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Interational Financial Regulation: Toward a Rule of Law

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¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² 2010 Instructions for Schedule UTP, Uncertain Tax Position Statement, Cat. No. 55028G.

²³ Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (P.L. 111-312), signed into law by President Obama on December 17, 2010, Act Sections 731(a), (b) and (c), amending 26 U.S.C. § 41(h)(1)(B).

²⁴ 26 U.S.C. §§ 267(b), 318(a), or 707(b).

²⁵ See IR-2010-122, Prepared Remarks of IRS Commissioner Doug Shulman before the 23rd Annual Institute on Current Issues in International Taxation (December 9, 2010).

²⁶ *Supra* 11.

²⁷ Roger Russell, *Gear Up for Tax Season*, Accounting Today, Vol.24, No. 16, December 13, 2010-Jan. 10, 2011, at 52.

²⁸ John D. McKinnon, *Progress on Overhaul of Corporate-Tax Rules*, Wall Street Journal, January 15-16, 2011, at A3; David Wessel, *Tax Redo Seeks 'Level Playing Field'*, Wall Street Journal, January 27, 2011, at A4; Jean Sahadi, *Corporate Tax Reform: Talk Grows Louder*, CNN Money.com, http://cnn.com/2011/01/14/news/economy/corporate_tax_reform/index.htm.

INTERNATIONAL FINANCIAL REGULATION: TOWARD A RULE OF LAW

by

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INTRODUCTION

Since the 1947 General Agreement on Tariffs and Trade (GATT), many nations have subscribed to multi-national treaties, agreements, and conventions seeking to govern the regulation of international trade in goods and services. National and International tribunals have settled or made recommendations concerning individual and national disputes submitted to their jurisdictions.¹ For example, the 1988 United Nations Convention on Contracts for the International Sale of Goods (CISG) has been applied to enforce contracts and grant remedies for breach of an agreement.² In 1994, 138 nations incorporated GATT and the General Agreement on Trade in Services (GATS) into the World Trade Organization (WTO) agreement. The Agreement recommends remedies to ensure free trade in Goods and Services. Annexes to the agreement seek freedom of trade in other areas, including finance. In particular, the WTO, by its financial services annex,³ seeks to open the banking, securities and insurance industries to competition from foreign companies. While intending to open

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services to consumers, the Agreement still permits countries to regulate the industries.

To date, however, no set financial regulations have been widely adopted among nations. No traditionally enforceable rule of the law of finance exists. But regulations have been proposed and recommended for acceptance among a number of nations and regulatory bodies.⁴ This article examines the growth of financial regulations in three areas: money laundering regulation; banking stability standards; and securities market supervision. This article concludes with an argument for the need for a World regulatory body to enforce by recommendation⁵ the financial principles examined below.

THE GROWTH OF FINANCIAL REGULATIONS

Money Laundering Efforts

The Financial Action Task Force as a Standard Setting Body:

The Financial Action Task Force (FATF), an international inter-governmental body presently composed of thirty-four nation members and two international organizations (the Gulf Cooperation Council [Bahrain, Kuwait, Oman, Qatar, Saudi-Arabia and the United Arab Emirates individually are not members] and the European Commission), also has twenty-seven associate or observer members included in its deliberations. The organization sets financial standards to combat money laundering, including terrorist financing.⁶

Police and banking authorities have always been interested in monitoring money obtained from drug sales, prostitution, racketeering and other illegal acts. The United States, the United Kingdom, France, Germany, Japan, Italy and

Canada (the G-7) initiated the plan to promote anti-money laundering regulations, which often occur in offshore financial centers. The FATF Forty Recommendations and its Eight Special Recommendations concerning terrorist financing have been accepted and implemented by the International Monetary Fund (IMF) and the World Bank. Both of these institutions, by gathering information and publication of investigation results, have assisted the implementation of the FATF Recommendations.⁷

At the 1989 Paris G-7 summit meeting, the G-7 heads of state and the President of the European Commission convened a task force which produced the April 1990 FATF Forty Recommendations. In October 2001 the FATF added eight special recommendations (which then became nine recommendations by October 2004) concerning money laundering and terrorist financing. The document is presently called the *40+9 Recommendations*.⁸ The FATF strongly urges all nations to take the necessary steps to combat money laundering and terrorist financing by bringing their legal systems into compliance with the Recommendations. Constant evaluations by regional bodies and assessments conducted by the IMF and the World Bank will ensure effective implementation. The Forty Recommendations address a) Legal Systems; b) Financial Institutions and Non-Financial Businesses and Professions; c) Necessary Institutional and Other Measures; d) International Cooperation.

Legal Systems:

The FATF indicates that money laundering should be criminalized in accord with the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic substances, 1988 (the Vienna Convention)⁹ and the United Nations Convention against Transnational Organized Crime,

2000 (the Palermo Convention)¹⁰. Criminal knowledge an intent may be inferred from objective factual circumstances. Where criminal liability is not possible, civil liability should attach to any legal person, who will be subject to effective sanctions in the form of injunction or monetary damage liability property and proceeds should be confiscated, assets should be frozen or ceased and any other measures consistent with domestic law should be pursued.¹¹

Measures to be taken by Financial Institutions and Non-Financial Businesses and Professions to Prevent Money Laundering and Terrorist Finances:

Financial Institutions should not use secrecy laws to inhibit Recommendation implementation. Institutional due diligence and record keeping will then prohibit anonymous or fictitious name accounts and will identify customers¹² when establishing businesses relations and carrying out transactions if there is a suspicion or reasonable doubt about money laundering or terrorist financing.

Customers in their turn will practice due diligence¹³ by verifying their own identity, identifying the beneficial owner of accounts, obtaining requested information and conducting ongoing due diligence.

In dealing with politically exposed persons (heads of state, senior officials and their families)¹⁴ financial institutions should determine the identity of such a person as politically exposed, obtain senior management approval for the businesses relationship, and take reasonable measures to determine the source of the funds and to monitor the ongoing relationship.

In relation to cross border corresponding banks and other institutions due diligence measures require the nature of

the correspondence business, its anti-money laundering and terrorist financial controls, obtain senior management approval and with respect to payable through accounts that the pay through customer be sufficiently identified. Shell banks¹⁵ used as covers for criminal activity should be prohibited.

New technologies for record keeping and any reasonable suspicions concerning information transmission with these technologies should be promptly reported. The financial institution, its officers and directors should be free from any past civil and criminal liabilities for failure to disclose suspicions to any authorized officials or administrative authority.

All non-financial businesses and professions must report suspicious transactions. In particular, dealers in precious metals/stones and trust company service providers must also be required to report suspicious circumstances. Legal professions and Accountants however, are not required to report their suspicions if they are subject to professional secrecy or other legal privilege.¹⁶

Regulatory measures with respect to countries that do not comply with the FATF Recommendations include publication of findings, counter measures by cooperating countries and disclosure by financial institutions and professionals of local laws which prevent application of the Recommendations to them.¹⁷ Competent local authorities should establish guidelines for financial institutions and non-financial businesses and professions concerning the effort to combat money laundering and terrorist financing, and to detect and report suspicious financial transactions.

Institutional and Other Measures Necessary in Systems for Combating Money Laundering and Terrorist Financing:

Financial Intelligence Units (FIU)¹⁸ and Suspicious Transaction Reports (STR)¹⁹ will create competent power and resources to assist countries in monitoring and sanctioning money laundering and terrorist financing. Special investigative techniques such as controlled delivery and undercover operations will assist in asset investigation. FIUs will have power to investigate and to use compulsory measures, including search and seizure of person's premises and property in order to obtain evidence. Professionals of skill and high integrity will cooperate with each other to develop and implement policies and activities to combat illegal laundering and financing.

Legal persons and entities should not be used to prevent lawful investigation. Beneficial ownership should be apparent concerning such beneficial ownership and control of entities suspected of money laundering and terrorist financing. In particular, express trusts documentation should include information identifying the settlor, trustee and beneficiaries.²⁰

International Cooperation:

The FATF urged countries to take immediate steps to implement fully the Vienna Convention the Palermo Convention, the 1999 United Nations International Convention for the Suppressing of the Financing of Terrorism,²¹ the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime²² and the 2002 Inter-American Convention against Terrorism.²³ Mutual legal assistance among nations should include clear and efficient processes to share information and to facilitate extradition of

criminal actors notwithstanding the absence of dual criminality. Expeditious local action will also facilitate identification and seizure of property laundered and instrumentalities used in the commission of offenses. Other forms of cooperation include information exchange between legal enforcement counterparts without undue restrictive measures and where a foreign competent authority may not act, that information at least be shared, always in a manner consistent with privacy rights and data protection.²⁴

The 2004 FATF Nine Special Recommendations on Terrorist Financing supplement the Forty Recommendations.²⁵ Each nation is encouraged to implement the 1999 United Nations International Convention for the suppression of the financing of terrorism, to criminalize any terrorist activity, to freeze and confiscate terrorist assets,²⁶ to report suspicious transactions, to cooperate with each other, so as not to provide safe havens for terrorist persons, to monitor closely wire transfers, and non-profit organizations particularly vulnerable to terrorist exploitation, and to detect physical cross-border transportation of currency by cash couriers.

High Risk and Non Cooperative Jurisdiction Review:

FATF and FATF style regional bodies' evaluation programs effectively reveal actors who pose a high risk to the international financial system and who fail to implement money laundering and terrorist financing regimes. The FATF investigative process of non cooperative countries and territories (NCCTs) revealed 23 jurisdictions with a lack of a coherent investigative and enforcement systems, but by October 2006 all 23 had been removed from the list.²⁷

Since 2007, the FATF newly formed International Cooperation Review Group (ICRG), at the renewed urging of

the now expanded Group of 20 (G-20), has analyzed additional high risk jurisdictions. In February 2011 the Review Group identified Iran and The Democratic People's republic of Korea as significant financial threats for money laundering and the financing of terrorism. The FATF urged its members to use counter measures for protective purposes. In June 2011 the Review Group continued to identify an additional eleven national actors with implementation deficiencies, where no significant progress has occurred: Angola, Bolivia, Ethiopia, Kenya, Myanmar, Nepal, Nigeria, Sri Lanka, Syria, Trinidad & Tobago, and Turkey. The entire list presently contained thirty-one jurisdictions but progress has been made in the other nations.²⁸

Banking Stability Standards

Basel I:

The Core Principles for Effective Banking Supervision (the Basel Core Principles) were issued by the Basel Committee of Banking Supervisory Authorities from Belgium, Canada, France, Germany, Italy, Japan, Luxembourg, Netherlands, Sweden, Switzerland, United Kingdom and the United States in 1997. They have been revised since that time but the 25 Basic Principles remain the same. Promulgation of the principle included consultation with non-G-10 supervisory authorities: Argentina, Brazil, Chile, China, the then Czech Republic, Hong Kong, Hungary, India, Indonesia, Korea, Malaysia, Mexico, Poland, Russia, Singapore and Thailand.²⁹

Preconditions for Effective Banking Supervision (Principle 1):

Primary among the preconditions, the Committee envisions the necessity of a legal framework to implement the Principles, the independence of regulators or enforce those

Principles, and their continuing legal protection from any liability for their decisions.

Licensing and Structure (Principles 2-5):

The licensing authority must have power to obtain full disclosure of ownership management and operating structure of any bank, which must clearly identify itself by the use of the word bank. Where the owner of the bank is itself a foreign bank, prior consent of its home country regulator must be obtained before a license is issued. Continuous review of the bank's financial condition, including its capital base must be permitted by law.³⁰

Prudential Regulations and Requirements (Principles 6-15):

All banks should maintain appropriate capital adequacy and international banks must adhere to the Basel Capital Accord, as amended.³¹ Loan and investment portfolios, management information systems, appropriate reserves, market risk limits, arm's-length requirements, internal controls, and "know-your-customer" rules should be promptly implemented to prevent risk of bank failures and the use of banks for criminal activity.

Methods of On Going Banking Supervision (Principles 16-20):

Banking supervisors, on a consolidated basis, must be able to use on-site and off-site supervision to obtain a thorough understanding of prudential reports and statistical returns.³² Those supervisors must be able to obtain independent validation of the information supplied to them.

Information Requirements (Principle 21):

Regular bank financial statements, compiled in accord with consistent account principles of full disclosure, must represent an adequate record of the true and fair financial condition of the bank and its profitability.³³

Formal Powers of Supervisors (Principle 22):

Banking supervisors must have the authority to take timely corrective action when banks fail to act prudently and even, in extreme circumstances, to revoke the banking license of an individual institution.³⁴

Cross-Border Banking (Principles 23-25):

Globally consolidated supervision by bank supervisors will effectively monitor foreign branches, joint ventures and subsidiaries of international banks. Information exchanged among supervisors from other nations and regions will ensure that the local operations of foreign banks be conducted in accord with uniform standards, both foreign and domestic.

In two appendices to the Principles,³⁵ the Committee urged that government owned commercial banks must operate in accord with the standards applied to private institutions and that all banks must secure and protect the deposits of their customers. The committee observes that the Principles set minimum requirements for governance and disclosure. The Principles rely upon the cooperation of banking regulators, nationally, regionally and internationally.

Basel II:

In June 2004, the Basel Committee issued a document concerning the International Convergence of Capital Measurements and Capital Standards.³⁶ The document urged international convergence on supervisory regulations applicable to internationally active banks. This revision of Basel I provides a greater range of options for bank supervisors to determine the capital requirements and risk factors applicable to banks. The Committee recognized that the Core, or Tier 1, Capital base must consist of share equity and disclosed reserves, the only elements common to all countries'

banking systems. Supplementary, or Tier 2, Capital would include undisclosed reserves, reevaluation reserves of assets already held by a bank and general loan-loss reserves which are subject to deterioration and which must be noted by accounting supervisors. Tier 3 Capital would consist of short-term subordinated debt which would be unsecured but fully paid up, having original maturity of at least two years, not be pre-payable unless bank supervisory authority agrees and be subject to the provision that no payment occur, should the bank than fall below its minimum capital requirement.³⁷

The Basel II Committee supplemented the Basel I twenty-five Core Principles with Three Pillars.

The First Pillar – Minimum Capital Requirements:

The First Pillar mandates the regulation of capital risks emanating from individual claims, urges external credit assessments and describes risk reduction implementation techniques with great particularity. The Internal Ratings-Based (IRB) Approach³⁸ examines its application across asset classes, including corporate, sovereign, bank, retail, revolving retail, equity and receivable exposures. It proposes formulas for the derivation of risk-weighted assets, adjustments for small and medium sized entities and the probability factors for default in all of these asset classes. The document describes in detail the minimum requirements of the IRB approach, including internal and external management of risk requirements.

The First Pillar devotes particular attention to the credit risks involved with secure transactions, including the capital requirements for early amortization of outstanding loans and the value of the security advanced upon the loan.³⁹ The Pillar even suggests a hierarchy of approaches to determine risk exposure in secure transactions.

The Pillar, finally, describes methods to measure operational risks and the credit risks involved in trading book issues - financial instruments and commodities held for trading purposes or as a hedge against other trades.⁴⁰

The Second Pillar – Supervisory Review Process:

Supervisory Review requires the application of four key principles: 1) Entity Assessment through examination of management and board oversight; proper capital and risk assessment; proper monitoring and reporting; and a continuous review of internal controls. 2) Specific Internal Risk Assessment in accord with certain specified minimum standards of capital adequacy, assessment of the control environment and the response of bank supervisors. 3) Minimum Capital Ratio Assessment in the banking process, including examination of the possibility of debtor default, the dangers of credit concentration and the ability to hold capital in excess of the minimum. 4) Capital Risk Prevention Assessment among bank supervisors in order to obtain rapid remedial action in the case of inadequate capitalization.⁴¹

The Third Pillar – Market Discipline:

The Third Pillar urges a continuous market review of bank discipline through the promulgation of disclosure requirements, guiding principles, accounting standards, and the definition of proprietary and confidential information.⁴²

Basel III:

The Basel Committee published the Basel III package of financial regulations on December 19, 2010. The Committee, established by G-10 countries in 1975, now consists of senior banking representatives from 27 nations: Argentina, Australia, Belgium, Brazil, Canada, China, France, Germany, Hong Kong SAR, India, Indonesia, Italy, Japan,

Korea, Luxembourg, Mexico, the Netherlands, Russia, Saudi Arabia, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States.⁴³

In the light of the financial crisis which began to develop a few years before its proposal, the committee, restated its 25 Principles, its Three Pillars and introduced a reform program to strengthen the resilience of the banking sector. The Committee indicated that its proposals form a part of a global initiative to strengthen the financial regulatory system endorsed by the Financial Stability Board and the G-20 leaders. The Committee noted that weaknesses in the banking system transmitted themselves to the financial system and “the real economy, resulting in a massive contraction of liquidity and credit availability” (Basel III, I, 4). The reforms introduced by the Committee build upon the agreement reached at the September 6, 2009 meeting of the Basel Committee’s governing body and include the following:

First, the quality and transparency of the capital base of internationally active banks must be raised so that Tier 1 Capital stock and published retained earnings will be able to absorb any fluctuations in risk-based assets. The Committee mandates that Tier 3 Capital be eliminated from bank capital assets, and that Tier 2 Capital instruments be harmonized so as to reveal the risks inherent in each of them in relation to the others.⁴⁴

Second, the Committee proposes that counter-party credit risk exposures deriving from derivatives, repossessions and securities financing be moved to central counterparties (such as clearing houses) and central exchanges so that no one institution be subject to risk of failure.⁴⁵

Third, the Committee will supplement the Basel II risk-based scheme by introducing a more rigorous international

leverage ratio requirement to adjust any accounting differences among internationally active banks.⁴⁶

Fourth, the Committee has introduced anti-cyclicality measures so as to promote the accumulation of capital assets during a cycle of prosperity. The Committee urges that such an accumulation will reduce the prior pro-cyclicality practices of banks which increased their risks and spent more of their assets during times of prosperity. The Committee also proposed practices to protect banks during periods of excess credit growth through the use of accounting standards to improve that calibration of risk estimates.⁴⁷

Fifth, the Committee has also introduced an international minimum liquidity standard for banks which includes a 30 day liquidity coverage ratio requirement which would include an even longer term net stable funding ratio to calculate continuing structural liquidity.⁴⁸

It is presently planned that all major G-20 financial centers adopt the Basel III recommendations by December 31, 2011 and that full implementation of Basel III occur by December 31, 2019.⁴⁹

Securities Market Supervision

The International Organization of Securities Commissions (IOSCO):

The IOSCO, founded in 1983, headquarters its General Secretariat in Madrid, Spain. The Organization's 115 Ordinary Members (securities regulators from Albania to Zambia, including the United Kingdom and the United States) include Securities Commissions with public authority to regulate or other self regulatory bodies such as Stock Exchanges, if a jurisdiction has no publicly authorized securities regulator.⁵⁰ In

May 2002, the Ordinary Members subscribed to a Multi-lateral Memorandum of Understanding (MMOU) concerning Consultation and Cooperation and the Exchange of Securities Information. Regional committees representing Africa and the Middle East, Asia and the Pacific Rim, Europe and the Americas assist in the continuing formulation and implementation of the MMOU rules.⁵¹

Multi-lateral Memorandum of Understanding (MMOU):

Introduction:

The objectives of IOSCO and of its MMOU encourage international cooperation "to promote high standards of security regulations to maintain just, efficient and sound markets", to ensure information exchange, to institute rigorous surveillance of international securities transactions and to provide a strict application and effective enforcement of rules by the member regulators.

These rules are laws and regulations which are promulgated for enforcement in the various jurisdictions to which regulator members belong, including regulations concerning:

First, insider trading, 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;⁵²

Second, the registration, issuance, offer, or sale of securities and derivatives, and reporting requirements related thereto;⁵³

Third, market intermediaries, including investment and trading advisers who are required to be licensed or

registered, collective investment schemes, brokers, dealers and transfer agents; and⁵⁴

Fourth, markets, exchanges and clearing and settlement entities.⁵⁵

Mutual Assistance and the Exchange of Information:

General Principles: The IOSCO signatory Securities Authorities (Authorities) have agreed to enforce compliance with the respective securities laws and regulations of their jurisdictions. The memorandum of understanding however, does not “create legally binding obligations or supersede domestic laws” (MMOU 6). The Authorities state to each other that no domestic secrecy laws prevent the sharing of information among signatories. The Authorities represent that they will not exclude any information from an authority who request securities transactions information unless domestic law will be violated or a criminal proceeding in the Requested Authority’s jurisdiction has already begun.

Requests for Assistance: A written request,⁵⁶ made to the Requested Authority’s contact office, will describe the underlying investigation facts, a description of the assistance sought, identification of any persons believed to possess such information and a statement that the laws and regulations of the jurisdiction may have been violated. The Requested Authority will seek sworn responses from any person required to execute the request. A Requesting Authority may in fact provide its own representative to ask specific questions of any witness.⁵⁷

Permissible Uses of Information: The Requesting Authority may solely use non-public information in order to ensure compliance with that jurisdiction’s laws and regulations. Public enforcement proceedings, whether civil, administrative or criminal, may emanate from this use of non-public documents.

If no such proceedings occur, however, the contents of the request may not be made public.⁵⁸

Continuing Consultation among Member Authorities:

Authorities will consult with each other at regular intervals and as conditions arise to examine any significant change in market or business conditions or any changes in the ability of an authority to comply with the provisions of the Memorandum of Understanding.⁵⁹

CONCLUSION: THE PROSPECTS FOR A WORLD FINANCIAL REGULATORY ORGANIZATION

As already mentioned in the introduction to this article, the World Trade Organization Agreement includes a compact on trade and financial services, but the Annex only urges free trade in the banking securities and insurance industries.

As we have seen, however, international bodies have begun to regulate the financial areas described above. Insurance company supervisors have also announced the investment and liquidity strategies of internationally active insurance companies.⁶⁰

A number of legal scholars have argued that the present financial regulations constitute “soft law” and not “hard law.” “Hard law” would be enforceable by dispute settlement authorities with enforcement powers, but “soft law” regulations would not. Others have contended that a global financial regulator would not be practical⁶¹ and that “soft law” enforced through the Financial Action Task Force, the Basel Accords and the IOSCO Multilateral Agreement would more than suffice through reputational constraints, market conditions and institutional sanctions.

The World Trade Organization Agreement, however, provides a framework for the institution of a World Financial Organization or some other regulatory body within the WTO itself. The WTO Dispute Settlement Understanding creates dispute settlement Panels and Appellate Bodies to settle controversies concerning trade in goods and services. The Agreement recognizes the complexity of a number of problems which arise concerning tariffs and rules of origin; import licensing procedures; safeguards against subsidies and dumping; technical barriers to trade; trade related aspects of intellectual property rights; measures in favor of least developed countries; vital national agricultural, textile and clothing products and the difficulties surrounding trade in services and the environment, including sanitary and phytosanitary rules. These problems, however, are subject to resolution before WTO bodies which issue recommendations rather than enforceable decisions. The WTO Panel and Appellate body decisions apply the rules enunciated by the WTO agreement in the light of the non-discrimination and transparency principles inherent in the Most Favored Nation and national treatment rules. These tribunals also apply the WTO agreement exceptions concerning developing nations, vital products and the escape clause principles concerning health, the environment, and national security. If enforcement is ever necessary, the agreement permits counter measures, such as countervailing duties and embargoes, against the parties who do not comply with the WTO decision.

The complex financial regulations just described could be enforced in a similar manner by financial dispute settlement bodies. The recommendatory decisions of these bodies would be enforced in the same manner as WTO Panel and Appellate Body decisions are presently enforced, with the retaliatory measures already present in the WTO scheme. The history of the growth of GATT, from its inception in 1947 to its

incorporation into the World Trade Organization Agreement in 1994, would argue that a similar growth process will occur in the area of financial regulation.

ENDNOTES

¹ August, Mayer, Bixby *International Business Law* (5th Edition) New Jersey: Pearson Prentice Hall contains cases concerning jurisdiction, international persons, state responsibility, dispute settlement, foreign investment, money and banking, services and labor, intellectual property, sales, transportation and financing of goods purchases and taxation presented to municipal (local courts) and internationally recognized tribunals.

² <http://www.cisg.law.pace.edu/cisg/text/treaty.html>

³ http://www.wto.org/english/docs_e/legal_e/26-gats_02_e.htm

⁴ The January 2011 article *How International Financial Law Works (and How It Doesn't)* by Chris Brummer, Professor of Law at Georgetown University Law Center, 99 *Georgetown Law Journal*, 257 reviews the financial regulation literature and has assisted me in formulating the argument contained in the present article. Professor Brummer would argue that "soft law" enforcement suffices, but it seems to me that the WTO Dispute Settlement Understanding (DSU) would answer many of the objections he presents to an international financial regulator.

⁵ The decisions made by WTO Panels and the WTO Appellate Body contain recommendations to treat a petitioner, for example in a non-discriminatory manner. These decisions do not have the command language present in local national court decisions. The WTO decisions however have been and are enforced in order to avoid retaliatory measures against offenders by member nations.

⁶ http://www.oecd.org/pages/0,3417,en_32250379_32235720_1_1_1_1_1,00.html

⁷ http://www.oecd.org/document/34/0,3746,en_32250379_32236963_45572898_1_1_1_1,00.html

⁸ http://www.oecd.org/document/28/0,3746,en_32250379_32236920_33658140_1_1_1_1,00.html; http://www.oecd.org/document/9/0,3746,en_32250379_32236920_34032073_1_1_1_1,00.html

⁹ <http://www.unodc.org/unodc/en/treaties/illicit-traffic.html>

¹⁰http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_eng.pdf

¹¹ The OECD/FATF has always been concerned not only with criminal prosecution but also with civil remedies which will call attention to the illicit money laundering efforts. This avenue of control receives detailed description in the Palermo Convention.

¹² The problem of anonymous and fictitious name accounts has been particularly difficult to surmount because of the long standing rules of certain jurisdictions, including Switzerland.

¹³ Due diligence is defined as it has been for years in common law and civil law countries; the exercise of that measure of prudence and care which a person would use in the conduct of their own affairs.

¹⁴ "Politically exposed persons" would include even relatives of officials beyond their immediate families.

¹⁵ The United States financial crimes task force lists a number of Shell Bank operations. http://www.fincen.gov/news_room/nr/html/20040816.html

¹⁶ The Sarbanes-Act requires a stricter standard of professional conduct both for attorney and especially for accountants with regard to suspicious circumstances.

¹⁷ These regulatory measures include remedies available under the WTO Agreement, in particular under its Dispute Settlement Understanding.

¹⁸ The International Monetary Fund (IMF) issued a report on the progress of FIUs in 2004. <http://www.imf.org/external/pubs/ft/FIU/index.htm>

¹⁹ http://www.fatf-gafi.org/document/16/0,3746,en_32250379_32236920_43690576_1_1_1_1_00.html

²⁰ The FATF observes that expressed trusts are often used to conceal money laundering operations. The Society of Trust and Estate Practitioners (STEP) regularly releases reports concerning these operations forbidden by the FATF rules.

<http://www.step.org/PDF/Trust%20Reporting%20Systems%20FINAL.pdf>

²¹ <http://www.un.org/law/cod/finterr.htm>

²² <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=141&CL=ENG>

²³ http://www.oas.org/xxxiiga/english/docs_en/docs_items/AGres1840_02.htm

²⁴ The literature indicates that the concern for money laundering activity is paramount.

²⁵ http://www.fatf-gafi.org/document/9/0,3746,en_32250379_32236920_34032073_1_1_1_1_00.html

²⁶ http://www.nti.org/e_research/official_docs/inventory/pdfs/finterr.pdf

²⁷ <http://www.fatf-gafi.org/dataoecd/0/0/37029619.pdf>

²⁸ <http://www.fatf-gafi.org/dataoecd/28/43/40285899.pdf>

²⁹ <http://www.bis.org/publ/bcbs30a.pdf>

³⁰ The Bank for International Settlements' most recent report describes the particulars of the review. <http://www.bis.org/bcbs/>

³¹ <http://www.bis.org/publ/bcbsca03.pdf>

³² Lombard Risk continues to publish a statistical guidelines for bank supervisors based upon the Basel principles.

http://www.lombardrisk.com/industries/regional_solutions.htm

³³ ACF consultants have indicated that the Basel accords will slash bank profitability. <http://www.resultspr.co.uk/press-releases/basel-iii-will-slash-banks%E2%80%99-profitability>

³⁴ The Social Science Research Network has published articles concerning the roles of supervisors urged by Basel.

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=901761

³⁵ The International Monetary Fund has produced assessments and results concerning the application of the Appendices.

<http://www.imf.org/external/np/mae/bcore/exp.htm>

³⁶ <http://www.bis.org/publ/bcbs128.pdf>

³⁷ http://www.basel-ii-accord.com/Basel_ii_The_constituents_of_capital_49.htm

³⁸ The Federal Reserve Bank of New York and Moody's published a document describing the IRB approach and its ramifications.

http://www.moodyskmv.com/conf04/pdf/presentations/hendricks_basel_II.pdf

³⁹ The credit-risks formula is clearly described at

<http://www.bionicturtle.com/how-to/article/three-pillars-of-basel-ii-and-credit-risk-operational/>

⁴⁰ <http://www.bis.org/bcbs/cp3part2.pdf>

⁴¹ The 4 Key Principles are detailed at <http://www.bionicturtle.com/how-to/question/basel-ii-second-pillars-supervisory-review-l2.t7.b2/>

⁴² The Market Discipline Principle is described and examined at <http://www.bionicturtle.com/how-to/question/third-pillar-of-basel-ii-market-discipline-l2.t7.b3/>

⁴³ <http://www.basel-ii-risk.com/basel-iii-guide-to-the-changes/>

⁴⁴ The Financial Express webpage critic the first and other reforms proposed by Basel III. http://www.thefinancialexpress-bd.com/more.php?news_id=132907&date=2011-04-19

⁴⁵ Deloitte recently published its observations concerning this reform. <http://www.deloitte.com/assets/Dcom->

UnitedStates/Local%20Assets/Documents/FSI/US_FSI_FinancialReformInsights_041911.pdf

⁴⁶ The Economist has also attempted to clarify this third and the other reforms.

http://www.economist.com/blogs/freeexchange/2010/09/financial_reform

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ The European Banking Confederation has expressed concern about the feasibility of the timetable and the negative effects which may result from failure to adhere to it. <http://www.gfsnews.com/article/103/1/>

⁵⁰ 84 non-voting Associate and Affiliate Members are self-regulatory agencies or other interested parties.

⁵¹ <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD126.pdf>

⁵² <http://www.treasury.gov.au/documents/178/PDF/atti.pdf>

⁵³ <http://www.cvent.com/events/2010-ifie-iosco-global-investor-education-conference/agenda-12ff63e32b1c4a3caa3221593e0425e.aspx>

⁵⁴ <http://www.world-exchanges.org/reports/regulation/iosco-principles-outsourcing-financial-services-market-intermediaries>

⁵⁵ http://books.google.com/books?id=66gCBR2c_jgC&pg=PA141&lpg=PA141&dq=iosco+clearing+entities&source=bl&ots=Ytyjv-xC6f&sig=NZLFzftpkNdhlyBMid7ssvgevvg&hl=en&ei=j9m5TbfoHYK5twe80uDeBA&sa=X&oi=book_result&ct=result&resnum=1&ved=0CBYQ6AEwAA#v=onepage&q&f=false

⁵⁶ http://www.sc.com.my/eng/html/iaffairs/ioscoreport/Publication_of_SAP.pdf

⁵⁷ Portfolio Media's Law 360 discusses the rights of Requesting Authorities' representatives.

<http://www.ropesgray.com/files/Publication/bacd6451-1c43-4223-b53b-3d625f511d8e/Presentation/PublicationAttachment/3c2487b3-4a52-4076-9286-3f574e7c565d/Regulatory%20Cooperation.pdf>

⁵⁸ The IOSCO treats such non-public information in a similar manner as most jurisdictions would; if a public authority has a right to demand the information, non-public documents will become public.

⁵⁹ http://www.osc.gov.on.ca/documents/en/Securities/mou_20021101-exchange-info.pdf

⁶⁰ http://www.iaisweb.org/_temp/7_April_2009_IAIS_supports_G20_Declaration.pdf

⁶¹ Brummer, op. cit. page 304-314 describes the "soft law" "hard law" dichotomy and the author's contention that a global financial regulator is impractical.

USING "THE INSIDER" TO TEACH LEGAL AN ETHICAL TOPICS IN A LEGAL ENVIRONMENT OF BUSINESS OF EMPLOYMENT LAW CLASS

by

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