3. Financial Trade Associations and Multilevel Regulation

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3.1 Introduction

Financial market activity is increasingly international. Commentators have identified internationalisation as a trend in the financial markets since at least the 1980s,¹ but in the 21st century even retail domestic financial markets such as markets for housing finance² and remittances³ have developed significant foreign and international aspects that raise issues for both domestic and international policy makers.⁴ However, although developments in the international financial markets affect increasing numbers of consumers of financial services, consumers are to a significant extent excluded from the processes which produce harmonised rules to regulate these markets.

The rate and volume of harmonization of financial regulation continue to increase thanks to multiple initiatives. Major international efforts include the work of the International Organisation of Securities Commissions (IOSCO),⁵ the Basle Committee on Banking Supervision (Basle Committee),⁶ and the International Association of Insurance Supervisors (IAIS)⁷ to develop harmonised principles of financial regulation and the European Union’s (EU) effort to achieve a single market in financial services.⁸

Over time, supranational standard-setters have begun to formalise their standard-setting processes, developing their practices for consulting on proposed standards, and even establishing

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⁴ In the first half of 2006 central bankers noted these developments. See supra notes ² and ³.


⁷ See, e.g., Pistor, loc. cit., note ⁵ at pp. 120-1.

consultation policies. However, the different organizations approach consultation and the reporting of the results of consultation differently, and there is, so far, no harmonised supranational administrative law. Consultation processes which exclude groups which are affected by harmonised rules because of a lack of transparency, or because the issues are framed in ways which make the views of affected groups seem irrelevant, lack legitimacy. Consumers and the organisations which represent their interests are more likely than financial firms to be excluded from effective participation in supranational standard-setting due to the combined effects of opaque processes, framing, and lack of resources.

Some harmonised rules are set out in binding legal instruments, others are only hortatory. Even the EU’s binding harmonisation measures sometimes leave to the Member States some discretion about how to implement the directives within their domestic legal systems. Non-binding standards developed by bodies such as IOSCO may be implemented differently by different states, or may not be implemented at all. However, even formally hortatory standards derive greater force, and become harder for domestic legislators and regulators to ignore, because international financial institutions (IFIs) such as the IMF encourage governments to adopt these standards.

Financial regulation involves complex issues of regulatory jurisdiction, in which jurisdiction is allocated horizontally between authorities in different territorial areas, and vertically between authorities at different hierarchical levels within states, and at the supranational (regional or global)

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13 Firms have suggested that the UK is too prone to “gold-plate” its rules: going further than is required by the directives. Cf. Financial Services Authority (hereafter “FSA”), Better Regulation Action Plan, London: FSA, December 2005, at p. 6 (“Our basic approach is to ‘copy out’ the text in our Handbook, adding interpretive guidance where that will be helpful. This avoids placing unintended additional obligations on firms. We will not gold-plate EU requirements. We will only add additional requirements when these are justified in their own right.”)

14 See, e.g., D. E. Alford, ‘Core Principles for Effective Banking Supervision: an Enforceable International Financial Standard?’, 28 Boston College International and Comparative Law Review, 2005, p. 237 at p. 286 (“because the agreements are not legally enforceable, nations can vary in their own interpretation and implementation of the standards.”)

15 See, e.g., idem at pp. 286-289.

16 In some states, such as the US, jurisdiction is also splintered among different functional regulators. See, e.g., H. M. Schooner and M. Taylor, ‘United Kingdom and United States Responses To the Regulatory Challenges of Modern Financial Markets’, 38 Texas International Law Journal, 2003, at p. 317.
levels. Within a domestic legal system the source for a rule of financial regulation may be sub-national, national, or supranational. Rules for the allocation of regulatory jurisdiction are established in statutes and treaties, but there can be uncertainty about the proper interpretation of the rules.

Standards which are formally harmonised at the supranational level usually need to be implemented within domestic regulatory systems. Implementation is sometimes multilayered and indirect. For example, the Basle Committee has developed capital adequacy standards for banks involved in international banking. Within the EU, capital adequacy requirements are an aspect of harmonised regulation of credit institutions, and the EU’s capital adequacy rules are being amended to reflect the new Basle standards. Competent authorities within the Member States are responsible for adjusting domestic capital adequacy requirements to reflect the new Basle standards as reflected in EU implementing measures.

Where domestic legislators and regulators have discretion about how they carry out implementation, there are usually multiple points for influencing the regulatory process. Many different actors have a stake in the outcomes of these multi-level or multi-stage regulatory processes, from financial firms and their advisors to corporate and individual consumers of financial services. But some stakeholders are in a better position to influence regulatory outcomes because of superior financial and other resources.

Financial trade associations (“FTAs”) and their members now take advantage of opportunities to influence regulatory policy within multi-level systems. In particular, FTAs use two rhetorical strategies that tend to promote the interests of their members and which work against the interests of consumers. The first of these strategies is “market protection rhetoric.” In relation to rule-making at the domestic or supranational level, FTAs often invoke arguments that particular proposals will interfere with the proper functioning of the financial markets. Market protection rhetoric is based in claims of expertise and usually implies that those invoking it are in a unique position to understand the market. Market protection rhetoric includes arguments for self-regulation based on expertise.

17 The complex web of regulation includes a significant component of privately generated standards and codes and contracts which may have quasi-regulatory effects. See, e.g., Bradley, loc. cit. note 10 at pp. 158-179.

18 Cf. S. Issacharoff and C. M. Sharkey, ‘Backdoor Federalization’, 53 UCLA L. Rev., 2006, p. 1353 at p. 1366 (“preemption battles have been largely confined to the realm of statutory interpretation.”)


22 The decision-makers in the supranational bodies also have a stake in the regulatory process, as do legislators and regulators. Cf. Braithwaite & Drahos, op.cit. note 6 at 23 (“Each regulatory domain has a distinct range of actors contending for victory at different sites.”)
The FTAs’ other routine strategy relies on “harmonisation rhetoric,” which is invoked in the context of domestic regulatory action. Harmonisation rhetoric involves an argument that the rules in one domestic jurisdiction should not be stricter than those in another. The argument appears in the context of implementation of supranational standards or rules (for example, arguments against gold-plating when implementing EU directives) and also arises to oppose rules proposed by domestic regulators that lack a supranational source. Harmonisation rhetoric can be seen as a subset of market protection rhetoric because those who invoke it would argue that more onerous rules in one jurisdiction limit the ability of firms established there to compete with firms established elsewhere. Harmonisation rhetoric may also include arguments for self-regulation, on the basis that self-regulatory standards and codes may be able to operate more effectively across territorial boundaries than state-based regulation.

FTAs use market protection and harmonisation rhetoric to frame debates around proposed rules and standards. This rhetoric, as much as lack of resources, helps to distance consumers from the regulatory process at all levels because consumers are not generally in a position to claim the same levels of expertise as the FTAs claim. Consumers are protected by law because they are likely to be vulnerable when dealing with businesses. Indeed, consumers are often defined by reference to their lack of

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23 Harmonisation rhetoric is only necessary in the context of the development of supranational rules and standards in order to limit the discretion of the implementing authorities.

24 See, e.g., S. Schaefer and E. Young, Burdened by Brussels or the UK? Improving the Implementation of EU Directives, London: Foreign Policy Centre, August 2006, at pp 10-11 (“Rules agreed at the EU level are vital for the proper functioning of the single market. But they can also hamper competitiveness and productivity if they add a differently sized burden in individual member states because they have been implemented in different ways. Gold-plating, as defined by an ongoing audit by HM Treasury, is part of a larger category of over-implementation which also includes double-banking or regulatory creep.”)

25 Cf. N. S. Poser, ‘The Stock Exchanges of the United States and Europe: Automation, Globalization and Consolidation’, 22 University of Pennsylvania Journal of International Economic Law, 2001, p. 497 at p. 538 (“These are not rules promulgated by a government agency, but by contractual arrangements among the participants. This suggests that self-regulation has the ability to finesse the problems of national sovereignty and differing legal systems that stand in the way of developing and enforcing common governmental regulatory standards.”)

26 In some contexts policy makers do seek the input of consumer representatives. See, e.g., HM Treasury, Government Response to the Treasury Committee’s Seventh Report for Session 2005-06 (HC 778) European Financial Services Regulation, London: HM Treasury, July 24, 2006 (“In the UK, the FSA Consumer Panel provides an excellent and necessary input to policy formation in the UK, particularly in respect of EU proposals where it is difficult to secure evidence based user input.”)

27 The UK’s Financial Services and Markets Act 2000 (FSMA) defines consumers as persons: “(a) who use, have used, or are or may be contemplating using, any of the services provided by (i) authorised persons in carrying on regulated activities; or (ii) persons acting as appointed representatives; (b) who have rights or interests which are derived from, or are otherwise attributable to, the use of any such services by other persons; or (c) who have rights or interests which may be adversely affected by the use of any such services by persons acting on their behalf or in a fiduciary capacity in relation to them.” Financial Services and Markets Act 2000, s. 138(7), 2000 Ch. 8.
expertise.\textsuperscript{28}

Individual consumers tend to care more about some rules than others.\textsuperscript{29} Consumers have only indirect interests in some areas of financial regulation, and thus only a remote claim to be consulted on the substance of rules and required procedures in those areas. For example, consumers are affected by failures of the systems used by financial firms,\textsuperscript{30} but most consumers do not have the expertise needed to determine the best rules for ensuring that financial firms’ systems are protected from threats from terrorism or pandemic disease.\textsuperscript{31} On the other hand, consumers do have expertise about how they perceive disclosures about the readiness of financial firms to face such threats. Thus, many areas of financial regulation involve amalgams of issues which are technical and of little interest to consumers, and issues which are directly relevant to consumers.\textsuperscript{32} And whether supranational standard-setters emphasise the technical aspects or the consumer aspects may have a significant impact on consumers’ interests. Thus, if market protection rhetoric successfully induces the standard-setters to view their standards as technical standards, consumer interests are less likely to be taken into account and the interests of consumers may be prejudiced. Domestic regulators who adopted this perspective might have it altered by a subsequent change of government, but it would be very difficult for consumer/voters to produce the necessary changes in IOSCO or the Basle Committee or the EU Commission or CESR.

3.2 Regulating Local, National and International Financial Markets

Financial regulators based in different jurisdictions increasingly work together to regulate transnational financial activity, through Memoranda of Understanding (MOUs), through transnational

\textsuperscript{28} Cf. FSA, \textit{Better Informed Consumers}, Consumer Research 1, London: FSA, April 2000, at p. 3 (distinguishing between the most receptive and least receptive financial decision makers).

\textsuperscript{29} Cf. FSA, \textit{What Consumers Know about Financial Regulation}, Consumer Research 29, London: FSA, June 2004, at p. 5 (“Some issues, products or organisations may be fundamentally more appealing than others and financial regulation is perhaps not the most interesting of subjects for many in the general population. Awareness of the FSA and financial regulation may be more meaningful for many when it is contextual, for example at a time when they are buying a product or have some financial query.”)


\textsuperscript{32} Some issues are of high salience for consumers. See, e.g., Federal Reserve, Notice of Study and Request for Information, 69 Fed. Reg. 29308, May 21, 2004, and the comments submitted in response to this request for information about debit card fees, which are available at \url{http://www.federalreserve.gov/generalinfo/foia/index.cfm?doc_id=OP%2D1196&doc_ver=1&ShowAll=Yes}
standard-setting organisations, and in the context of supervision and enforcement.\textsuperscript{33} Securities regulators collaborate to enforce laws against fraudsters who seek to operate across national borders.\textsuperscript{34} Banking regulators work together to supervise transnational banking organisations and ensure consolidated supervision.\textsuperscript{35}

For regulators, therefore, financial regulation operates at multiple different levels. Financial regulators operate together at the supranational level when they agree on terms of co-operation with regulators from specific other jurisdictions,\textsuperscript{36} or when they meet generally with regulators from other jurisdictions in bodies such as IOSCO, the Basle Committee and CESR\textsuperscript{37} to agree standards for financial regulation. But they also work at the national (and sometimes sub-national) level, sometimes in collaboration with regulators from other jurisdictions and sometimes not.

The development of multi-level regulatory processes provides opportunities for domestic regulators, but also makes their roles more complex. Domestic financial regulators are answerable to the domestic authorities who appoint them, rather than to regulators in other jurisdictions or to supranational bureaucrats, and they may tend to see (or at least characterise) their role as primarily a domestic role with some inevitable supranational and transnational elements.\textsuperscript{38} On the other hand, financial regulators may use supranational agreements as an excuse to implement policies at home that they regard as desirable but which are politically unpopular or to serve their own interests in other ways.\textsuperscript{39}

In 2005, the UK’s Financial Services Authority (FSA) began to publish a document entitled International Regulatory Outlook (IRO).\textsuperscript{40} Initially, the FSA described the purpose of the publication as being to “help stakeholders plan for forthcoming regulatory change.”\textsuperscript{41} However, the FSA’s IRO

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\textsuperscript{35} See, e.g., Alford, loc. cit. note \textsuperscript{14} at pp. 250-259.


\textsuperscript{37} See, e.g., A. Slaughter, A New World Order, Princeton, N.J.: Princeton University Press, 2004 at p. 36 (describing regulators as “the new diplomats.”)


publications themselves suggest that they are not only designed to help UK firms adjust to regulatory change but also to help financial firms to influence supranational developments. In the November 2005 issue of the IRO, John Tiner, the FSA’s Chief Executive, wrote: “if stakeholders wish to influence the development of international policy initiatives, it is important that they do so as early in the process as possible and are alert to consultation documents as they are published.” He added, “to maximise the scope for effective policy-making, stakeholders should support calls for international bodies to develop a better regulation agenda focused on transparent, evidence-based policy-making that incorporates adequate time for consultation and market failure analyses and cost-benefit analyses.” The FSA seems to suggest that its role in the context of transnational rule-making is partly to promote the interests of the UK market and of firms doing business in the UK market.

The FSA is in an unusual position with respect to supranational rule-making because it regulates a financial market which has for a long time been more international than most other domestic financial markets. In the late 1960s and the 1970s the UK’s relaxed approach to financial regulation facilitated the development of the eurobond market. As the UK has developed its system of financial regulation since the 1980s regulators and market participants alike have recognised the importance of not imposing rules on the UK markets which would drive business away. London is one of the leading global financial centres.

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42 FSA, IRO Nov. 2005, supra note 40 at p. 5.

43 The FSA’s approach reflects that of the Treasury. See, e.g., HM Treasury, Departmental Report, Cm. 6830, London: HM Treasury, May 2006 at p. 37 (“The Treasury will continue to ensure that the methodology for measuring administrative burdens is integrated into the regulatory simplification programme; prioritise a risk-based approach to implementation and enforcement of EU legislation; and strengthen stakeholder consultation, including business input to the process of regulatory design.”) It is worth noting that many of the financial firms doing business in the UK are multi-national rather than UK firms.


46 See, e.g., Corporation of London, supra note 44 at p. 7 (discussing regulation as a factor in the competitiveness of London as a financial centre); Callum McCarthy, Chairman, FSA, Speech at the Muslim Council of Britain Islamic Finance and Trade Conference, June 13, 2006, available at http://www.fsa.gov.uk/pages/Library/Communication/Speeches/2006/0613_cm.shtml (discussing the importance of ensuring that London provides an accommodating environment for Islamic finance: “It is reasonable to regard London as a centre for a full range of Sharia compliant wholesale products – an important objective if London is to retain its international character.”)
financial centres and policy makers in the UK would like it to retain that status. London does, however, face competition from other financial centres within the EU and outside the EU.

Whereas policy makers in the UK have focused on nurturing the UK financial markets and protecting them from foreign competition for some time, until recently the US financial markets often seemed to operate as if market participants and regulators did not need to worry too much about the rest of the world except, perhaps, to persuade the rest of the world to adopt American standards. The SEC’s Office of International Affairs (OIA) states that it “promotes investor protection and cross-border securities transactions by advancing international regulatory and enforcement cooperation, promoting the adoption of high regulatory standards worldwide, and formulating technical assistance programs to strengthen the regulatory infrastructure in global securities markets.” The OIA characterises its role in part as being to ensure that financial market participants cannot engage in regulatory arbitrage: “OIA works with a global network of securities regulators and law enforcement authorities to facilitate cross-border regulatory compliance and ensure that international borders are not used to escape detection and prosecution of fraudulent securities activities.”

Domestic political conditions may disrupt the ability of financial regulators to work with or compete with regulators in other jurisdictions. In 2002, after the collapse of Enron, the US Congress enacted the Sarbanes-Oxley Act, which imposed a range of new requirements on public companies in the US. The public companies affected by these new rules included foreign issuers which had decided to enter the US market, some of which were faced with conflicts between the new requirements of US law and their own domestic laws. The SEC has mitigated some of the rigours of Sarbanes-Oxley through

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47 See, e.g., S. Sassen, ‘Global Financial Centers’, 78 Foreign Affairs, 1999, p 75. See also idem at p. 83 (“London is the preeminent city for global finance today, in good part due to the numerous financial firms that have located key operations and resources in the City, London’s financial district.”)


50 See, e.g., Braithwaite & Drahos, op. cit. note 6 at 157 (“Since the New Deal the US, through the agency of the SEC, has usually been the state that has dictated terms.”) More recently academic commentators and policy makers have expressed concerns that the US financial markets are not sufficiently competitive with other markets. See, e.g., Committee on Capital Markets Regulation, Interim Report of the Committee on Capital Markets Regulation, November 30, 2006, available at http://www.capmktsreg.org/pdfs/11.30Committee_Interim_ReportREV2.pdf.

51 SEC, Office of International Affairs, at http://www.sec.gov/about/offices/oia.htm (modified March 2, 2007).

52 Ibid.

implementing regulations which allow foreign issuers to comply with their own domestic rules of corporate law,\(^{54}\) and which allow foreign banks which have issued securities in the US to make loans to their directors under the same conditions as US banks may make loans to their directors.\(^{55}\) An SEC proposal to adjust the rules regulating circumstances in which foreign issuers can avoid the need to comply with many of the SEC’s disclosure rules\(^{56}\) was originally criticised by some commentators as unduly restrictive\(^{57}\) and complex.\(^{58}\) The SEC published a revised proposal in response to these criticisms,\(^{59}\) and new rules were finally adopted in 2007.\(^{60}\) Foreign issuers are keen for the SEC to allow issuers to publish financial disclosures in the US which comply with International Financial Reporting Standards without the need for reconciliation to US GAAP.\(^{61}\) The SEC and the EU’s CESR have agreed to work together in the future to minimise frictions between their different regulatory schemes for the financial markets.\(^{62}\)

Financial regulators in countries with smaller financial markets also focus on competition with


\(^{56}\) SEC, Proposed Rule on Termination of a Foreign Private Issuer's Registration of a Class of Securities under Section 12(g), 70 Fed Reg 77688 (Dec. 30, 2005).


\(^{60}\) SEC, Reproposed Rule on Termination of a Foreign Private Issuer's Registration of a Class of Securities Under Section 12(G) and Duty to File Reports Under Section 13(A) or 15(D) of the Securities Exchange Act of 1934, 72 Fed. Reg. 16934, April 5, 2007.

\(^{61}\) See, e.g., Comments of the 100 Group of Finance Directors and of the GC 100 Group, supra note 57 (“We believe that, in order to maintain the attractiveness of the U.S. markets, the Commission and its staff should be working more quickly to ease the burden of duplicative regulation on foreign private issuers that remain – or wish to become – Exchange Act reporting companies. We are confident that the Commission can do much in this regard without compromising its basic mission of protecting U.S. investors. The single most important issue of this type is mutual recognition of IFRS and U.S. GAAP.”)

\(^{62}\) See, e.g., supra note 36.
markets based in other jurisdictions. However, some options for competition are constrained by initiatives such as the IMF’s Assessment Program for Offshore Financial Centers.\(^6^3\)

Within federal states statutes may allocate financial regulatory responsibilities to different levels. For example, the US has a dual system of banking regulation under which banks may elect to be chartered by state banking regulators or by the Office of the Comptroller of the Currency, which is a federal agency.\(^6^4\) State and municipal officials may decide that they need to take action to protect the people they represent, and their claims to be able to exercise rule-making or enforcement jurisdiction may conflict with claims of national regulators. In the US three visible recent examples of conflicts between state and federal authorities are Eliot Spitzer’s enforcement of state rules against financial firms and the resulting criticisms,\(^6^5\) the Sarbanes-Oxley Act which has been criticised for many reasons, including claims that it is problematic because it federalises corporate law,\(^6^6\) and the debate about predatory lending and how it should be regulated.\(^6^7\)

Increasing internationalisation of financial activity combined with incomplete regulatory
harmonisation means that financial firms run into conflicts between domestic rules in different jurisdictions. Firms also encounter conflicts between domestic rules and international market practices, whether established or developing. Sometimes financial firms see differences between rules in different jurisdictions as creating opportunities for regulatory arbitrage. At other times financial firms argue for harmonisation. However, within supranational regulatory processes there is an inevitable tension between local and supra-local interests, just as there is within federal states such as the US. In their interventions in supranational and domestic regulatory processes financial trade associations often argue against local rule-making authority, in the same way that FTAs argue against state (rather than federal) control within the US. National regulators, like state regulators in the US, may argue that they need to retain an ability to protect local consumers of financial services, and even that they protect consumers more effectively.

The sharing of regulatory power among and within nations and their financial regulators creates a complex web of power and numerous possibilities for well-resourced and knowledgeable firms and their advisers to influence outcomes. Yet another source of complexity in financial regulation at all levels is the relationship between formal regulation and standards adopted by governmental and intergovernmental or supranational authorities and informal regulation and standards adopted by non-governmental organisations.

There is an ongoing debate among financial regulators and market participants about the extent to which rules of financial regulation should be imposed on the markets by governmental authorities or should be generated by market participants themselves. The debate has been fueled by scandals in the financial markets, and by changes in the legal structures through which some self-regulatory organisations operate. Domestic and supra-national standard setters have raised questions about the

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68 See, e.g., A. Licht, ‘Regulatory Arbitrage for Real: International Securities Regulation in a World of Interacting Securities Markets’, 38 Virginia Journal of International Law, 1998, p. 563, at p. 567 (suggesting that sometimes firms may engage in regulatory arbitrage not by moving, but “by opting into another regulatory jurisdiction they pit one regulatory regime against the other.”)

69 See, e.g., John P Burke, Commissioner of Banking, State of Connecticut, Comments to the National Conference of State Legislatures Annual Meeting, Salt Lake City, Utah, July 22, 2004, available at http://www.csbs.org/Content/NavigationMenu/PublicRelations/PresentationsSpeeches/JackBurke_NCSL_Address_072204.pdf (“Our primary role as defined by our mission statement is to protect the citizens of our state, the users of those financial services, from unlawful and improper practices by our regulated entities. We are often the last refuge of the maligned consumer trying to cope with an industry that focuses on volume and profit, while establishing call centers that put you through a five page menu before they even let you talk to a real person. If in fact, there is one at the end of the line.”)


extent to which formal regulation should incorporate or defer to standards set by private bodies, and under what conditions.

Securities exchanges are often privileged within domestic regulatory systems, and the threat of loss of some of this privilege has led exchanges to think carefully about their governance arrangements. In response to some of the focused attention of regulators, some exchanges have emphasised the involvement of non-industry members. In the US, exchange rule-making proposals are subject to review by the SEC and they are published in the Federal Register and on the SEC’s website. In the UK, the Banking Code and the Business Banking Code are developed under the auspices of the British Bankers’ Association, reviewed by an independent reviewer, and monitored by the Banking Code Standards Board.

However, many other private standard-setters which develop standards, codes and contracts do not engage in consultation with non-member constituencies and operate in realms of limited transparency. The work of some of these private standard-setters may have an impact on the position of consumers. For example, credit rating agencies establish criteria for securitizations which may ultimately affect the terms on which consumers can borrow money.

The next section of the paper discusses evolving arrangements for consultation of stakeholders in multi-level financial regulation.

3.3 Consultation in Multi-level Regulation

The regulatory state was designed to ensure that regulations were promulgated by specialised agencies and based on expertise. More recently, stakeholder models of governance assume that ensuring...
the participation of different stakeholder groups ensures the legitimacy of the process and implicitly the
legitimacy of the result. In Jamaica, good governance now means pushing “the public service away
from the tradition of top-down solutions and more toward creating a community of participation and a
new culture of governance that embraces differentiated polity.” Codes of Consultation often mandate
wide consultation and may encourage policy makers to seek out interested parties and people who may be
affected by a proposed policy. For example, the UK’s Cabinet Office Code of Practice on Consultation
notes that: “small businesses, children, consumers and those from minority communities, may be
particularly difficult to reach.” Techniques for consulting interested parties may include focus groups,
public meetings and web forums.

Supranational standard-setters are evolving their own governance principles and codes of
consultation. The EU with its complex institutional structures has a closer resemblance to a federal
government than other supranational standard-setters, and has focused greater attention on issues of
governance and consultation. Consultation is a significant element of policy-making in the EU:
“wide consultation of stakeholders and in-depth impact assessments prior to legislative
proposals... help to ensure that proper account is taken of the concerns of citizens and of
all interested parties. They make essential contributions to implementing the
Commission’s ‘better lawmaking’ policy.”

However, commentators have often suggested that businesses have had greater influence than other
groups on the development of policy in the EU. In 2006 the Commission began to seek views about the

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79 But see, e.g., E. Rubin, The Myth of Accountability and the Anti-Administrative Impulse, 103 Michigan

80 Cabinet Office (Jamaica), Consultation Code of Practice for The Public Sector, Kingston: Cabinet
Office, January 2005, at p. i.

81 See, e.g., Cabinet Office (UK), Better Regulation Executive, Code of Practice on Consultation, London:

82 Ibid. The following sentence reads: “It is important to engage proactively with individuals, organisations
and trade associations.” Ibid.

83 Ibid.


85 See, e.g., EU Commission, Communication from the Commission, Towards a reinforced culture of
consultation and dialogue - General principles and minimum standards for consultation of interested parties by the

86 EU Commission, Green Paper, supra note 12 at p. 2.
idea of regulating lobbying in the EU, and on the Commission’s consultation standards.

Other supranational standard setters publish proposed rules and standards and also publish comments on those standards. IOSCO has developed a Code of Consultation, which resembles those published by national governmental authorities.

Multi-level financial regulation involves very high levels of participation by groups which represent the interests of financial firms, but much lower levels of participation by groups which represent the interests of consumers of financial services. FTAs co-ordinate their actions with other FTAs and develop cross border strategic linkages.

The unbalanced levels of participation of business and non-business groups in consultations about financial standard-setting contrasts with some other policy areas where non-business stakeholder groups are very active. It is clear that FTAs dedicate significant resources to influencing the outcomes of regulatory processes, but non-business groups can promote agendas different from those that the FTAs promote, using the same technologies. For example, environmental organisations have been extremely successful in raising general awareness of environmental policy issues. The consumer equivalents of charismatic megafauna might be vulnerable consumers: older consumers or members of minorities.

One solution to a perceived imbalance in the participation of different groups is to make a particular effort to encourage the participation of otherwise non-participating groups. Policy-makers

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87 Idem at p. 3. For this purpose “lobbying” means: “all activities carried out with the objective of influencing the policy formulation and decision-making processes of the European institutions” and not just activities by people who self-identify as lobbyists. Idem at p. 5.

88 Idem at p. 4.

89 See, e.g., Bradley, loc. cit. note 10, at pp. 140-146.

90 See supra note 9.

91 See, e.g., Green Paper, supra note 12 at 6 (“according to many NGOs, there is no level playing field in lobbying because the corporate sector is able to invest more financial resources in lobbying.”)


93 See, e.g., J. Lobel and G. Loewenstein, ‘Emote Control: the Substitution of Symbol for Substance in Foreign Policy and International Law’, 80 Chicago-Kent Law Review, 2005, p. 1045, at p. 1073 (“As many commentators have noted, people tend to respond powerfully to the plight of large, cute animals - ‘charismatic megafauna’ - that are easy to visualize and to anthropomorphize.”)

94 However, strategies which emphasise consumer vulnerability and may thus be potentially effective in political terms also tend to undermine arguments that regulators should listen to what those vulnerable consumers say about proposed regulations.

95 The EU Commission established a forum to reflect the views of consumers and small businesses in 2004. See, e.g., FIN-USE Expert Forum of Financial Services, FIN-USE Annual Report 2004/5, April 26, 2005 (“FIN-USE was set-up by the European Commission in 2004 as an independent expert forum to help meet the
can take extra steps to ensure that consumer groups have real opportunities to make their voices heard in the context of financial regulation. Regulators sometimes express surprise that consumers are not more vocal.\textsuperscript{96} Governments do sometimes seek to involve voluntary groups more actively in developing policy but commentators sometimes caution that voluntary groups are not likely to be neutral.\textsuperscript{97} In the domestic context, statutes may require financial regulators to make special efforts to consult stakeholders who would not otherwise actively comment on regulatory proposals. For example, the UK’s FSA is required by statute to establish a Consumer Panel.\textsuperscript{98} Where regulators who are required to pay particular attention to consumer voices participate in supranational standard-setting they may provide an indirect channel for those voices.

Consumers individually are distracted by a range of issues that seek their attention. Similarly, the groups which represent the interest of consumers tend to have a broader and more complex remit than FTAs.\textsuperscript{99} Some groups focus on a broad range of consumer issues, including financial services. Other groups represent the interests of retired persons, including their financial interests.\textsuperscript{100} Other groups concentrate on informing investors rather than on advocacy and lobbying.\textsuperscript{101} Consumer groups which do focus on financial services tend to focus on consumers’ relationships with lending institutions rather than


\textsuperscript{97} See, e.g., Taylor and Burt, \textit{loc. cit.} note \textsuperscript{92}, at p. 604 (“It is our contention, which we develop later in this article, that the underlying assumption of government is that VSOs, while delivering such services, can operate in politically neutral ways. However, our research shows that VSOs are developing their information and knowledge management through the adoption and use of ICTs in ways that will strengthen their political and democratic ‘voice’ within the polity... a position that secures them not as neutral political actors but as ones intent on shaping political discourse to the advantage of their cause and the interests that they represent.”). Cf. The Compact, \textit{supra note} \textsuperscript{9} at 3 (voluntary and community organisations “should be willing to offer their advice to Government based on objective experience and appropriate consultation with those they work with. This helps to establish and maintain the credibility of voluntary and community organisations as a valuable source of informed opinion.”)

\textsuperscript{98} FSMA, supra note \textsuperscript{27}, s. 10. See also the Financial Services Consumer Panel’s website at \url{http://www.fs-cp.org.uk/}.

\textsuperscript{99} David Miliband MP, \textit{Speech at the Annual Conference of the National Council for Voluntary Organisations}, February 21, 2006, available at \url{http://www.davidmiliband.info/sarchive/speech06_06.htm} (“The whole point about voluntary organisations is that they defy neat categorisations. They cross conventional boundaries between social care, education and health; between consumer and producer; and between service delivery and citizen advocacy.”)

\textsuperscript{100} An example is the AARP. See \url{http://www.aarp.org/}.

\textsuperscript{101} An example is the American Association of Individual Investors. See \url{http://www.aaii.com/index.cfm}.
with securities and investment firms. Many of these groups focus on local communities, and their advocacy activities at the national level grow out of local community work.

The following section of the paper examines some uses by financial trade associations of market protection and harmonisation rhetoric.

3.4 Rhetoric and Financial Regulation in Multi-level Systems

Focusing on the processes of standard setting ensures that consumer groups can have a seat at the table, or at least can enter the rooms where policy decisions are made. But even if they are present for policy discussions, consumers and their representatives may be disadvantaged by framing of the issues by other groups in advance. In part, this is a process issue: if consumers were consulted at an early enough stage in the process they could participate in deciding how issues should be framed. But in part it is an issue which goes deeper than process, and implicates structural issues at the heart of legal harmonisation.

Legal standards which are developed at the supranational level are often drafted in very abstract and general terms. IOSCO’s general principles of securities regulation are expressed in very general language. The EU consciously decided to move towards a system combining more general high level

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102 Cf. FIN-USE Expert Forum of Financial Services, The Implications For Users of Solvency II, An Assessment by FIN-USE, January 15, 2007, at p. 2 (“FIN-USE’s final general observation is that it does not know of any consumer body in Europe which has followed the ongoing debate about Solvency II and contributed in a meaningful way to the debate. The whole subject of prudential supervision is, of course, highly technical and calls for resources which go far beyond those available to consumer bodies. Therefore, FIN-USE has to recognise that it is venturing into uncharted waters.”)

103 One such group is the Center for Responsible Lending which “began as a coalition of groups in North Carolina that shared a concern about the rise of predatory lending.” M. D. Calhoun, Center for Responsible Lending, Testimony Before the U.S. House Committee on Financial Services Subcommittee on Financial Institutions and Consumer Credit, The Role of the Secondary Market in Subprime Mortgage Lending, May 8, 2007, available at http://www.responsiblelending.org/pdfs/Sec_Market_Testimony-Calhoun-FINAL-2_.pdf.


105 Cf. idem at p. S80 (“The focus was on the negotiation of solutions rather than the discussion of ethical problems. It is almost as if only moral problems that already had a solution which was readily translatable into action—that is, into the language of policy work—were successfully articulated. Furthermore, the framing of problems reflected the institutions involved in the process.”)

106 Cf. J. R. Wedel, et al., ‘Toward an Anthropology of Public Policy’, 600 Annals of The American Academy of Political and Social Science, 2005, p. 30, at p. 37 (“the field of policy studies has often evaded serious critique because it has not adequately explored how policy narratives mobilize the language of science, reason, and ‘common sense.’ Policy can be presented as apolitical because it appeals to seemingly neutral scientific reasoning or incontestable assertions about human nature. In this way, policy makers can mute opposition not through crafty Machiavellian maneuvers but by simply casting counter-arguments as ‘irrational’ or ‘impractical.’ Thus, a key task for the anthropology of policy is to expose the political effects of allegedly neutral statements about reality.”)
rules and more detailed second level implementing rules so that financial regulation could adapt more easily to changing circumstances.\textsuperscript{107}

On the other hand, the problems consumers face are not abstract at all, but highly contextual, and are likely to be affected by characteristics of the consumers and of the places where they live.\textsuperscript{108} The FTAs use rhetoric consistent with the abstract and general focus of supranational standard setting rather than with the specific focus of most consumers. This section of the paper illustrates how far removed the FTAs’ rhetoric is from the local contextualised environment in which consumers operate.

3.4.1 Market Protection Rhetoric

Market protection rhetoric takes many forms. Comments by FTAs on regulatory proposals often contain statements about the FTAs and their activities which are designed to emphasise that the comments are based on knowledge and expertise.\textsuperscript{109} ISDA emphasises that no other organisation has the level of expertise it possesses in relation to derivatives because of its role in developing standard form documentation for derivatives transactions:

“ISDA is the global trade association representing leading participants in the privately negotiated derivatives industry. ISDA was chartered in 1985, and today has more than 700 member institutions from 50 countries, including Russia. These members include most of the world’s major financial institutions that deal in privately negotiated derivatives, as well as many corporations, governmental entities and other end-users that use over-the-counter derivatives to manage efficiently the financial market risks inherent in our business activities. As you know, ISDA documentation is the standard for OTC derivatives transactions globally.”\textsuperscript{110}

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\textsuperscript{108} See, e.g., R. Austin, ‘Of Predatory Lending and the Democratization of Credit: Preserving the Social Safety Net of Informality in Small-Loan Transactions’, \textit{53 American University Law Review}, 2004, p. 1217, at p. 1221 (2004) (arguing for a contextual analysis of predatory lending: “More contextual data about the sources of the borrowers’ economic vulnerability, as well as the financial practices, preferences, and perceptions both they and the lenders bring to financial transactions, would be very useful in formulating legal reforms or supporting alternative sources of credit that might enable borrowers to accomplish their economic goals.”)
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\textsuperscript{109} When the FTAs file amicus briefs the briefs also describe the FTAs’ expertise. See, e.g., Amicus Brief for Securities Industry and Financial Markets Association and the Chamber of Commerce of the USA in \textit{Tellabs v Makor}, December 2006, available at \url{http://www.sifma.org/regulatory/briefs/Tellabs_20Amicus.pdf}, at pp. 1-2.
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\textsuperscript{110} ISDA, \textit{Comments on Proposed Amendment to Article 1062 of the Second Part of the Civil Code of the Russian Federation}, June 8, 2006, available at \url{http://www.isda.org/speeches/pdf/RUS-Comments-Art1062-08June06.pdf}. The language of this comment is highly deferential: “As in our previous discussions, we defer completely to national legal and regulatory policy experts in Russia as to the appropriateness of the proposed amendment and its relation to other substantive areas of Russian financial and commodity law and regulation. We offer these comments exclusively from an international financial market perspective as respectful suggestions for your consideration.” \textit{Idem}.
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FTAs strengthen their credibility as advocates by developing standard form documentation and codes of conduct and by organising conferences for their members.

FTAs commonly argue that proposed rules or court decisions would undermine legal certainty, and that this would damage the financial markets. These arguments have been accepted in some jurisdictions as meriting serious attention. In the UK, financial market participants’ concerns about legal certainty persuaded the Bank of England to appoint a Legal Risk Review Committee and subsequently a Financial Law Panel to address issues of legal risk. The Bank of England replaced the Financial Law Panel with a Financial Markets Law Committee in 2002. In Japan and New York, financial lawyers have established groups which focus on issues of financial law and which are supported by the Bank of Japan and the New York Federal Reserve Bank respectively.

Derivatives seem far removed from the lives of most consumers, but FTAs invoke market protection rhetoric in other areas that are clearly much closer to the interests of consumers. For example, FTAs in the US have invoked market protection rhetoric to argue that state predatory lending regulation threatens consumers’ access to credit because it risks foreclosing opportunities for securitisation of loans. Consumer groups argue that many of the state laws that regulate predatory lending do not in fact


112 See, e.g., Legal Risk Review Committee, Final Report of the Legal Risk Review Committee, October 1992 (copy on file with author). The Committee noted that "markets cannot function efficiently without a strong legal foundation. Promoting legal certainty, even though it is not the only relevant concern, is therefore of fundamental medium- to long-term importance." Idem at ¶ 1.2.


114 The Financial Markets Law Committee’s web site is at http://www.fmlc.org/


seem to limit borrowers’ access to credit. The debates about predatory lending in the US are politically highly charged, in part because race is a factor.

Predatory lending and its regulation involve complex issues. When financial institutions lend money to sub-prime borrowers they charge higher interest rates than they would charge to borrowers with lower credit risk profiles. However, in some cases consumers are misled into borrowing as if they were sub-prime borrowers when they are not, and sub-prime borrowers are induced to enter into agreements with onerous terms which are not adequately explained to them. The state laws which seek to address the problems vary. Some state laws have imposed liabilities on assignees of loans, and it is these laws in particular that threaten securitisations. However, FTA and financial firms’ opposition to state predatory lending statutes does not focus just on the specific types of statutory provision that pose the greatest risks for securitisations, but rather on the idea that different states might regulate predatory lending with different rules. National banks urged the OCC to pre-empt the application and enforcement of state rules against national banks, and the OCC did so.

The example of predatory lending in the US illustrates that financial firms and their FTAs prefer national rather than local rules, or at least national level rather than local level enforcement. The firms and FTAs use abstract market protection rhetoric to advocate for national rules and national enforcement. The rhetoric of the consumer groups who advocate on behalf of sub-prime borrowers focuses in contrast on the stories of people who lost their homes because they fell into the grips of predatory lenders. On the national political stage these stories are powerful, and national political interest may affect the behavior of domestic regulators. The OCC emphasises in public statements that it abusive lending violates its own rules. However, it is doubtful whether the OCC has sufficient resources to protect vulnerable consumers throughout the US.

At the national level, politics can remedy some of the consequences of regulatory processes

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121 See, e.g., *idem* at 4 (“Most abusive lending takes place in the subprime market, where unscrupulous lenders target vulnerable borrowers, including those with weak or blemished credit histories. Predatory lending can take different forms, but includes steering borrowers into a higher priced loan when they could qualify for a loan on better terms, stripping equity from a borrower by charging exorbitant fees or by levying abusive subprime prepayment penalties, and engaging in practices that increase the risk of foreclosure, such as making a loan without regard to the borrower’s ability to repay the mortgage.”)


124 See, e.g., Burke, *loc. cit. supra* note 69.
which emphasise abstract concepts of market protection. As supranational standard setting develops it will be important to ensure that there are similar possibilities at the supranational level.

3.4.2 Harmonisation Rhetoric

FTAs argue that differences between rules in different jurisdictions impose costs on their members. They may argue, expressly or impliedly, that subjecting domestic firms to rules more stringent than those which apply to foreign firms will make it harder for the domestic firms to compete abroad. Harmonisation rhetoric is invoked in the context of rule-making proposals of domestic origin and where domestic regulators seek to implement supranational standards within their own systems. The rhetoric has echoes of mutual recognition. For example, FTAs argue that multinational groups which are subject to effective regulation in their home jurisdictions should not be subjected in other jurisdictions to unnecessary additional requirements.\(^\text{125}\)

Vague, general supranational standards invite domestic regulators to exercise discretion in interpreting and applying them.\(^\text{126}\) But discrepancies between different national implementations of harmonised standards can give rise to two sets of problem: first, from the perspective of financial firms much of the benefit of harmonisation will be lost if they have to comply with different rules in different jurisdictions. And second, firms which are subject to stricter requirements in some jurisdictions may suffer competitive disadvantages compared to firms subject to more relaxed requirements.

Capital adequacy requirements are costly for financial firms, and firms and their FTAs have been concerned about revisions to the Basle standards for some time. US banking regulators have suggested that they are conscious of the need not to impose rules on US based banks which have a negative impact on their competitiveness with banks based in other jurisdictions.\(^\text{127}\)

In the UK financial firms have adopted the term “gold-plating” to refer to domestic rules implementing EU directives which add requirements over and above those set out in the directive. The FSA has accepted this idea and now refers in its own publications to the need not to “gold-plate”

\(^{125}\) See, e.g., The Bond Market Association, International Swaps and Derivatives Association, Inc. & Securities Industry Association, Comments on Revised Interagency Statement on Sound Practices Concerning Elevated Risk Complex Structured Finance Activities, June 15, 2006, available at http://www.isda.org/speeches/pdf/Join%24Comment-Letter-061506.pdf (“The Associations believe, however, that the second sentence in footnote 7 of the Revised Guidance\(^\text{17}\) may be construed as obligating U.S. branches and agencies of foreign banks to establish a control infrastructure that is additional to, rather than an integral part of, the foreign bank’s global control framework. The Associations respectfully request that the Agencies clarify that the Revised Guidance is not intended to require U.S. branches and agencies of foreign banks to establish separate control infrastructures where adequate institutional controls are otherwise in place and apply to the branch or agency.”)


FTAs also use harmonisation rhetoric as a means to underline the importance of legal certainty in financial markets. For example, ISDA recently commented on Russian legislative proposals which are intended to facilitate derivatives transactions and suggested that some of the proposed restrictions did not apply in other jurisdictions:

“Many countries, when implementing legislation to exempt financial and commodity market activity from anti-gambling rules, have not felt the need to restrict the scope of the exemption so that at least one party is a licensed or regulated institution. The key point is that the policy that underlies anti-gambling rules is not relevant to legitimate investment and risk management activities carried out in the financial and commodity markets.”

This statement suggests that ISDA’s interest is primarily in facilitating derivatives business, but ISDA would also like to level the playing field for non-Russian firms:

“Nonetheless, to the extent that you conclude that this limitation should remain, we strongly believe that it is in the interest of the future stability, efficiency and liquidity of the Russian financial markets that the limitation be clarified to include non-Russian financial institutions.”

Harmonisation rhetoric, used in the context of domestic rule-making or domestic implementation of supranational standards, is likely to reinforce market protection rhetoric. Harmonisation rhetoric emphasises the abstract and the general over the localised and contextual. Thus successful harmonisation rhetoric can reduce consumer protection.

3.5 Even Better Regulation: Ensuring Consumer Protection in Markets with Harmonised Rules

Two possibilities for further study emerge from this discussion. First, if framing of the issues is significant to the ultimate development of policy it is important to involve consumers, or people who have focused on consumer needs at the very early stages in policy development where the issues are identified. In order to decide whether it is necessary to protect a particular market activity from regulation, we should understand whether that market activity imposes externalities. And sometimes what may serve the interests of consumers best is not new regulation but new approaches to old problems.

Second, it is possible to mitigate some of the effects of harmonisation by separating responsibilities for rulemaking and enforcement. Such a separation is characteristic of the EU at present.

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128 See, e.g., supra note 13.

129 ISDA, Comments on Proposed Amendments to Russian Civil Code, supra note 110 at p. 3.

130 Idem.

131 Cf. Austin, loc. cit. supra note 108 at p. 1256 (stating that if “the democratization of credit were truly the goal, the reform agenda would extend beyond usury regulation and suitability requirements” and suggesting that “[p]romoting savings and strengthening pro-debtor sources of credit that preserve the benefits of informality” would be preferable).
as EU rules of financial regulation are enforced by national authorities (subject to the Commission’s power to take enforcement action against Member States which do not comply with their obligations under Community law). However, in the US, allowing state authorities to enforce uniform standards on predatory lending would be an improvement over either large numbers of potentially inconsistent and/or unclear standards or one standard which was never enforced.\footnote{Cf. Burke, \textit{loc. cit. supra note 69} (“I am personally in favor of federal preemption in regard to Fair Credit Reporting and have even proposed that state laws governing predatory lending need to be preempted but only by a strongly defined federal or even legislative action tied to authority being delegated to the states for the enforcement of such a mandate.”)}

### 3.6 Conclusion

The increasing significance of regulatory harmonisation through supranational and transnational channels means that it is increasingly important to consider the impact of harmonisation on different stakeholder interests. Financial firms and FTAs are better positioned than consumers to participate in harmonisation processes at all levels because of their superior financial and other resources. In particular, FTAs invoke abstract rhetorical strategies which are particularly well suited to the abstract nature of supranational standard-setting. And FTAs reinforce their market protection arguments by invoking harmonisation rhetoric at the domestic and local levels to argue against rules which would protect local interests. Thus FTAs help to frame the issues in ways which tend to put consumers at a disadvantage. In the interest of enhancing the legitimacy of multi-level regulatory processes it is necessary to consider how to ensure that consumers are able to participate at all levels, and not just to be present but also to be heard.