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IOSCO: The World Standard Setter for Globalized Financial Markets

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IOSCO: THE WORLD STANDARD SETTER FOR GLOBALIZED FINANCIAL MARKETS

Antonio Marcacci

ABSTRACT:

As the current endless crisis clearly proves, world financial markets are closely interconnected. In order to provide a legal backdrop, a soft-law body, named the International Organisation of Securities Commissions (IOSCO), was established and tasked with encouraging an efficient flow of capital. Funded as a Pan-American, and subsequently world-wide, forum more than thirty years ago, IOSCO is a multilateral regulatory network whose members are the public regulators of more than ninety percent of the world's securities and futures markets. It is devoted to promoting common and efficient regulations, setting the floor for the exchange of information between its members, improving the effective surveillance of international securities transactions, and increasing the mutual assistance necessary for the integrity of global financial markets, valued at over \$800 trillion. IOSCO is now the primary institution through which international standards, memoranda, and guidelines concerning the securities markets are promulgated. This paper examines the way this relatively hidden organisation works by trying to figure out its regulatory role in the international financial arena.

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1) THE BIRTH OF IOSCO: FROM A PAN-AMERICAN TO A GLOBAL ORGANISATION

Born in 1974 as a pan-American forum, IOSCO was originally named the “Inter-American Conference of Securities Commissions.”¹ Its first conference was held in Caracas, Venezuela.² The idea of creating a permanent forum of American regulators of securities markets was initially sponsored and funded by the International Finance Corporation (IFC), the lending arm for the private sector of the World Bank Group.³ The first authorities to join the Conference came from Argentina, Brazil, Quebec, Ontario, Chile, the United States, Mexico, Panama and Venezuela, but even non-American regulators attended as observers, like the French *Commission des Opérations en Bourse*.⁴ IOSCO operated in a very informal fashion in its first decade, making it difficult to find documents dated before 1987.⁵

IOSCO did not stay informal for very long. At the 1983 Conference held in Quito, Ecuador, an Inter-American regional group became the global “International Organisation of Securities Commissions” with France, Indonesia, Korea, and the United Kingdom becoming official members in 1984.⁶ Three years later, IOSCO established a secretariat in Montreal, Québec, Canada.⁷ In 1994, IOSCO had seventy ordinary members, nine associate members, and thirty-five affiliate members, covering eighty-five percent of the world’s securities markets.⁸ IOSCO currently has one hundred and fifteen ordinary members (usually public financial market authorities), twelve associate members (such as regulators not dealing with regulated capital markets), and seventy-six affiliate members (usually stock and futures exchanges or brokers/dealers associations) coming from all around the

¹ It has also been referred to as the “Inter-American Association of Securities Commissions.” *E.g.*, A.A. Sommer, Jr., *IOSCO: Its Mission and Achievement Symposium: Internationalization of Securities*, 17 NW. J. INT’L L. & BUS. 15, 15 (1996).

² IOSCO, *Annual Report 2010*, at 49 (2011).

³ Régis Bismuth, *La Coopération Internationale des Autorités de Régulation du Secteur Financier et le Droit International Public* 207 (Mar. 23, 2009) (unpublished Ph.D. dissertation, Université Paris-Sorbonne) (on file with author).

⁴ *Id.* at 207-08.

⁵ *See* Sommer, *supra* note 1, at 16.

⁶ IOSCO, POLISH FIN. SUPERVISORY AUTH., http://www.knf.gov.pl/en/About_us/International_Cooperation/internationals/iosco.html (last visited Oct. 10, 2012).

⁷ JOEL P. TRACHTMAN, *THE INTERNATIONAL ECONOMIC LAW REVOLUTION AND THE RIGHT TO REGULATE* 327, n.18 (Cameron May 2006).

⁸ David Zaring, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*, 33 TEX. INT’L L. J. 281, 292 (1998).

world.⁹ To date, IOSCO covers more than ninety-five percent of the world's securities and futures markets,¹⁰ and it is the primary global institution tasked with setting international standards for finance.¹¹

a. The Organisation's legal nature

The Organisation's legal nature is quite intricate and fascinating. Despite the label "Organisation," IOSCO is not a "proper" public international organisation because it lacks a founding treaty.¹² A better term would be "multilateral regulatory network of supervisors" because IOSCO is a private organisation made up of mostly public authorities.¹³ Moreover, it did not have any formal recognition for the first five years of its existence and was only formally recognized as a non-profit corporation by Quebec law in 1987.¹⁴

Interestingly, the 1987 Quebec statute¹⁵ recognizing IOSCO states: "*It is appropriate to recognize the Organization as a not-for-profit legal entity,*" while article 7 specifies: "*The Organization shall have a legal personality and have such capacity to contract, to acquire, and to dispose of property and to sue.*" Significantly, the Quebec Law did not mention anything concerning IOSCO's functioning and governance, but left everything to IOSCO's internal rules. "*Subject to this Act, the Statutes of the International Organization of Securities Commissions, effective November 30, 1987, shall continue to govern the Organization until they have been modified, replaced, or repealed.*"¹⁶

⁹ See *Ordinary Members of IOSCO*, OICU-IOSCO, https://www.iosco.org/lists/display_members.cfm?memID=1&orderBy=none (last visited Sept. 28, 2012); *Associate Members of IOSCO*, OICU-IOSCO, https://www.iosco.org/lists/display_members.cfm?memID=2&orderBy=jurSortName (last visited Sept. 28, 2012); *Affiliate Members of IOSCO*, OICU-IOSCO, https://www.iosco.org/lists/display_members.cfm?memID=3&orderBy=jurSortName (last visited Sept. 28, 2012).

¹⁰ See *IOSCO Historical Background*, OICU-IOSCO, <https://www.iosco.org/about/index.cfm?section=background> (last visited Sept. 28, 2012).

¹¹ Chris Brummer, *Post-American Securities Regulation*, 98 CALIF. L. REV. 327, 338 (2010).

¹² See David Zaring, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*, 33 TEX. INT'L L. J. 281, 284 (1998).

¹³ See *Membership Categories and Criteria*, IOSCO, <http://iosco.org/about/index.cfm?section=membership> (last visited Oct. 12, 2012).

¹⁴ Quebec was the jurisdiction hosting the General Secretariat at that time. Sommer, *supra* note 1, at 15.

¹⁵ *Loi concernant l'Organisation Internationale des Commissions de Valeurs*, 1^{er} Décembre 1987, Assemblée Nationale du Québec, 33^e législature, 1^{re} session, 1987, chapitre 143, Loi n° 243, Bulletin de l'Assemblée Nationale du Québec, 1987, 2453-2456.

¹⁶ *Article 8 de la Loi concernant l'Organisation Internationale des Commissions de Valeurs*, 1^{er} Décembre 1987, Assemblée Nationale du Québec, 33^e législature, 1^{re}

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In 1999, Madrid became the host city of the IOSCO General Secretariat's headquarters.¹⁷ IOSCO was incorporated under Spanish law with a 1999 Act concerning administrative order.¹⁸ This piece of Spanish legislation defined IOSCO as a public utility association, which confirmed the quite controversial nature of IOSCO as a non-profit organisation.¹⁹

Both the Spanish and the Quebec laws leave wide leeway to the Organisation's self-imposed internal rules, the so-called By-Laws. These by-laws can be thought of as, *mutatis mutandis*, the "Constitution" of IOSCO. The document distinguishes the differing nature and roles of the members (full, associate, and affiliate), describes the governance of the organisation, and establishes annual meetings and a system of sanctions that can be inflicted on members in cases of "repeated failure to pay contributions."²⁰ Significantly, not even the by-laws give a proper definition of IOSCO's legal nature; instead, they simply state that securities regulators decide to "assemble together in the International Organisation of Securities Commissions, governed by the present By-Laws" in order to achieve specific aims, such as co-operation and information sharing.²¹

session, 1987, chapitre 143, Loi n° 243, Bulletin de l'Assemblée Nationale du Québec, 1987, 2453-2456. (The centrality of IOSCO internal rules was acknowledged by the Quebec Act in other articles: "*Sont membres de l'Organisation, les commissions de valeurs et organismes similaires qui le 30 novembre 1987 sont membres de l'Organisation internationale des commissions de valeurs et tout autre organisme qui le deviendra par la suite conformément aux statuts de l'Organisation*" (Art. 3); "*Les dirigeants et membres de comités de l'Organisation internationale des commissions de valeurs en fonction le 30 novembre 1987, le demeurent jusqu'à ce qu'ils aient été remplacés conformément aux statuts de l'Organisation*" (Art. 5); "*Le secrétaire général est désigné conformément aux statuts de l'Organisation. Il dirige le secrétariat général et prend les décisions nécessaires à son administration*" (Art. 6).

¹⁷ IOSCO, *A Resolution on the Relocation of the IOSCO General Secretariat to Madrid* (May 1999).

¹⁸ Law 55/1999, of Dec. 29, on Tax, Administrative, and Social Order tit. 5, ch. 13, amend. 3 (B.O.E. 1999, 312) (Spain).

¹⁹ See *id.* See generally Law 191/1964, of Dec. 24, art. 4, § 1 (B.O.E. 1964, 311) (clarifying that a non-profit organizations represent "*de cooperación para el desarrollo*" (cooperation for the development) and seek "*de fomento de la economía social*" (to develop social economy).

²⁰ IOSCO, *Resolution of the President's Committee on Amendment to IOSCO's By-Laws to Reflect Change in Structure*, IOSCO, at 20 (2010) (referencing all of part three and section 77 of part 12 of the IOSCO by-laws), available at <http://www.iosco.org/library/resolutions/pdf/IOSCORES33.pdf> [hereinafter *Structural Change Amendment*].

²¹ *Id.*

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b. The Organisation's Official Aims

The official aims of IOSCO were originally created by the Quebec Act that incorporated the Organisation, which states: “*The Organization aims to enable its members to better fulfill their mission, including the exchange of information in order to develop the securities markets and improve their operations, coordinate the activities of its members and adopt or propose the adoption of common standards.*”²² Thus, IOSCO’s “eternal” goals seem to have been the exchange of information in order to better develop financial markets, operational coordination, and the adoption of common rules. The Spanish Act, however, does not mention the Organisation’s aims in detail, but simply refers to IOSCO as a public utility association.

IOSCO members officially declare to be working together to fulfill four major objectives:

- Promotion of high standards of regulation in order to maintain just, efficient and sound markets;
- Exchange of information on members’ respective experiences in order to promote the development of domestic markets;
- Establishment of standards and an effective surveillance of international securities transactions; and
- Provision of mutual assistance to promote the integrity of the markets by a rigorous application of the standards and by effective enforcement against offenses.²³

It is thus clear that the core activity of IOSCO is to harmonize domestic legislation concerning national securities markets and to create a proactive international environment where information can be easily and safely passed from one domestic regulator to another to enforce home securities regulations based on common standards. It is worth mentioning the so-called operational priorities, a set of temporary objectives established “to help focus common efforts and coordinate actions.”²⁴ These “operational priorities” can be viewed as the

²² Art. 2, *Loi concernant l’Organisation Internationale des Commissions de Valeurs*, 1er Décembre 1987, Assemblée Nationale du Québec, 33e législature, 1re session, 1987, chapitre 143, Loi no 243, Bulletin de l’Assemblée Nationale du Québec, 1987, 2453-2456.

²³ POLISH FIN. SUPERVISORY AUTH., *supra* note note 6; *See also Objectives and Principles of Securities Regulation*, IFCI RISK INST., <http://riskinstitute.ch/144460.htm> (last visited Oct. 11, 2012); Press Release, Financial Services Board, South Africa to Host Global Securities Conference (Oct. 9, 2008), available at <ftp://ftp.fsb.co.za/public/media/09102008.pdf>.

²⁴ IOSCO, Presidents Committee, *Resolution on IOSCO’s Mission, Goals and Priorities*, at 2 (July 2010).

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organisation's mid-term policy goals, characterized by the fact that they are much more detailed, more flexible, and less formal than the statutory goals mentioned above.

An example of these "mid-term policy goals" can be found in the Final Update of the 36th Annual Conference where a new "strategic direction" was devised.²⁵ This document draws up a new set of operational priorities for the period spanning from 2010 to 2015. According to the Final Update, during these five years, IOSCO must be particularly focused on the following:

- Maintaining and improving the international regulatory framework for securities markets by setting international standards;
- Identifying and addressing systemic risks;
- Advancing implementation of the IOSCO Objectives and Principles of Securities Regulation; and
- Pursuing full implementation of the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information.²⁶

2) THE GOVERNANCE OF IOSCO

A key aspect of IOSCO's governance is that the Organisation operates through a network of committees, which are usually composed of the Organisation's full members, although associate and affiliate members also play an active role.²⁷

Formally speaking, the most important organ is the Presidents' Committee, which consists of the presidents of all of IOSCO's public authorities members.²⁸ This Committee meets once a year at the annual conference and makes key formal decisions.²⁹ Each ordinary member has one vote at the annual meeting³⁰ and the associate members have the right to attend and speak.³¹ The Presidents' Committee plays a formal leading role for the organisation by and large and "has all the powers necessary or convenient to achieve the objectives of the

²⁵ Press Release, Final Update 36th Annual Conference of the International Organization of Securities Commissions, IOSCO/MS/04/2011 1 (Apr. 20, 2011), available at <http://www.iosco.org/news/pdf/IOSCONEW207.pdf>.

²⁶ *Id.*

²⁷ Sommer, *supra* note 1, at 18.

²⁸ *See id.*; *Annual Report 2010*, *supra* note 2, at 47.

²⁹ In order to operate, the quorum that the Presidents' Committee must achieve is the majority of the ordinary members attending the Annual Meeting. *See Structural Change Amendment*, *supra* note 20, at 7, 18.

³⁰ *Id.* at 9.

³¹ *Id.*

Organisation.”³² The Presidents’ Committee is responsible for adopting the resolutions that reformulate IOSCO’s mission and goals, setting up the Organisation’s operational priorities, amending the by-laws, admitting new members, recognizing the regional committees, determining the annual contribution for the members, and imposing sanctions upon members.³³

The Executive Committee is, formally speaking, the second key body of IOSCO. It acts as the executive arm of the organisation and, like any other committee of IOSCO, its members are elected every two years at the biennial meeting.³⁴ It is composed of nineteen members: the Chairman of the Technical Committee, the Chairman of the Emerging Markets Committee, the four Chairmen of the four Regional Committees, one ordinary member elected by each Regional Committee from among the ordinary members of that region, and nine ordinary members elected by the Presidents’ Committee.³⁵ If the Presidents’ Committee is the formal decision-making organ that officially makes the most important decisions,³⁶ then the Executive Committee is the body that actually implements those decisions and lays the groundwork necessary to achieve IOSCO’s objectives.³⁷ This is why the Executive Committee meets periodically during the year,³⁸ unlike the Presidents’ Committee, which only meets once a year.³⁹

After a formal examination, one could identify the Executive Committee as IOSCO’s “principal governing body.”⁴⁰ It is the organ concerned with the active management of the Organisation rather than the mere formulation of policy.⁴¹

The Executive Committee has established two specialised working committees, the Technical Committee and the Emerging Markets Committee, which “carry out the policy development of IOSCO” and are responsible before the Executive Committee.⁴² The Technical Committee was established in 1987 by the Executive Committee in order “to study critical issues affecting countries with developed securi-

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 11; *Annual Report 2010*, *supra* note 2, at 47.

³⁵ *Annual Report 2010*, *supra* note 2, at 47. The current members of the Executive Committee come from Australia, Belgium, Brazil, China, France, Germany, India, Japan, Morocco, Nigeria, Portugal, Spain, South Africa, Turkey, United Kingdom, the United States of America, and Uruguay. *Id.*

³⁶ *Id.* at 23.

³⁷ *Id.* at 47.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Sommer, *supra* note 1, at 18.

⁴¹ *Id.*

⁴² *Annual Report 2010*, *supra* note 2, at 26, 47.

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ties markets.”⁴³ It is, indeed, made up of eighteen agencies that regulate some of the world’s larger, developed, and international markets including China, Switzerland, and India.⁴⁴ Its reason for existence is to “review major regulatory issues related to international securities and futures transactions, and to coordinate practical responses to these concerns.”⁴⁵

The work of the Technical Committee is performed by six standing committees covering six major topics.⁴⁶ The members of standing committees meet regularly and work “on the mandates they receive from the Technical Committee.”⁴⁷ The Multinational Disclosure and Accounting Committee mainly focuses on the quality of financial information that investors must receive from listed institutions, and the accounting standards which constitute the basis of this information.⁴⁸ The Committee on the Regulation of Secondary Markets focuses on the infrastructure of global capital markets and exchanges while keeping an eye on on-going changes and their impact on the effectiveness of markets.⁴⁹ The Committee on the Regulation of Market Intermediaries analyzes how the intermediaries meet their responsibilities, manage their conflicts of interest, and ensure the protection of clients’ interests.⁵⁰ The Committee on the Enforcement and the Exchange of Information monitors the implementation of guidelines and procedures regarding the exchange of information.⁵¹ The Committee on Investment Management is tasked with studying the development of this sector.⁵² Finally, the Committee on Credit Rating Agencies works toward easing potential conflicts between CRA supervisors.⁵³

⁴³ Cynthia C. Lichtenstein, *Introduction to Bank for International Settlements: Committee on Banking Regulations and Supervisory Practices’ Consultative Paper on International Convergence of Capital Measurement and Capital Standards*, 30 INT’L LEGAL MATERIALS 967, 971 (1991).

⁴⁴ See *Members of the Technical Committee*, IOSCO, http://www.iosco.org/lists/display_committees.cfm?cmtid=3 (last visited Oct. 12, 2012).

⁴⁵ *Annual Report 2010*, *supra* note 2, at 47.

⁴⁶ *IOSCO Working Committees*, IOSCO, <http://www.iosco.org/about/index.cfm?section=workingcmts> (last visited Sept. 21, 2012).

⁴⁷ See *IOSCO Working Committees*, *supra* note 46.

⁴⁸ See *Annual Report 2010*, *supra* note 2, at 26. The Standing Committee on Multinational Disclosure and Accounting works on behalf of the Technical Committee in giving views on the work carried out by the international accounting standard setting bodies. *Id.* It participates as an observer in the IFRS Interpretations Committee (IFRIC), the IFRS Advisory Council, and other IFRS Advisory Groups. *Id.*

⁴⁹ *Id.* at 27.

⁵⁰ *Id.* at 29.

⁵¹ *Id.*

⁵² See *id.* at 30.

⁵³ *Id.* at 32.

The Technical Committee is the key body that enables IOSCO's entire structure to work because it elaborates or drafts most of IOSCO's documents like the *Objectives and Principles of Securities Regulation* and the several Memoranda of Understanding. Moreover, it can be defined as a "self-constituting" committee since it determines the countries that can join its membership.⁵⁴ One recent example is the invitations the Committee sent to India, China, and Brazil to join the committee.⁵⁵ In the same vein, the Technical Committee also establishes its own procedures and agenda.⁵⁶ Hans Hoogervorst, Chairman of the Autoriteit Financiële Markten (AFM), or the Netherlands Authority for the Financial Markets, was appointed as the Technical Committee Chair in 2012.⁵⁷

The Emerging Markets Committee is the other specialised committee, whose task is to focus on the development and improvement of emerging financial markets.⁵⁸ This Committee carries out its mission by setting up principles and minimum standards, preparing training programs, and "facilitating the exchange of information and transfer of technology and expertise."⁵⁹ Its work is carried out by five working groups (analogous to the Technical Committee's standing committees) covering the following topics: Disclosure and Accounting; Regulation of Secondary Markets; Regulation of Market Intermediaries; Enforcement and Exchange of Information; and Investment Management. Importantly, the Emerging Markets Committee has established several task forces tasked with studying, analysing, and assessing different, relevant issues.

⁵⁴ Sommer, *supra* note 1, at 19.

⁵⁵ See Press Release, OICU-IOSCO, Committee Invites Brazil, China and India to Join its Membership (Feb. 19, 2009), available at <http://www.iosco.org/news/pdf/IOSCONEWS136.pdf>. The Brazilian Comissao de Valores Mobiliarios (CVM) has concluded many bilateral agreements with the US SEC. Probably the most important is the one establishing a fullest mutual assistance which is provided in order "to facilitate the performance of securities market oversight functions, inspection or examination of investment businesses, and the conduct of investigations, litigation or prosecution in cases where information located within the jurisdiction of the requested Authority is needed to determine whether, or prove that, the laws or regulations of the requesting Authority may have been violated." Memorandum of Understanding between the United States Securities and Exchange Commission and Comissao de Valores

Mobiliarios (Brazil) (July 1, 1988), available at <http://www.cvm.gov.br/reinter/mou/ussec-in.asp>.

⁵⁶ Sommer, *supra* note 1, at 19.

⁵⁷ See Press Release, OICU-IOSCO, Hans Hoogervorst Appointed Chairman of IOSCO's Technical Committee, IOSCO/MR/06/2010 (June 08, 2010).

⁵⁸ See *id.*

⁵⁹ *Id.*

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The Emerging Markets Committee and the Technical Committee are the organs that together run IOSCO. The latter can be described as a group of “elite regulators” who come from developed countries and are charged with the main regulatory powers.⁶⁰ The former is made up of less developed countries that play a different role: by participating in this Committee they are necessary for the Organisation to issue institution-wide standards.⁶¹

In addition to the Technical Committee and the Emerging Markets Committee, IOSCO has four Regional Committees, which meet to discuss problems specific to their respective geographical areas: the Africa/Middle-East Regional Committee, the Asia-Pacific Regional Committee, the European Regional Committee, and the Inter-American Regional Committee.⁶² Each regional committee acts as a forum for its members to discuss topics of special interest and provides recommendations and reports to IOSCO on regional issues.⁶³

Self-Regulatory Organisations (SROs) play an important role within the IOSCO structure because they are members of the SRO Consultative Committee (SROCC). The SROCC was established in 1989 and currently has sixty-nine members representing securities and derivatives markets.⁶⁴ Some of the most important stock exchanges in the world are members of the SROCC, including the London Stock Exchange, Tokyo Stock Exchange, and the National Stock Exchange of India.⁶⁵ Their participation at IOSCO is aimed at making “a constructive input in the work of IOSCO.”⁶⁶ SROCC members work with the Technical Committee “to provide substantive input on their regulatory initiatives,”⁶⁷ while working with one another to enforce securities laws and regulations.⁶⁸

Finally, the General Secretariat in Madrid carries out all the necessary administrative and organisational tasks. These duties include keeping IOSCO’s records, updating by-laws and resolutions,

⁶⁰ Chris Brummer, *Post-American Securities Regulation*, 98 CAL. L. REV. 327, 339 (2010).

⁶¹ *Id.*

⁶² See *Annual Report 2010*, *supra* note 2, at 47.

⁶³ See *id.* at 40-43.

⁶⁴ The committee members are 17 regulatory membership organisations, 43 exchanges (including the World Federation of exchanges), 4 clearing and settlement agencies, and 5 investor protection funds. See *Annual Report 2010*, *supra* note 2, at 18.

⁶⁵ *SROCC Member Organization Links*, IOSCO, <http://www.iosco.org/committees/srocc/index.cfm?srocc=links> (last visited Oct. 12, 2012).

⁶⁶ IOSCO, *Annual Report 2008*, at 25 (2009).

⁶⁷ *Id.*

⁶⁸ See *SRO Consultative Committee (SROCC)*, IOSCO, <http://www.iosco.org/committees/srocc/index> (last updated 2012).

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monitoring members' compliance, examining membership applications, representing the Organisation in meetings with, or presentations to, other groups and bodies, and preparing the Annual Report of the Organisation.⁶⁹

This graph shows an overview of IOSCO's current governance:

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New amendments to IOSCO's by-laws in 2012 caused a deep change in IOSCO's structure that year.⁷¹ A new body, the IOSCO Board, replaced the Executive and the Technical Committees and the Advisory Board of the Emerging Markets Committee.⁷² This transformation has just taken place and it will be interesting to see the way IOSCO works once this reform is implemented.

⁶⁹ *Structural Change Amendment*, *supra* note 20, at 14, § 51(a)-(h).

⁷⁰ *Annual Report 2008*, *supra* note 66, at 25.

⁷¹ See *Structural Change Amendment*, *supra* note 20, at Ann.1. The Presidents' Committee conferred upon the Executive Committee the authority to do all it is deemed necessary for the amendments to take effect before the 2012 Annual Meeting. See *id.* It also indicated a bridge period, running from the 2012 Annual Meeting to the 2014 Annual Meeting, during which a transitional IOSCO Board will be constituted and will carry out all the functions and wield all the powers conferred upon the formal IOSCO board. See *IOSCO, Resolution of the Presidents Committee on Transitional Arrangements for the IOSCO Board*, at Ann. 2 (2011).

⁷² *Annual Report 2010*, *supra* note 2, at 4. See generally *Members of the IOSCO Board*, OICU-IOSCO, http://www.iosco.org/lists/display_committees.cfm?cmtid=11 (detailing the organisational structure of the IOSCO Board) (last visited Oct. 12, 2012).

34 *RICHMOND JOURNAL OF GLOBAL LAW & BUSINESS* [Vol. 12:1*a. IOSCO's funding system*

A regular annual fee of 15,000 Euros used to be applied equally to all members, regardless of whether they were ordinary, associate, or affiliate members. As of 2012, a new funding system has been introduced based on a mild progressive scheme that differentiates countries through two variables: Low, Middle and High income economies, and Low, Middle and High GDP. The following table explains this new scheme:

Annual financial contribution structure in Euros from 2012:

GDP	National Per Capita Income		
	1. Low Income	2. Middle Income	3. High Income
A. Low GDP	€ 12,500	€ 15,000	€ 16,000
B. Medium GDP	€ 15,000	€ 16,000	€ 21,000
C. High GDP	€ 16,000	€ 21,000	€ 30,000

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Annex 1 to the Resolution of the Presidents' Committee on Funding the New Strategic Direction specifies that the GDP categories are the following:

- Low GDP is any amount less than US \$100,000 million;
- Middle GDP is any amount from US \$100,000 million to US \$500,000 million; and
- High GDP is any amount above US \$500,000 million.⁷⁴

Standards regarding the Gross National Income per Capita indicator are the following:

- Low income economies is less than US \$1,025;
- Middle income is from US \$1,026 to US \$12,475; and
- High income is above US \$12,476.⁷⁵

IOSCO should now receive more funds from its members, just as it hoped for in the 2010 Annual Report, which held that changes

⁷³ OICU-IOSCO, *Resolution of the Presidents Committee on Funding the New Strategic Direction*, at Ann. 1, p. 1 (2010).

⁷⁴ *Id.* at Ann. 1, p. 2.

⁷⁵ WORLD BANK, HOW WE CLASSIFY COUNTRIES, <http://data.worldbank.org/about/country-classifications> (last visited Nov. 26, 2012).

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were needed to create more resources.⁷⁶ This increase in revenue is perfectly coherent with the broadening role that IOSCO is now supposed to play in the global arena.

b. IOSCO's sanctions system

According to the IOSCO By-Laws, the term "sanction" concretizes three different kinds of suspensions representing a scale of seriousness of breaches. These sanctions are the suspension a member's voting rights for a certain period; the suspension of a member from membership in the Organisation for a certain period; and the exclusion of a member from membership.⁷⁷

The Presidents' Committee holds the power to impose a sanction and to determine its length and severity when it is alerted by the Executive Committee.⁷⁸ Before sending any recommendation, however, the Executive Committee must give the member under scrutiny reasonable notice of its intention to send a sanction recommendation to the Presidents' Committee and give that member the opportunity to make representations concerning the intended recommendation.⁷⁹

Sanctions are not frequently imposed, and the IOSCO website library only reports one case taking place in 2002.⁸⁰ In that circumstance the Presidents' Committee passed a resolution by which it suspended the voting rights of the Superintendency of Securities of Colombia and of the National Commission of Securities of Paraguay, and also suspended the affiliate membership of the Open Electronic Market of Argentina until such time as each of their outstanding annual financial contributions to the Organisation were paid.⁸¹ Whereas the Superintendency of Securities of Colombia is still an ordinary member of IOSCO, both the National Commission of Securities of Paraguay and the Open Electronic Market of Argentina are no longer ordinary and affiliate members, respectively.⁸²

⁷⁶ *Annual Report 2010*, *supra* note 2, at 4.

⁷⁷ *Structural Change Amendment*, *supra* note 20, at 20.

⁷⁸ See, e.g., IOSCO, *A Resolution on Delinquents of the Presidents' Committee* (May 2002).

⁷⁹ See *id.*

⁸⁰ See *id.*

⁸¹ *Id.*

⁸² The Argentinean stock market is now represented by the *Bolsa de Comercio de Buenos Aires* which is an IOSCO affiliate member. See *Affiliate Members of IOSCO*, OICU-IOSCO, http://www.iosco.org/lists/display_members.cfm?memID=3&orderBy=jurSortName (last visited on Sept. 27, 2012).

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3) THE “NORMATIVE” PRODUCTION OF IOSCO

IOSCO’s Objectives and Principles of Securities Regulation and the Multilateral Memorandum of Understanding are the core “*normative*” production of IOSCO. I write *normative* in italics and between quotation marks because IOSCO’s standards and principles are not binding because they are “soft-law” rules.⁸³ Moreover, even if they are *norms* adopted by a private legal organisation, they also have a public law effect given by the quasi-immediate incorporation carried out by IOSCO’s members.⁸⁴ Finally, they are deliberately broad because they aim to ease the assimilation of specific content, rather than focus on detailed rules. While IOSCO recognises that there is “no single prescription or roadmap to good regulation in the field of securities,”⁸⁵ these broad goals must necessarily lead to a predefined objective.

a. *Objectives and Principles of Securities Regulation*

In September 1998, IOSCO enacted the *Objectives and Principles of Securities Regulation*, the so-called IOSCO Principles.⁸⁶ The document was revised in 2010 when eight principles were added to adapt the IOSCO Principles to the post-financial crisis environment.⁸⁷ The list now contains 38 principles of securities regulation, which are inevitably general so as to apply to many different jurisdictions and “to accommodate the differences in the laws, regulatory framework, and market structures among its [m]ember jurisdictions.”⁸⁸ Despite this generality, these principles represent an attempt to ground the fundamental elements of an “effective regulatory system.”⁸⁹ IOSCO has officially stated that in drafting the Principles it wanted to “avoid being

⁸³ See Antonio Cassatella, *La Regolazione Globale del Mercato dei Valori Mobiliari: la International Organization of Securities Commissions (IOSCO)*, in LA REGOLAZIONE GLOBALE DEI MERCATI FINANZIARI 77,127 (Stefano Battini ed. 2007).

⁸⁴ See generally *id.* at 101 (discussing the hybrid nature of IOSCO standards).

⁸⁵ Brummer, *supra* note 60, at 340.

⁸⁶ See generally IOSCO, *Objectives and Principles of Securities Regulation* (Sept. 1998), available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD82.pdf>.

⁸⁷ The recently added principles deal with issues such as hedge funds, credit rating agencies, auditor oversight, mitigating systemic risk, and disclosure of conflicts of interest. IOSCO, *Objectives and Principles of Securities Regulation* (2010), available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD323.pdf>.

⁸⁸ IOSCO, *Methodology for Assessing Implementation of the IOSCO Objectives and Principles of Securities Regulation*, at 3 (2008), available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD266.pdf> [hereinafter *Methodology for Assessing Implementation*].

⁸⁹ Jeffrey Lucy, Deputy Chairman, Austl. Sec. and Inv. Comm’n, *The Single Market for Financial Services in the EU and Its Impact on Globalisation*, Speech Before the European Australian Business Council (Nov. 3, 2003) (transcript available at http://www.asic.gov.au/asic/pdfflib.nsf/LookupByFileName/EABC_speech_

overly prescriptive in its requirements while, at the same time, providing sufficient guidance as to the core elements of an essential regulatory framework for securities.”⁹⁰

The IOSCO Principals are important for three main reasons: “they establish higher standards of regulation across jurisdictions; improve the depth of cooperation between different regulators; and provide a chance to regulate foreign jurisdictions in domestic regulatory arrangements.”⁹¹ Additionally, the IOSCO Principals follow three main goals:

- Protecting investors [mainly through information disclosure];⁹²
- Ensuring that markets are fair, efficient and transparent; and
- Reducing systemic risk [through efficiency].⁹³

The document clarifies that the 38 principles must be incorporated into domestic legislation in order to achieve the goals described above.⁹⁴ These 38 principles are then further grouped into nine clusters: a) Principles Relating to the Regulator; b) Principles for Self-Regulation; c) Principles for the Enforcement of Securities Regulation; d) Principles for Cooperation in Regulation; e) Principles for Issuers; f) Principles for Auditors, Credit Rating Agencies, and other information providers; g) Principles for Collective Investment Schemes; h) Principles for Market Intermediaries; and i) Principles for the Secondary Market.⁹⁵

The IOSCO Principles look like the *nec plus ultra* of the Efficient Markets Hypothesis transposed into a transnational “*normative*” document. This economic theory is, indeed, based on the following three main arguments:

1. Investors are generally rational in valuating securities.
2. Investors who are irrational act randomly and their trades cancel each other.

031103.pdf/\$file/EABC_speech_031103.pdf) (hover over “Publications” tab, then click on “Speeches”, click on “2003”, click on the first link under 2003).

⁹⁰ *Methodology for Assessing Implementation*, *supra* note 93, at 3.

⁹¹ Lucy, *supra* note 89.

⁹² The Document specifies in its second footnote that “the term investor is intended to include customers or other consumers of financial services.” IOSCO, *Objectives and Principals of Securities Regulation*, at 3, n.2 (2010), available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD323.pdf>.

⁹³ *Id.* at 3.

⁹⁴ *Id.*

⁹⁵ *Id.* at Table of Contents.

3. Rational arbitrageurs eliminate the influence of irrational investors on prices.⁹⁶

Setting aside the most technical aspects regarding the arbitrage coordination, we can nevertheless highlight the rationale behind the theory: given the publicly available information, investors are able to give each security the most adequate price. The availability of information is the essential condition for financial markets to efficiently develop.

Reading the IOSCO Principals, one can easily see that this document is actually based on the idea that full disclosure of material information can enable investors to make good investment decisions. Disclosure is the most important means to ensure investor protection. Through enough information and transparency, both professional and retail investors can assess the potential risks and rewards of their investments and thus protect their own interests. Moreover, through efficient and transparent transactions it is possible to reduce the systemic risk inherent in financial markets. Importantly, Part E, which deals with Principles for Issuers, directly mentions both investor protection and accounting and auditing standards, which are held to be key components of disclosure requirements and “should be of a high and internationally acceptable quality,” as assessed through the lens of IOSCO’s normative production.⁹⁷

b. The Multilateral Memorandum of Understanding

The memoranda of understanding are probably the oldest instruments used by IOSCO members. A MOU is a cooperative tool used by the contracting parties to facilitate their functional needs in specific areas. At the beginning of the 1980’s, the existing classical international law tools were thought to be “inadequate because they were too general and inflexible for highly technical and rapidly evolving” financial markets, where deep supervision is needed to fight illegal activities.⁹⁸ Given the difficulty of carrying out extraterritorial investigations or wielding administrative power, MOUs were conceived of as a tool to avoid these obstacles and to introduce a flexible alternative.⁹⁹

⁹⁶ ANDREI SHLEIFER, *INEFFICIENT MARKETS: AN INTRODUCTION TO BEHAVIORAL FINANCE 2* (Oxford University Press, 2000).

⁹⁷ IOSCO, *Objectives and Principals of Securities Regulation*, at 8 (2010), available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD323.pdf>.

⁹⁸ *Id.*

⁹⁹ Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT’L L. 1, 30 (2002).

The IOSCO MOUs were originally bilateral and the first Multilateral Memorandum of Understanding (MMoU) is still relatively recent, having been developed after the events of September 11, 2001, and adopted in May 2002.¹⁰⁰ This MMoU concerning Consultation and Cooperation and the Exchange of Information was seen as the perfect tool for regulators to “exchange information across borders in order to fulfil their domestic enforcement mandates.”¹⁰¹ The rules of conduct set up by this document were meant to become a worldwide “recognised international benchmark for cross-border co-operation aimed at combating violations of securities laws and regulations.”¹⁰²

It took about a decade for most IOSCO members to become signatory parties of the MMoU. Indeed, in the first years, the implementation process was so slow that the Presidents’ Committee pushed to speed it up. At IOSCO’s Annual Conference in Sri Lanka in 2005, the Presidents’ Committee made the decision to compel all full and associate members with primary responsibility for financial regulation in their home countries either to apply for and be accepted as signatories under Appendix A of the MMoU, or to express, via Appendix B, a commitment to seek legal authority to enable them to become signatories before January 1, 2010.¹⁰³ As of October 2012, eighty-six members are signatories to the IOSCO MMoU.¹⁰⁴

Paragraph 4 of the MMoU is the core element of the document because it sets up the kind of information requests covered by the Memorandum:

- Insider dealing, market manipulation, misrepresentation of material information and other fraudulent or manipulative practices relating to securities and derivatives, including solicitation practices, handling of investor funds and customer orders;
- The registration, issuance, offer, or sale of securities and derivatives, and reporting requirements related thereto;

¹⁰⁰ IOSCO, *Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information*, at 2 (May 2002), <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD126.pdf> [hereinafter *Memorandum of Understanding*].

¹⁰¹ *Annual Report 2010*, *supra* note 2, at 7.

¹⁰² *Id.* at 5.

¹⁰³ *Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (MMoU)*, IOSCO, http://www.iosco.org/library/index.cfm?section=mou_main (last visited on Sept. 19, 2012).

¹⁰⁴ *IOSCO MOU: Current Signatories and Responses to Questionnaire*, IOSCO, http://www.iosco.org/library/index.cfm?section=mou_siglist (last visited Oct. 12, 2012).

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- Market intermediaries, including investment and trading advisers who are required to be licensed or registered, collective investment schemes, brokers, dealers, and transfer agents; and
- Markets, exchanges, and clearing and settlement entities.¹⁰⁵

Paragraph 7 clarifies the scope of assistance provided by the MMoU:

- (a) The Authorities will, within the framework of this Memorandum of Understanding, provide each other with the fullest assistance permissible to secure compliance with the respective Laws and Regulations of the Authorities.
- (b) The assistance available under this Memorandum of Understanding includes, without limitation
 - a. Providing information and documents held in the files of the Requested Authority regarding the matters set forth in the request for assistance;
 - b. Obtaining information and documents regarding the matters set forth in the request for assistance [. . .]; and
 - c. In accordance with Paragraph 9(d), taking or compelling a Person's statement, or, where permissible, testimony under oath, regarding the matters set forth in the request for assistance.
- (c) Assistance will not be denied based on the fact that the type of conduct under investigation would not be a violation of the Laws and Regulations of the Requested Authority.¹⁰⁶

By reading the fundamental parts of the IOSCO MMoU it becomes clear that the driving regulatory ideas governing financial markets are meant to be the free movement of capital and financial stability. To maintain both of them, a constant and continuous exchange of information must be kept between domestic authorities. In a global liberalised and deregulated financial market, reciprocal assistance and the exchange of information among regulators become the tools to tame markets. Unfortunately, the IOSCO MMoU does not touch upon important issues such as investor protection, but it is still important to keep in mind because it clearly depicts the leitmotif of current financial regulation.

¹⁰⁵ *Memorandum of Understanding*, *supra* note 103, at 2.

¹⁰⁶ *Id.* at 4-5.

4) CONCLUDING REMARKS

After reading this paper, the answer to the question, “Is a greater role for IOSCO looming?” cannot be anything but affirmative. Indeed, IOSCO has grown exponentially over the last two decades and has become more and more defined, structured, and organised. Its original goals have become much broader and its normative production has increasingly penetrated domestic legislation. The adoption of two important documents like the Multilateral Memorandum of Understanding or the “*Objectives and Principles of Securities Regulation*” confirms this trend.

But all that glitters is not gold. Controversially, IOSCO is a private, law-based organisation, but is made up of public authorities.¹⁰⁷ It adopts soft-law documents in the form of private law-based regulations, but these instruments have a quasi-immediate public law effect being incorporated into domestic legislation soon after.¹⁰⁸ Finally, the regulatory powers are in the hands of an elite committee made up of regulators coming from developed and important countries.¹⁰⁹ All of this raises the classic problem of legitimacy.

What seems to matter most, however, is the regulatory philosophy that is conveyed by IOSCO. Through the “enough disclosure” and “exchange of information” paradigm, IOSCO “regulations” aim at establishing an efficient transnational market by eliminating the externalities generated out of information asymmetries that are likely to distort financial transactions. Ultimately, the goal should be to meet the market’s expectations by achieving general financial stability. On this very point, however, another crucial question arises: is this regulatory model, pushed by a handful of developed regulators, economically efficient in the long run?

¹⁰⁷ See *Membership Categories and Criteria*, *supra* note 13.

¹⁰⁸ See Cassatella, *supra* note 83, at 101.

¹⁰⁹ *The Monitoring Group*, IOSCO, https://www.iosco.org/monitoring_group/ (last visited on Sept. 28, 2012).

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