

The Regulation of International Financial Markets

Perspectives for Reform

Edited by

Rainer Grote and Thilo Marauhn

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PREFACE

Most of the contributions included in this volume were originally presented during a workshop held at the 'Evangelische Akademie Loccum' in 2001. The editors wish to explicitly acknowledge the financial and logistical support provided by the 'Evangelische Akademie Loccum'. In particular, we appreciate the contribution of Dr Christoph Hüttig to the conceptual framework of the workshop and the establishment of contacts with Benjamin J. Cohen and Axel Peuker through him. Further papers were added and existing papers were revised subsequently, with final editing being done in 2004. The editors are grateful to the VolkswagenStiftung for its financial support in respect of both the workshop and the preparation of the publication. We also appreciate the editorial assistance provided by Michael Weiss. Due to the long editing process which is the sole responsibility of the editors the final versions of the various contributions differ in respect of timing. Authors have, however, successfully contributed to a meaningful interdisciplinary volume which the editors have sought to draw conclusions upon in their final chapter. This chapter also outlines perspective for further research. Finally, the editors wish to express their gratitude to the publisher and all the assistance provided by Cambridge University Press.

ABBREVIATIONS

ADB	Asian Development Bank
AFTA	ASEAN Free Trade Area
AICPA	American Institute of Certified Public Accountants
AMF	Asian Monetary Fund
APA	Administrative Procedure Act
APEC	Asia-Pacific Economic Co-operation forum
ASEAN	Association of South-East Asian Nations
ASEAN + 3	ASEAN + Japan, China and South Korea
ASEM	Asia-Europe Meeting 2000
ATS	Alternative Trading System
ATTAC	Action pour la Taxation des Transactions Financières pour l'Aide aux Citoyens (Association for the Taxation of Financial Transactions for the Benefit of Citizens)
BCBS	Basle Committee on Banking Supervision
BGBI.	Bundesgesetzblatt
BIS	Bank for International Settlements

BVerfGE	Sammlung der Entscheidungen des Bundesverfassungsgerichts (Collection of the Decisions of the German Federal Constitutional Court)
CCL	Contingent Credit Line
CEO	Chief Executive Officer
CESR	Committee of European Securities Regulators
CFA	Commodities Futures Act
CFMA	Commodities Futures Modernization Act
CFO	Chief Financial Officer
CFTC	Commodities Futures Trading Commission
CGFS	Committee on the Global Financial System
CIA	Central Intelligence Agency
CMCG	Capital Market Consultative Group
CO	Colorado
CPSIPS	Core Principles for Systemically Important Payment Systems
CPSS	Committee on Payment and Settlement Systems
CTT	Currency Transaction Tax
DC	District of Columbia
DSU	Dispute Settlement Understanding
DTEFs	derivatives transaction execution facilities
EAEC	East Asia Economic Caucus
EAEG	East Asian Economic Group
EASDAQ	European Association of Securities Dealers Automatic Quotation System

EC	European Community
ECB	European Central Bank
ECJ	European Court of Justice
ECOFIN	A configuration of the Council of Ministers of the European Union concerned with economic and financial affairs
ECOSOC	Economic and Social Council
EEA	European Economic Area
EEC	European Economic Community
EMI	European Monetary Institute
EMU	Economic and Monetary Union
ERM	Exchange Rate Mechanism
ESC	European Securities Committee
ESCB	European System of Central Banks
EU	European Union
FASB	Financial Standards Supervisory Board
FATF	Financial Action Task Force on Money Laundering
FBI	Federal Bureau of Investigation
FDI	Foreign Direct Investment
FDIC	Federal Deposit Insurance Corporation
FESCO	Forum of European Securities Commissions
FFIEC	Federal Financial Institutions Examination Council
FFSA	Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht)

FIRREA	1989 Financial Institutions Reform, Recovery, and Enforcement Act
FSA	Financial Services Authority
FSAP	European Commission's Financial Services Action Plan
FSAP	Financial Sector Assessment Program
FSF	Financial Stability Forum
FSLC	Financial Sector Liaison Committee
FSLIC	Federal Savings and Loan Insurance Corporation
FSMA	Financial Services and Markets Act 2000
GAB	General Agreement to Borrow
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDDS	General Data Dissemination System
GDP	gross domestic product
HM	Her Majesty
IAIS	International Association of Insurance Supervision
IAPC	International Accounting Practices
IASB	International Accounting Standards Board
IASC	International Accounting Standards Committee
IBRD	International Bank for Reconstruction and Development
ICC	Interstate Commerce Commission

IFAC	International Federation of Accountants
IFIs	International Financial Institutions
IMF	International Monetary Fund
IMFC	International Monetary and Financial Committee of the Board of Governors of the IMF
INSOL	International Federation of Insolvency Professionals
INTOSAI	International Organisation of Supreme Audit Institutions
IOSCO	International Organisation of Securities Commissions
IPO	initial public offer
IRS	Internal Revenue Service
ISA	International Standards on Auditing
ISD	Investment Services Directive 93/22/EEC
LDC	less developed country
MAI	Multilateral Agreement on Investment
MFN rule	most-favoured-nation-rule
MoU	memorandum of understanding
MPIFG	Max-Planck-Institut für Gesellschaftsforschung' (Max Planck Institute for the Study of Societies)
NAB	new arrangements to borrow
NAFTA	North American Free Trade Agreement
NAIC	National Association of Insurance Commissioners

NAMU	North American Monetary Union
NASD	National Association of Securities Dealers
NASDAQ	National Association of Securities Dealers Automated Quotation (system)
NCOIL	National Conference of Insurance Legislators
NCUA	National Credit Union Administration
NEWEX	New Europe Exchange
NFA	National Futures Association
NGO	Non-Governmental Organisation
NJ	New Jersey
NY	New York
NYSE	New York Stock Exchange
OCC	Office of the Comptroller of the Currency
OECD	Organisation for Economic Co-operation and Development
OEEC	Organisation for European Economic Co-operation
OJ	Official Journal of the European Union
OTC	over-the-counter
OTS	Office of Thrift Supervision
RCH	Recognised Clearing Houses
RIE	Recognised Investment Exchanges
ROSC	Reports on the Observance of Standards and Codes
RTC	Resolution Trust Corporation
S&Ls	savings and loan associations

SAIF	Savings Association Insurance Fund
SDDS	Special Data Dissemination Standard
SDRM	Sovereign Debt Restructuring Mechanism
SEC	US Securities and Exchange Commission
SRF	Supplemental Reserve Facility
SROs	self-regulatory organisations
TRIPS Agreement	Agreement on Trade Related Aspects of Intellectual Property Rights
UCITS	Directive 85/611/EEC on Undertakings for Collective Investment in Transferable Securities
UK	United Kingdom
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNICEF	United Nations Children's Fund
US	United States of America
USD	US dollar
WTO	World Trade Organisation
WTO Agreement	Marrakesh Agreement establishing the World Trade Organisation
XBOTs	exempt boards of trade

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Introduction: the regulatory dilemma in international financial relations

THILO MARAUHN

I. The globalisation of capital markets: benefits and risks

The globalisation of capital markets has become the subject of a broad public debate.¹ It is no longer perceived as a purely technical topic. Its benefits and risks are part of a truly political discourse that has long left the secluded environment of the financial and academic elite. Benefits and risks of such globalisation are thus not only discussed from the perspective of economic rationality but are assessed against a whole set of heterogeneous values, such as democracy,² human rights,³ and many more. While the debate has thus become much more vivid it is increasingly at risk to be governed by ideological motivations rather than rational arguments. Pleading for rationality does not mean to return to purely technical or even elitist considerations. Rather it aims at establishing a procedural framework to accommodate all the relevant aspects that should be taken into account by political, economic, and other decision-makers. Such procedural framework can effectively be provided by public international law arrangements. While this has been realised in other sectors of an increasingly global

¹ See, *inter alia*, Richard A. Grasso, 'Globalization of Capital Markets', (1997) 21(2) *Fordham International Law Journal* 390–6; Dragana M. Đurić, 'Globalization of Financial Markets', (1999) 50(1082/83) *Review of International Affairs* 15–21; Sol Picciotto and Jason Haines, 'Regulating Global Financial Markets', (1999) 26(3) *Journal of Law and Society* 351–68; Ellis Ferran and C. A. E. Goodhart (eds.), *Regulating Financial Services and Markets in the Twenty First Century* (Oxford, 2001); Joseph E. Stiglitz, 'Principles of Financial Regulation – A Dynamic Portfolio Approach', (2001) 16(1) *World Bank Research Observer* 1–18.

² Chantal Thomas, 'Does the "Good Governance Policy" of the International Financial Institutions Privilege Markets at the Expense of Democracy?' (1999) 14(2) *Connecticut Journal of International Law* 551–62.

³ Cf. Ross P. Buckley, 'The Essential Flaw in the Globalisation of Capital Markets – Its Impact on Human Rights in Developing Countries', (2001) 32(1) *California Western International Law Journal* 119–31.

economy,⁴ capital markets have for one and another reason largely escaped the regulatory power of public international law. Even the academic discourse has long been led by economists and experts in private law with a significant silence on the side of political scientists as well as experts in public law.⁵ The situation seems about to change, most probably due to the topic moving into the wider political arena.

It is against this background that the research for this publication was undertaken. The basic question to be addressed from a variety of angles is whether there is a meaningful potential in the regulation of international financial relations at the level of public international law. In spite of grand rhetoric such as ‘international financial architecture’⁶ the present contribution of public international law to a regulatory framework for global capital markets is rather limited. Neither does the reference to an ‘international financial architecture’ describe an existing regime nor does it provide a blueprint for governance in international financial relations. Rather it covers a great variety of institutions and numerous forms of co-operation among actors on the international financial markets. Whether or not there is a need for and a potential impact of public international law in international financial relations can only be assessed against the background of a much broader analysis.

A first part of this analysis must be a historical one,⁷ considering the factual dimension of the problem and the ups and downs of capital

⁴ Bilateral as well as multilateral agreements related to foreign direct investment rather provide a framework for the settlement of disputes than a set of substantive standards; cf. Christian Tietje, ‘Die Beilegung internationaler Investitionsstreitigkeiten’, in Thilo Marauhn (ed.), *Streitbeilegung in den internationalen Wirtschaftsbeziehungen. Völkerrechtliche Einhegung ökonomischer Globalisierungsprozesse* (Tübingen, 2005), pp. 47–62 at 49–51. Similarly, the World Trade Organisation (WTO) does not integrate national economies into the global economy but only tears down barriers to economic transactions in between these economies; see Hans van Houtte, *The Law of International Trade* (2nd ed. 2002), at p. 128: ‘A free market requires . . . liberalisation of the movement of goods and services as well as the prohibition of restrictions on competition by the market participants.’

⁵ Rochael M. Soper, ‘Promoting Confidence and Stability in Financial Markets – Capitalizing on the Downfall of Barings’, (1997) 7(2) *Duke Journal of Comparative and International Law* 651–70; Herbert Kronke, ‘Capital Markets and Conflict of Laws’, (2001) 286 *Recueil des Cours/Académie de Droit International de La Haye* 245–385; Douglas W. Arner, ‘Globalisation of Financial Markets – An International Passport for Securities Offerings?’ (2001) 35(4) *International Lawyer* 1543–88.

⁶ Cf. Peter Behrens, ‘The International Architecture of Global Financial Markets’ (1999) 6(3) *Maastricht Journal of European and Comparative Law* 271–98.

⁷ Such analysis is provided in this book by Benjamin J. Cohen (chapter 1). See also William F. Shepherd, *International Financial Integration – History, Theory and Applications in OECD Countries* (Aldershot, 1994).