 34.

44 *Supra* note 34.

regulation could be tailored to address localised concerns. Secondly, a proposal for raising the bar – regardless of the motivation behind it or its demonstrated efficacy – could always be presented as inherently beneficial and impartial advice. Thirdly, the opposition could always be disarmed by citing safety-related issues. ‘Best practice’ was no normative ideal and financial regulation was rapidly evolving into a technique of power that was cloaked in seeming neutrality.

These trends were revisited during the development of anti-money laundering regulation. According to Braithwaite and Drahos, money laundering occupies the top priority in the US scheme of globalised financial regulation.<sup>45</sup> The authors attribute this enthusiasm to the “domestic priority of tackling the drug trade and the political attractions of blaming foreigners”.<sup>46</sup> Further, they suggest that money laundering has historically served as a convenient – if ‘coincidental’ – catchall for “national security objectives” as well as foreign policy imperatives.<sup>47</sup> But during the 1980s, most countries did not seem overly excited about devising anti-money laundering measures,<sup>48</sup> certainly not enough to initiate regulation. The USA pushed the topic onto the Basel Committee as a subject worthy of regulation and eventually drafted the Basel Statement of Principles on Money Laundering (approved by the committee in 1988).<sup>49</sup>

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45 BRAITHWAITE & DRAHOS, *supra* note 1, at 105. Money laundering outranks uniform accountancy standards, harmonising tax, macroeconomic policy coordination and even capital adequacy for banks, something the authors find “somewhat shocking”. BRAITHWAITE & DRAHOS, *supra* note 1, at 142. Compliance with money laundering standards is more strictly monitored than other financial standards. BRAITHWAITE & DRAHOS, *supra* note 1, at 106. Interestingly, however, Delaware, Nevada and Montana in the US are still the biggest money laundering havens in the world. JEFFREY ROBINSON, *THE SINK* 328 (2003).

46 “The realist edge is that the US state gets domestic political kudos by painting the drug problem as a foreign conspiracy to corrupt the US that must be fought as a war.” BRAITHWAITE & DRAHOS, *supra* note 1, at 105, 391.

47 The war on drugs was a convenient weapon against General Noriega and his ilk while the CIA “has an interest in being a major launderer of dirty money itself, while making it harder for the competition to do so.” BRAITHWAITE & DRAHOS, *supra* note 1, at 105. According to the authors, a consequence of the militarization of the war on drugs under Nixon, Reagan and Bush was that “drug interdiction was subordinate to the foreign policy goal to the defeat of communism”. BRAITHWAITE & DRAHOS, *supra* note 1, at 390. Post 9/11, the comparable foreign policy objective would probably be the defeat of terrorism.

48 Braithwaite & Drahos cite FATF figures stating that up until 1990, only six countries had chosen to model the US practice of declaring money laundering a specific criminal offence. BRAITHWAITE & DRAHOS, *supra* note 1, at 105.

49 BRAITHWAITE & DRAHOS, *supra* note 1, at 106. Significantly, the Basel principles predate the UN Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

## The Oyster of ‘the Global Regulator’<sup>50</sup>

### *The Regulatory Web*

At the global level, responsibility for the creation of rules and standards is assigned to several different organisations. The Basel Committee handles banking supervision; the International Organisation of Securities Commissioners (IOSCO) looks at securities and companies regulation; and the OECD-based Financial Action Task Force (FATF) deals with money laundering. Even so, the lines of responsibility are not as clear as in multilateral lending or international trade as these agencies are not discrete ‘legislative’ units.

The Basel Committee may have the banking portfolio but the WTO’s General Agreement on Trade in Services plays a growing role in financial sector issues as do regional treaty arrangements such as the European Union.<sup>51</sup> The Basel Committee is actively involved in both derivatives and money laundering regulation but a logical banking sub-field, the regulation of systemically important payments, lies with the Committee on Payments and Market Infrastructures (CPMI), earlier known as the Committee on Payments and Settlements System (CPSS).<sup>52</sup> IOSCO is responsible for securities and companies and regulates securities settlements systems with the CPMI, but the corporate governance rules are drafted by the OECD.<sup>53</sup> The IMF and the World Bank, meanwhile, look on approvingly. Global financial regulation is thus “a dense web of influences”<sup>54</sup> with multiple regulators for most areas.

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50 With apologies to Shakespeare for the liberty taken with his *Merry Wives of Windsor*.

51 Although the WTO plays no role in setting domestic financial regulatory standards, the free-trade principles of the GATS may influence how other international organisations and standard-setting bodies devise international standards of financial regulation. Meanwhile, the EU regulatory system has also come up with minimum harmonised standards for prospectuses for initial public offerings, market abuse, and insider trading, as well as money laundering. ALEXANDER ET AL., *supra* note 5, at 9-10.

52 *Committee on Payments and Market Infrastructures*, BANK FOR INTERNATIONAL SETTLEMENTS, <http://www.bis.org/cpmi>. The bifurcation is interesting because till 2009, the CPSS comprised the same set of members as the Basel Committee – the G10 central bankers. Delonis, *supra* note 23, at 590. In 2009, the list of members was expanded to 25, including, notably, Brazil, Russia, India and South Africa.

53 *List of Standards, Codes, and Principles*, INTERNATIONAL MONETARY FUND, <http://www.imf.org/external/standards/scnew.htm>

54 I owe the phrase to BRAITHWAITE & DRAHOS, *supra* note 1, at 13.

This is problematic because the institutional overlap makes it impossible to hold a single agency responsible for any piece of regulation. Further, while the multiplicity of regulatory institutions implies a ‘many voices’ approach to regulation – an indication of diversity and inherent salubriousness – the practice on ground sharply contradicts such notions. The global regulatory convergence project was conceived in response to the demand of global capital for harmonisation across jurisdictions and markets. As such, the ‘replicatory’ efforts need to be seen for the mutually legitimising exercises that they are.

### *Governance Structures*

“The epistemic community that steers financial regulation is a community of the North.”<sup>55</sup> Nowhere is this clearer than in the institutional structures of the regulatory agencies, and the Basel Committee is again a good example. As the USA unilaterally commandeered the agenda at Basel, the committee too *assumed* the mantle of global regulator/supervisor/standard-setter. In 1990, the Basel Committee issued a supplement to the 1983 Concordat to improve the flow of prudential information between supervisors “globally”<sup>56</sup> – not just between the G-10. In 1992, certain principles of the Concordat were reformulated as “Minimum Standards”, which other supervisors were subsequently “invited to endorse”.<sup>57</sup> In 1998, the Basel Committee amended the Concordat to make it applicable to *all* countries where banks conducted cross-border operations.<sup>58</sup>

Also worth remembering is that till 2009, the committee comprised the G10+3<sup>59</sup> central bank governors and national bank regulators. It can thus be seen as non-representative and unaccountable on two counts. First, it excluded participation by other countries; to date, membership can only be acquired via invitation, and potential members are judged based on how important their national system is to

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55 BRAITHWAITE & DRAHOS, *supra* note 1, at 123.

56 *Supra* note 34.

57 *Supra* note 34.

58 *Supra* note 34.

59 Present membership comprises 28 jurisdictions: Argentina, Australia, Belgium, Brazil, Canada, China, EU, France, Germany, Hong Kong, India, Indonesia, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, Russia, Saudi Arabia, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, UK and the USA. *Membership*, BANK FOR INTERNATIONAL SETTLEMENTS, <http://www.bis.org/bcbs/membership.htm>.

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international financial stability.<sup>60</sup> Secondly, given the emphasis on the need for ‘independent’ central banks, the members are unaccountable to even those within their domestic jurisdictions.

Although the committee has tried to involve non-member countries in various aspects of the standard setting process,<sup>61</sup> this involvement has remained limited to consultation and “the actual decision making remains controlled by the G10 countries”.<sup>62</sup> The coterie is renowned for their “secretive” decision-making and over-reliance on “personal contacts”.<sup>63</sup> Given its exclusivity as well as the lack of a mandate from other countries, the committee, strictly speaking, has no business devising rules for the world. But the committee located a mandate for itself in a “communiqué issued by the G7 Heads of State in 1997 that encourage[d] emerging economies to adopt ‘strong prudential standards’ and ‘effective supervisory structures’”. The Committee ... interpreted the G7 communiqué as authority for it to devise global capital standards and other core principles of prudential regulation for all economies where international banks operate[d].”<sup>64</sup> Even so, this is unsatisfactory and insufficient authority for an agency that affects the lives of the non-G10 countries as well. First, the regulatory initiative came from the G7, not the emerging markets that were supposed to implement the same. Secondly, the G7 effectively delegated an authority they did not possess.<sup>65</sup>

The securities markets are also beset with similar issues. The International Organisation of Securities Commissioners (IOSCO) began in 1974 as an inter-American regional association.<sup>66</sup> The decision to go global was taken by the 11 North and South American members in 1983. The new organisation was intended as a forum for the world’s regulators to meet, discuss and agree on policies and

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60 *Charter*, BANK FOR INTERNATIONAL SETTLEMENTS, <http://www.bis.org/bcbs/charter.htm>.

61 This has been through the establishment of a Core Principles Liaison Group comprising 13 non-G10 countries (including India, Brazil, Russia and China) as well as by establishing “close relations” with regional bank supervisory groupings such as the Offshore Group of Banking Supervisors. *Supra* note 34.

62 ALEXANDER ET AL., *supra* note 5, at 42

63 ALEXANDER ET AL., *supra* note 5, at 37.

64 ALEXANDER ET AL., *supra* note 5, at 38.

65 That the separation between initiating and creating regulation further dilutes accountability is another matter altogether.

66 *History*, INTERNATIONAL ORGANISATION OF SECURITIES COMMISSION, [http://www.iosco.org/about/?subsection=about\\_iosco](http://www.iosco.org/about/?subsection=about_iosco).

best practices. While IOSCO ranks higher than the Basel Committee on the democratic scale – it boasts 200 members from more than 110 countries<sup>67</sup> – it too is still learning democratic decision-making. Up until 2012, for example, the task of determining regulatory priorities and devising standards fell to the lot of the IOSCO Technical Committee, which featured only 15 regulators from the world’s most developed securities markets including the G10.<sup>68</sup> While all members were provided with the opportunity to voice their concern on all proposals, “most of the practical bargaining and shaping of issues” took place in closed-door Technical Committee meetings.<sup>69</sup> Significantly, the meetings are off-limits for even other IOSCO members. While all members were entitled to vote on proposals, in practice, the decision of the Technical Committee was final. This was not only because of the expertise of its members but also because of the fact that the issues raised concerned the world’s leading financial markets.<sup>70</sup>

In 2012, the standard-setting functions of the Technical Committee were taken over by the IOSCO Board, which features regulators from 34 jurisdictions including several from the global South. But there is little to show whether – and to what extent – decision-making is responding to the changes in governance structures.

The FATF is similarly cliquish. It was established by the leaders of the G7 and the president of the European Commission in 1989. Boasting a total of 16 members drawn from the G7, the EC and eight other countries, FATF was to combat the perceived threat posed by money laundering to financial stability.<sup>71</sup> Although the number of members has since increased to 36, the global South is underrepresented while the OECD contingent dominates.<sup>72</sup> This is significant primarily because the

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67 IOSCO’s current membership list includes 200 ordinary, affiliate, and associate members. *Membership*, INTERNATIONAL ORGANISATION OF SECURITIES COMMISSION, <http://www.iosco.org/about/pdf/IOSCO-Fact-Sheet.pdf>.

68 ALEXANDER ET AL., *supra* note 5, at 58. For an exhaustive treatment of IOSCO’s institutional structure, see ALEXANDER ET AL., *supra* note 5.

69 ALEXANDER ET AL., *supra* note 5, at 59.

70 ALEXANDER ET AL., *supra* note 5, at 59.

71 *Regulations*, FINANCIAL ACTION TASK FORCE, <http://www.fatf-gafi.org/pages/aboutus/historyofthefatf>.

72 Interestingly, one of the criteria for membership listed on the FATF website is that the country be of “strategic importance”. There is no explication as to what constitutes strategic importance, *Members and Observers*, <http://www.fatf-gafi.org/pages/aboutus/membersandobservers>.



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agency claims the regulatory ambit to safeguarding the *global* financial system from money laundering and terrorist financing but has neither the representation nor a mandate to match.<sup>73</sup>

#### *Enforcement*

The issue of enforcement should technically not arise. Global finance is governed primarily by international soft law. As “legally non-binding standards, principles and rules that influence and shape state behaviour but do not fit into the traditional categories of public international law and bi- or multilateral treaties”,<sup>74</sup> soft law – unlike ‘hard’ law – does not imply obligation.<sup>75</sup> By definition then, soft law precludes both enforcement and penalties for breach.<sup>76</sup>

Consequently, all the agencies referred to stress the ‘voluntary’ nature of their “recommendations”, “guidelines” or “principles”. The Basel Committee, for example, insists that it does not have any “formal supranational supervisory authority” and that it formulates its recommendations in the expectation that individual national authorities will implement them.<sup>77</sup>

However, as Lichtenstein argues, the characterisation of a particular norm embedded in a regulatory regime as either ‘hard’ or ‘soft’ does not matter. What matters instead is “the process of obtaining effectiveness ..., the methodology of better international dealings and cooperation”.<sup>78</sup> And this seems to be the approach taken by the regulators.

On the face of it, the Basel Committee’s emphasis on the role of “individual authorities” and decentralised implementation of standards – one echoed by both IOSCO and FATF<sup>79</sup> – suggests that the “process for obtaining effectiveness” or

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73 The mandate for 2012-2020 was endorsed only by its members. *Final Mandate*, FINANCIAL ACTION TASK FORCE, <http://www.fatfgafi.org/topics/fatfgeneral/documents/ministersrenewthemandateofthefinancialactiontaskforceuntil2020.html>.

74 ALEXANDER ET AL., *supra* note 5, at 59.

75 Quote attributed to Sir Joseph Gold in Cynthia Crawford Lichtenstein, *Hard Law v. Soft Law: Unnecessary Dichotomy?*, 36 INT’L LAW.1433 (2001).

76 *Id.*

77 *Supra* note 34 (emphasis added).

78 *Supra* note 75, at 1440.

79 *Objectives and Principles for Securities Regulation*, INTERNATIONAL ORGANISATION OF SECURITIES COMMISSIONS, <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD154.pdf>.

regulatory convergence depends on national regulators. Since there are ostensibly no penalties for non-compliance and domestic implementation is necessary to give force to the standards, the decision whether or not to implement the global standards seems to rest squarely on the shoulders of national regulators. Contradicting this assumption, however, are the vigorous *mainstreaming*<sup>80</sup> exercises conducted by these agencies. The Basel Committee, for example, engages in extensive monitoring of member compliance<sup>81</sup> and confesses to “constantly exploring the mechanics of enforcing [its] standards”.<sup>82</sup> By their own admission, IOSCO and FATF are also similarly occupied.

This mainstreaming is further enhanced by the official sector. Since the demise of the Bretton Woods system, the IMF has slowly but consistently been mapping new areas of operations for itself. At present, the Fund describes its core activities as lending, surveillance, providing technical assistance, economic research and statistics,<sup>83</sup> and development of standards and codes.<sup>84</sup> However, of the standards and codes deployed in 12 key areas, the IMF authors just three.<sup>85</sup> In the other areas, the IMF simply endorses the standards developed by other private sector agencies such as the Basel Committee, IOSCO, FATF, CPMI, OECD, International Accounting Standards Board, IAIS and International Federation of

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80 The term here refers to a subtle form of coercive enforcement conducted by popularising the use of the prescribed standards and codes.

81 ALEXANDER ET AL., *supra* note 5, at 37.

82 *Supra* note 34.

83 *What the IMF Does*, INTERNATIONAL MONETARY FUND, <http://www.imf.org/external/work.htm>.

84 The 12 “key” areas of operations are anti-money laundering and the combating of terrorism, accounting, auditing, banking supervision, corporate governance, data dissemination, fiscal transparency, insolvency and creditor rights, insurance supervision, monetary and financial policy transparency, payments systems, and securities regulation. *Reports on the Observance of Standards and Codes*, INTERNATIONAL MONETARY FUND, <http://www.imf.org/external/np/rosc/rosc.asp>.

85 These include data dissemination; fiscal policy transparency and monetary and fiscal policy transparency. Interestingly, even the Code of Good Practices on Transparency in Monetary and Financial Policies was developed *in conjunction with* the Basel Committee, the Center for Latin American Monetary Studies (CEMLA), CPSS, European Central Bank, International Association of Insurance Supervisors (IAIS), International Finance Corporation, IOSCO, OECD and the World Bank. *Code of Good Practices on Transparency in Monetary and Financial Policies*, INTERNATIONAL MONETARY FUND, <http://www.imf.org/external/np/mae/mft>.

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Accountants.<sup>86</sup> With the IMF as “principal enforcement agent”<sup>87</sup> then, the standards and codes authored by these agencies work their way into the fabric of all international economic transactions and relationships.<sup>88</sup> This technique of enforcement operates within the official sector as well as at the level of the market.<sup>89</sup>

Within the IMF, these standards and codes are a crucial component of four of its five functions. First, the IMF usually works in almost all of its officially supported standards and codes into its loan agreements with states.<sup>90</sup> The Basel standards, for example, are “routinely” part of loan packages and compliance was a condition on at least seven of the loan arrangements made to East Asian countries after the 1997 crisis.<sup>91</sup> The IOSCO standards were similarly prescribed for at least one country<sup>92</sup>. Further, in some cases, compliance with standards such as those of the Basel Committee is a prequalification for IMF loans.<sup>93</sup> In others, compliance is a guarantee of better terms on the next loan.<sup>94</sup>

Secondly, and perhaps most importantly in the context of the relation between standard-setting states and standard-receiving ones, the standards and codes are at the heart of IMF surveillance operations. In 1977, surveillance of the “general economic situation and policy strategy of each member country”<sup>95</sup> became a key

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86 *List of Standards, Codes and Principles Useful for Bank and Operational Work and for which Reports on the Observance of Standards and Codes are Produced*, INTERNATIONAL MONETARY FUND, <http://www.imf.org/external/standards/scnew.htm>. For an interesting discussion of the origins of the standards, see Delonis, *supra* note 23. “The fact that these standards come from sources other than the IMF could theoretically pose a problem because the Fund generally prohibits cross-conditionality with the objectives of other organizations; however, as IMF General Counsel Francois Gianviti has stated, ‘If the Fund concludes . . . that certain reforms need to be made to give effect to its own purposes, the fact that these actions will give effect to other treaties . . . cannot bar the Fund from making them a condition of its financial assistance’”. Delonis, *supra* note 23, at 597.

87 Delonis, *supra* note 23, at 595.

88 Delonis, *supra* note 23, at 623-4.

89 Delonis, *supra* note 23, at 95-6.

90 Delonis, *supra* note 23, at 597.

91 Delonis, *supra* note 23, at 598-601, 603.

92 Delonis, *supra* note 23, at 598-601.

93 ALEXANDER ET AL., *supra* note 5, at 39.

94 Delonis, *supra* note 23, at 612.

95 *IMF Surveillance Fact Sheet*, INTERNATIONAL MONETARY FUND, <http://www.imf.org/external/np/exr/facts/surv.htm>.

part of IMF operations. In 1995, the IMF began its “data dissemination” work.<sup>96</sup> But the most significant was the Financial Sector Assessment Programme (FSAP), which was launched in 1999 in conjunction with the World Bank. With the “soundness of financial systems” as its aim, the FSAP seeks to determine the strength of a country’s financial system, the quality of its regulatory and supervisory framework as well as its ability to manage and resolve financial crises and accordingly dispense country-specific macro and micro prudential recommendations.<sup>97</sup> The programme hinges on “detailed assessments” of the extent of a country’s compliance with financial sector standards and codes.<sup>98</sup> Not only are these assessments published as Reports on Observance of Standards and Codes (ROSCs), the FSAP also provides the groundwork for the Financial Sector Stability Assessments in which IMF staff address issues such as the stability of the financial sector and its potential contribution to growth.<sup>99</sup>

This has two significant implications. First, since the Basel Committee/IOSCO/FATF – agencies with even less political legitimacy than the IMF itself – conceive these standards in the first place, in effect, it is they who decide whether a financial system is ‘sound’ or otherwise. Secondly, one sees the meticulous construction of a multi-layered edifice, where each subsequent layer is validated by the one preceding it and all rest on the base of standards and regulations.

Thirdly, the standards also have a bearing on the technical assistance function. Requests for technical assistance by some developing countries are a corollary to

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96 This comprises the General Data Dissemination System (approved by the IMF Board of Directors in 1997), which is aimed at all members and provides “recommendations of good practice” for the production and dissemination of macroeconomic and financial data (including the real, fiscal, financial and external sectors) as well as socio-demographic data (population, health, education, poverty). The Special Data Dissemination System (approved in 1996), on the other hand, targets those countries having or seeking access to international capital and prescribes specific macroeconomic and financial standards that must be adhered to. Other tools include Special Data Dissemination Plus and Data Quality Reference Site. *General Data Dissemination System*, INTERNATIONAL MONETARY FUND, <http://dsbb.imf.org/Applications/web/gdds/gddswhatgdds>.

97 *Financial Sector Assessment Program*, INTERNATIONAL MONETARY FUND, <http://www.imf.org/external/np/fsap/fssa.aspx>.

98 *Supporting Documents Country FSP's*, INTERNATIONAL MONETARY FUND, <http://www.imf.org/external/np/fsap/fsap.asp>.

99 *Fact Sheet- The Financial Sector Assessment Program*, INTERNATIONAL MONETARY FUND, <http://www.imf.org/external/np/exr/facts/fsap.htm>.

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the surveillance process.<sup>100</sup> Through the means of short-term staff missions, longer term ‘expert placement’, training courses, workshops and additional staff reports among others,<sup>101</sup> technical assistance helps countries cope with *the specific problem of non-compliance*<sup>102</sup> as identified by the FSAPs. This point is critical because it speaks of convergence as an end in itself, not as a possible cure for other consequences that may flow from non-compliance.

In November 2002, for example, the IMF added the FATF recommendations to its list of standards and codes. Along with the World Bank, the IMF then “substantially increased” technical assistance available to those countries looking to strengthen financial, regulatory, and supervisory frameworks for anti-money laundering and the combating of terrorism.<sup>103</sup> As such, the IMF and the World Bank can be seen as the prime instruments of regulatory convergence.<sup>104</sup>

That said, the importance of the market cannot be underestimated. A study of enforcement practices at the level of the market not only indicates the depth of mainstreaming, it also shows how the market functions as an IMF *amplifier*. While some commercial banks insist on IMF conditionality as a precondition to lending to states, the debt ‘clubs’ usually insist on an “IMF clause” in their agreements with countries.<sup>105</sup> Many private financial institutions and investors base investment decisions on IMF surveillance data.<sup>106</sup> As a result, the publication of compliance data brings to bear an inordinate amount of pressure on a non-compliant state<sup>107</sup> looking to the international financial markets for funds. Studies show that states

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100 Delonis, *supra* note 23, at 571.

101 *Technical Assistance and Training* INTERNATIONAL MONETARY FUND, <http://www.imf.org/external/np/exr/facts/tech.htm>

102 This is substantiated by Braithwaite & Drahos’ assertion that capacity building by the IFIs tends to focus on the “transplant” of regulatory models from one state to another and does not address the more pertinent issue of building the capacity to manage those systems. BRAITHWAITE & DRAHOS, *supra* note 1, at 138.

103 *The IMF and the Fight Against Money Laundering and the Financing of Terrorism*, INTERNATIONAL MONETARY FUND, <http://www.imf.org/external/np/exr/facts/aml.htm>.

104 BRAITHWAITE & DRAHOS, *supra* note 1, at 115; ALEXANDER ET AL., *supra* note 5, at 36.

105 Pahuja, *supra* note 14, at 765, 749.

106 Delonis, *supra* note 23, at 609. Delonis cites the specific examples of Price waterhouse Coopers and the California Public Employees Retirement System.

107 Delonis, *supra* note 23, at 595-6. In a similar vein, Braithwaite & Drahos recount the example of how the US and UK coerced countries into complying with capital adequacy standards in 1987 by linking compliance with entry to their markets and threatening “inefficient financial regulatory systems” with the “spectre” of loss of business. BRAITHWAITE & DRAHOS, *supra* note 1, at 132.

with better compliance have lower debt risk premiums and that the publication of ROSCs has a significant bearing on sovereign credit ratings.<sup>108</sup> Given the widespread interest in IMF data, even states use compliance as a ‘signalling device’ to potential trading partners and international investors in order to attract trade and investment.<sup>109</sup>

### *Accountability For None?*

The combined operation of the regulatory web, the institutional structures of the agencies and the enforcement mechanisms makes assigning responsibility – and the locating of specific interests – within this diverse set a Herculean task. There is, of course, the issue of multiplicity. Take the example of the Know Your Customer (KYC) regulation. The regulation has long been an integral part of the Basel Core Principles for Effective Banking Supervision<sup>110</sup> and the FATF guidelines elaborate on the same in great detail.<sup>111</sup> Meanwhile, both the Basel principles and the FATF guidelines are used in the IMF’s ROSCs.<sup>112</sup> Today, KYC procedures are a key requirement of most central banks and are accordingly woven into the domestic legislative or regulatory fabric. But no single regulatory body can be held accountable, or even responsible, for the regulation.<sup>113</sup>

Equally interesting are the issues of agency, both between the ‘global’ and the ‘local’ and within the global web. On the one hand, the emphasis on the ‘voluntary’ nature of the standards not only sets up a false dichotomy between the global and the local,<sup>114</sup> it further imputes to the state/domestic regulators a degree of autonomy

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108 Delonis, *supra* note 23, at 610-1

109 Delonis, *supra* note 23, at 611.

110 The explanatory notes to the 25 principles justify the regulation by claiming that even “inadvertent” association with “drug traders and other criminals” can undermine public confidence in banks and damage the bank’s reputation. The notes also recommend reference to FATF guidelines for a more thorough treatment of how to implement KYC procedures: *Core Principles for Banking Supervision*, BASEL COMMITTEE ON BANKING SUPERVISION, <http://www.bis.org/publ/bcbs30a.pdf>.

111 *Regulations*, FINANCIAL ACTION TASK FORCE, [http://www.fatf-gafi.org/document/27/0,2340,en\\_32250379\\_32236920\\_33965659\\_1\\_1\\_1\\_1,00.html](http://www.fatf-gafi.org/document/27/0,2340,en_32250379_32236920_33965659_1_1_1_1,00.html)

112 *Standards and Codes*, INTERNATIONAL MONETARY FUND, <http://www.imf.org/external/standards/index.htm> accessed.

113 This statement is supported by Braithwaite & Drahos’ assertion that histories of globalisation are complex and cannot be understood in terms of the agency of single actors using single mechanisms. BRAITHWAITE & DRAHOS, *supra* note 1, at 31.

114 On the convergence of the national and global, see generally Sassen and Picciotto. Sassen refers to the process as the “blurring of duality” between the national and global, state and non-state,

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which is not evidenced by the workings of the global political economy. ‘State’ power is constituted by and helps constitute webs of regulatory influences comprising many actors wielding many mechanisms to achieve globalisation.<sup>115</sup> To paraphrase Santos, the world system, operating at the supra-state level, develops its own systemic law. This is superimposed on the national law of the individual states across the world system.<sup>116</sup> Perceiving financial regulation as essentially ‘domestic’ is thus untenable. On the other hand, the global web of regulation and the various interests it represents preclude the possibility of identifying a single omnipotent agency or state. “A community of the North” is as close as one can get to isolating a specific interest.

### CONCLUSION

The subprime crisis of 2007 showed that even the most stringent regulation is not enough to protect the global economy from the impact of financial crises in interconnected financial markets. Since the crisis arose in the most developed jurisdictions – with arguably the best-regulated markets – the calls for increasing regulation are now being met with a healthy dose of scepticism. The less developed markets that stand to acquire a hefty regulatory burden are now arguing that it’s not their mess and they shouldn’t have to clean it up, that too at such a high cost to themselves.

Against this backdrop, the ‘democratic deficit’ in the devise and spread of global financial regulation underscores the need to interrogate both the substance as well as the aims of global financial regulation. The norms of transparency and accountability essential to good governance are severely lacking in the global financial regulation project. Recent scholarship has stripped economic regulation of its apolitical, technical pretensions and discovered a disturbing proclivity towards colonial domination through economic means.<sup>117</sup> How different is financial regulation?

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private and public in ministries of finance, central banks and specialised technical regulatory agencies while Picciotto speaks of the “fragmentation of the public sphere” as giving rise to “systems of layered governance based on regulation.” See Saskia Sassen, *The Participation of States and Citizens in Global Governance*, 10 *IND. J. GLOBAL LEGAL STUD.* 5 (2003); Picciotto, *supra* note 20.

115 BRAITHWAITE & DRAHOS, *supra* note 1, at 31.

116 BOAVENTURA DE SOUSA SANTOS, *TOWARDS A NEW LEGAL COMMON SENSE* 67 (2002).

117 For accounts of the debilitating impact of neo-colonialism on the South, see generally Appadurai, Anghie, Pahuja and Picciotto.