INTERNATIONAL FINANCIAL STANDARDS AND CODES: MANDATORY REGULATION WITHOUT REPRESENTATION

ROBERT P. DELONIS*

Over the past decade, all states, developing and industrialized alike, have been increasingly encouraged to adopt uniform regulatory standards and codes governing a variety of financial sectors and activities. Initiated by the Group of Seven (G-7) states[1] and most recently spurred by the 1997 East Asian financial crisis,[2] the standards and codes movement features policies drafted by a range of international bodies,[3] while implementation is promoted by the International Monetary Fund (IMF, or "the Fund") through its activities with member states.[4] But control of all of the organizations involved in this movement—from conceptualization and planning to standards drafting to implementation promotion—is dominated by a small group of industrialized states or bodies of private financial professionals drawn principally from those states.[5]

This Note surveys the history and function of the international institutions central to the standards and codes movement, and in it I make two related claims regarding them. First, I argue that, despite the Fund's statements to the contrary, the methods used by the IMF to promote universal implementation of standards and codes make their adoption essentially mandatory for developing states that seek, or may

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1. These states are the United States, Japan, Germany, France, the United Kingdom, Italy, and Canada. See *infra* Part II.B for a discussion of the G-7 states' role in the movement, and Part II.C for a discussion of the G-7 itself.

2. See *infra* Part I.B.2 for a discussion of the crisis and its role in standards and codes promotion.

3. *See infra* Part II.C.

4. *See infra* Part III.

5. *See infra* Parts II.C & IV.

seek, access to IMF or private capital. Second, I contend that the control and policymaking structures of these institutions overly exclude developing states and their citizens. This exclusion violates the norm of democratic governance and risks diminished policy compliance because of that violation.

The Note is divided into five interconnected parts. The first two parts provide the "survey," discussing the relevant institutions and facts necessary for my argument. Part I considers how the IMF operates and how it became involved in standards and codes issues. Part II explains what standards and codes are and details the organizations that create them. The next two parts contain my argument. Part III, building upon the IMF background provided in Part I, argues that the Fund's promotion of standards and codes makes them effectively mandatory for developing states. Part IV, drawing on the standards background in Part II and the argument in Part III, contends that the system for both creating and implementing standards is undemocratic and therefore faces normative and practical difficulties. Part V concludes that the status quo is democratically deficient and needs reform.

All of my claims revolve around the argument that standards and codes are effectively mandatory. This contention, in turn, centers on the International Monetary Fund, because it is the agent making them mandatory. The Note therefore begins with a survey of the Fund's operations and its role in the standards and codes movement.

I. The Operations and Role of the IMF

A. *The Mechanics of the IMF*

The IMF is essentially a credit union for states: In order to be members, states are required to pay a "quota subscription," a sort-of deposit, in proportion to the size of their economy as measured by output.[6] These quotas, in turn, determine the amount of money a given state can borrow from the IMF; the voting power of that state within the Fund; and the

6. *See* Int'l Monetary Fund, *What Is the International Monetary Fund? (2002)* (describing the Fund's function), *at* http://www.imf.org/external/pubs/ft/exrp/what.htm [hereinafter *What Is the IMF?*]. For the analogy to a credit union, see John W. Head, *Lessons from the Asian Financial Crisis: The Role of the IMF and the United States,* 7 Kan. J.L. & Pub. Pol'y 70, 88 (1998).

state's Special Drawing Rights (SDR)[7] allocation, which it can use in transactions with other IMF members, "institutional" holders of SDRs, and the IMF itself.[8] At present, 184 states are IMF members, and it is widely considered a universal membership organization.[9]

It is difficult to overstate the importance of IMF loan packages and consultations to developing states. When developing states encounter balance of payments problems,[10] they turn to the IMF for aid, seeking funding for both immediate crises and long-term adjustments of their economic structure.[11] The IMF is able to both loan some of its own resources to the state and, through the "seal of approval" that an IMF loan packages conveys, convince commercial banks that the state is creditworthy.[12] The Fund, therefore, plays *the* central role in providing developing states with access to financial capital when those states' public finances are in trouble. The challenges and difficulties of development make such troubles

7. Special Drawing Rights are a form of international currency created by the IMF for use among the parties described in the text. *See* MARGARET GARRITSEN DE VRIES, THE IMF IN A CHANGING WORLD 1945-85, at 75-79 (1986) (discussing SDRs and their creation).

8. *See What Is the IMF?*, *supra* note 6 (at "What Is an SDR?") 25% of each quota must be paid in SDRs or "major currencies," i.e., the Euro, the U.S. dollar, the Japanese Yen, or the British Pound. The total value of this percentage is the state's allocation. *Id.* (at "Where Does the IMF Get its Money?").

9. *See* Int'l Monetary Fund, *The IMF at a Glance (2004)*, *at* http://www.imf.org/external/np/exr/facts/glance.htm [hereinafter *The IMF at a Glance*]; Herbert V. Morais, *The Quest for International Standards: Global Governance vs. Sovereignty*, 30 U. KAN. L. REV. 779, 811-12 (2002) (for the description of the IMF as a "universal membership" entity) [hereinafter Morais, *The Quest for International Standards*].

10. The term "balance of payments," as it is commonly used, has two meanings. Its general meaning, not applicable here, refers to the total amount of money entering a state from international sources, minus the total amount leaving, over a set period of time. Its more specific meaning, however, refers to the ability of a government to repay its outstanding debts when facing a limited income stream (e.g., from taxes). MATTHEW BISHOP, POCKET ECONOMIST 25-26 (2000). It is this narrow meaning that applies to IMF activity.

11. *See infra* Part I.A.1 (discussing the various emergency and structural adjustment loan facilities provided by the IMF).

12. EVA RIESENHUBER, THE INTERNATIONAL MONETARY FUND UNDER CONSTRAINT: LEGITIMACY OF ITS CRISIS MANAGEMENT 33-34 (2001).

common, and therefore make cooperation with the IMF a necessity for many developing states.[13]

1. *Loans*

A state is usually permitted to borrow up to three times the amount of its quota, though in unusual circumstances that ratio is increased.[14] These loans are issued under an arrangement with a country that includes a set of conditions, spelled out in a letter of intent from the country's government to the IMF Executive Board, that the country must abide by to receive the loan.[15] The IMF extends these loans in a series of sequential tranches, with continued borrowing of successive blocks of funds conditioned upon the fulfillment of certain criteria.[16] States' ability to obtain a loan and then their access to the funds in their entirety are thus tied to the fulfillment of these conditions.

The IMF has also gradually established a set of loan instruments, called "facilities," that provide a starting point for arrangements and target the needs of certain groups of states in certain circumstances.[17] These facilities can be divided into concessional (low interest rate) and non-concessional groups. Concessional facilities are only available to a select group of low-income member states and are channeled through the Poverty Reduction and Growth Facility (PRGF).[18] The non-concessional facilities, which make up the bulk of the IMF's lending activity, are comprised of four main types: Stand-By Arrangements (SBAs), the Extended Fund Facility (EFF), the

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13. The "necessity" idea is developed further *infra* Part III.

14. Head, *supra* note 6, at 88.

15. Int'l Monetary Fund, *How Does the IMF Lend?* (2003), *at* http://www.imf.org/external/np/exr/facts/howlend.htm [hereinafter *How Does the IMF Lend?*]. For a brief summary of the development of this conditionality, see Andreas F. Lowenfeld, *The International Monetary System and the Erosion of Sovereignty: Essay in Honor of Cynthia Lichtenstein*, 25 B.C. INT'L & COMP. L. REV. 257, 262-63 (2002).

16. Morris Goldstein, Strengthening the International Financial Architecture: Where Do We Stand? 12 (Oct. 2000) (unpublished paper presented at KIEP/NEAEF Conference on "Regional Financial Arrangements in East Asia: Issues and Prospects"), *available at* http://www.ciaonet.org/wps/gom04/gom04. html.

17. *How Does the IMF Lend?*, *supra* note 15.

18. *Id.*

Supplemental Reserve Facility (SRF), and the Compensatory Financing Facility (CFF).[19]

For purposes of this Note's argument, the most important distinction between these sets of facilities is their duration, because, as discussed *infra*,[20] their duration often guides the types of conditions attached to them. The SBAs and CFF are the two oldest facilities, and are designed to address balance-of-payments difficulties caused by short-term (one- to two-year) problems.[21] The SRF, created in 1997 in response to the East Asian currency crisis,[22] is also short-term but assumes an extremely high level of access.[23] Between 1999 and 2003, the IMF also offered the Contingent Credit Line facility (CCL), which was comprised of a set of pre-approved credit lines available to prevent, rather than ameliorate, cases of financial "contagion."[24]

Today, however, growing numbers of the IMF's debtors are developing states that are borrowing money for considerably longer periods of time;[25] they do so under the EFF and the PRGF. Both facilities are composed of longer-term arrangements (three years or more) and explicitly state that the balance-of-payment problems they address must be remedied by structural adjustment.[26]

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19. *Id.*

20. *See infra* Part III.A.

21. *See What Is the IMF?*, *supra* note 6 (at "Highlights in the Evolution of IMF Lending" and "Instruments of IMF Lending and Their Evolution"); *How Does the IMF Lend?*, *supra* note 15.

22. For a more detailed discussion of the East Asian currency crisis, see *infra* Part I.B.2.

23. *How Does the IMF Lend?*, *supra* note 15.

24. Int'l Monetary Fund, *The IMF's Contingent Credit Lines* (2004), *at* http://www.imf.org/external/np/exr/facts/ccl.htm [hereinafter *The IMF's Contingent Credit Lines*]. While I argue below that the CCLs are an important policy precedent, "[f]or various reasons, the facility was never used. In November of 2003, the CCL was allowed to expire on its scheduled sunset date." *Id.* *See also infra* Part III.C (discussing the CCLs in more detail). "Contagion" refers to the spread of financial problems between different international capital markets. *See infra* Part II.B.2.

25. Indep. Evaluation Office, Int'l Monetary Fund, *Evaluation of Prolonged Use of IMF Resources 9-10 (2002)*, *available at* http://www.imf.org/external/pubs/ft/EPUI/2002/pdf/Report.pdf [hereinafter Indep. Evaluation Office].

26. Int'l Monetary Fund, *The Poverty Reduction and Growth Facility (PRGF) (2004)*, *at* http://www.imf.org/external/np/exr/facts/prgf.htm; *How Does*

2. *Management*

The IMF management structure is relatively simple. The highest authority in the Fund is the Board of Governors, which meets once a year at the IMF and World Bank Annual Meeting and is composed of one Governor (and one alternate) from every member state.[27] The day-to-day operations of the Fund are managed by a twenty-four member Executive Board ("the Board"), chaired by the Fund's Managing Director.[28] While the Board's powers are officially limited, the size and infrequency of meetings of the Board of Governors has meant that almost all the powers in the Articles reserved for the Board of Governors have been delegated to the Executive Board.[29]

Power in the Executive Board is divided along two dimensions: seats on the board and the voting power of the individuals in those seats. According to the Articles of Agreement, the five member states with the largest quotas have their own representatives on the Board, while the remaining seats are voted in by groups of member states called "constituencies."[30] This means that the U.S., Japan, Germany, France, and the U.K. have one seat each. China, Russia, and Saudi Arabia have also gained their own seats over time.[31] The constituencies filling

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the IMF Lend?, *supra* note 15. The facilities are also historically related: The more sweeping PRGF was created by the Initiative for the Heavily Indebted Poor Countries to replace the Enhanced Structural Adjustment Facility (ESAF), and the ESAF was an early offshoot of the EFF. *See What Is the IMF?*, *supra* note 6 (at "Lending to Countries in Difficulty"); Int'l Monetary Fund, *The Poverty Reduction and Growth Facility (*PRGF)—Operational Issues, *at* http://www.imf.org/external/np/pdr/prsp/poverty2.htm (at "Introduction").

27. Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, art. XII, sec. 2(a), 60 Stat. 1401, 2 U.N.T.S. 39, *as amended by* Apr. 1, 1978, 29 U.S.T 2203, 2229. *See What Is the IMF?*, *supra* note 6 (at "Who Makes Decisions at the IMF?").

28. Articles of Agreement of the International Monetary Fund, *supra* note 27, art. XII, sec. 3(a) & (b), 29 U.S.T. at 2230-31. S*ee What Is the IMF?*, *supra* note 6 (at "Who Makes Decisions at the IMF?").

29. Anthony Galano III, *International Monetary Fund Response to the Brazilian Debt Crisis: Whether the Effects of Conditionality Have Undermined Brazil's National Sovereignty?*, 6 PACE INT'L L. REV. 323, 334 (1994).

30. Articles of Agreement of the International Monetary Fund, *supra* note 27, art. XII, sec. 3(b)(i)-(ii), 29 U.S.T. at 2231; *What Is the IMF?*, *supra* note 6 (at "Who Makes Decisions at the IMF?").

31. *What Is the IMF?*, *supra* note 6 (at "Who Makes Decisions at the IMF?").

the remaining sixteen seats are organized (roughly and voluntarily) by geography, supposedly representing groups of states with homogenous interests.[32] The constituencies often depart from geographic continuity, however, and spread some developed states between constituencies so that, of the 24 seats at the table, every G-7 state has a representative, as do all but one of the eleven "G-10" countries.[33] By way of comparison, only two representatives speak for nineteen African states.[34]

The Board typically makes decisions by consensus, but when necessary it decides matters by vote.[35] Rather than a one-vote-per-representative system, votes are instead weighted by each state's contribution to the Fund or, in the case of constituency representatives, the sum total of the contributions of the states in that constituency.[36] Thus, the American representative wields 371,743 votes, or 17.14 percent of the total, while the next largest state, Japan, possesses 133,378 votes, or 6.15 percent of the total.[37] All told, the G-7 states control approximately forty-seven percent of the voting power of the

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32. *See* Galano, *supra* note 29, at 335 (for the notion of homogeneity in groupings). *See also* Int'l Monetary Fund, *IMF Executive Directors and Voting Power (2004)* (listing the current Executive Board members and the countries that make up their constituencies), *at* http://www.imf.org/external/np/sec/memdir/eds.htm [hereinafter *IMF Directors and Voting Power*]. I say "roughly" in terms of geography because while some constituencies are composed of states near one another, others are not; thus Spain is grouped with principally Latin American countries, Canada and Ireland with Caribbean island states, and Poland and Switzerland with Central Asian states like Azerbaijan, Tajikistan, and Uzbekistan. *Id.* Such groupings raise real questions about the homogeneity of their interests.

33. *IMF Directors and Voting Power*, *supra* note 32. The G-10 states are the G-7 plus the Netherlands, Belgium, Switzerland, and Sweden. The only G-10 state not directly represented is Sweden, which is in a constituency comprised entirely of Scandinavian, Nordic, and Baltic states. *Id.* *See* Part II.C for a discussion of the states comprising the G-7 and G-10 and the history of these groups.

34. *IMF Directors and Voting Power*, *supra* note 32.

35. *What Is the IMF?*, *supra* note 6 (at "Who Makes Decisions at the IMF?").

36. *Id.* *See also IMF Directors and Voting Power*, *supra* note 32 (detailing the voting power of each Board member); Articles of Agreement of the International Monetary Fund, *supra* note 27, art. XII, sec. 5(a), 29 U.S.T. at 2229 (allocating votes per member).

37. *IMF Directors and Voting Power*, *supra* note 32.

IMF, and the G-10 states control approximately sixty-four percent.[38]

While a detailed critique of the IMF's management structure is provided below,[39] it should be emphasized here that this power allocation decidedly under-represents developing states in both seat allocation and voting power. This democratic deficit has led many parties to question the Fund's political legitimacy.[40] A plausible rejoinder is that the allocation is purely based on the amount of capital put into the organization and it is appropriate that states with a larger stake have more say in the risk to which their funds are exposed and purposes for which those monies are used. Were the IMF merely one lending body among many, that response would be adequate. But the Fund's screening role for the investment of private capital,[41] the influence its loan conditions have on domestic financial policy,[42] and its role in the creation of international financial norms[43] all give the IMF's decisions much more weight, and a much larger impact, than the funds they directly regard. If the Fund is going to take on a broader soft-law-making role, then the lack of equal representation for affected populations becomes a salient concern.

3. *Other Activities*

In addition to making loans, the IMF monitors and discusses its member states' financial conditions and policies—a process it calls "surveillance."[44] The central component of

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38. Mario Giovanoli, *A New Architecture for the Global Financial Market: Legal Aspects of International Financial Standard Setting*, *in* INTERNATIONAL MONETARY LAW: ISSUES FOR THE NEW MILLENNIUM 30-31 (Mario Giovanoli ed., 2000).

39. See *infra* Part IV.C.3.

40. *See, e.g.*, OXFAM INT'L, BRIEFING PAPER—DEMOCRACY AND ACCOUNTABILITY: THE IMF'S DEFICIT (2000) (on file with the N.Y.U. Journal of International Law and Politics).

41. For a discussion of how IMF approval usually serves as a prerequisite for private capital investment, see *infra* Part III.C.

42. *See infra* Part I.B.2 (detailing this influence in South Korea and Russia).

43. *See infra* Part II.C.1 (discussing the IMF's role in standards creation); Part IV.B (discussing how standards are forming a soft law basis for the New International Financial Architecture).

44. Int'l Monetary Fund, *IMF Surveillance* (2003), *at* http://www.imf.org/external/np/exr/facts/surv.htm [hereinafter *IMF Surveillance*].

IMF surveillance are the Article IV consultations, annual meetings between the Fund and each member state that address a wide range of topics affecting the state's economic stability and performance.[45] While it formally takes place only annually,[46] the consultation process has become so heavily supplemented by interim staff visits, frequent informal contact, and constant analysis that it has become, or is in the process of becoming, effectively continuous.[47] Some developing states also request Fund technical assistance as an offshoot of the surveillance and loan processes.[48] This assistance covers the same broad scope of topics as surveillance and loan conditionality; it is performed by short-term staff missions, longer-term expert placement, training courses, workshops, and additional staff reports.[49]

These processes and policies of the Fund are themselves the product of historical evolution. It is to this history and the movement of the Fund into Standards and Codes that this Note now turns.

B. *The Evolution of the IMF's Role in International Monetary Policy*

1. *The Development of the IMF's Modern International Role*

The creation of the IMF began in July 1944 when the fledgling United Nations held a conference in Bretton Woods, New Hampshire to design an international economic plan that would avoid repeating the policies that led to the Great Depression of the 1930s.[50] The Bretton Woods Conference produced the International Monetary Fund's Articles of Agreement ("the Articles"), and the IMF formally came into existence in December 1945 when the 29th state ratified its Articles.[51]

45. *Id.*

46. *Id.*

47. S*ee* Eric Dorkin, *Private Capital and Development: Challenges Facing International Financial Institutions in a Globalized Economy* (pt. 3) 9 TRANSNAT'L L. & CONTEMP. PROBS. 247, 267 (1999).

48. Int'l Monetary Fund, *Technical Assistance (*2003), *at* http://www.imf.org/external/np/exr/facts/tech.htm [hereinafter *IMF Technical Assistance*].

49. *Id.*

50. *See What Is the IMF, supra* note 6 (at "Origins of the IMF").

51. *Id.* There is a wealth of literature available on the history of the IMF, the nature and roots of its original design (particularly the influence of, and

The Fund was initially designed to monitor and maintain a regime of fixed exchange rates among currencies, and between the U.S. dollar—the anchor currency—and gold. That regime proved economically unsustainable, and in the early-1970s the United States abandoned the gold standard, instead permitting its currency to "float," i.e., be valued by free market exchange rates.[52] After losing its core competence to the market, the Fund temporarily suffered as an institution without a clear mission.[53] By the time it codified the end of its old role, however, the IMF had begun to lay the basis for its current one.

In 1976, the member states amended the Articles and added a new Article IV, "Obligations Regarding Exchange Arrangements," which recommitted the states to promoting economic growth and exchange rate stability, established exchange rate reporting and surveillance requirements, and otherwise left member states free to choose the exchange rate system of their choice.[54] These requirements are the source of the Fund's current surveillance and consultation mandate.[55] Article V(3), which regards loan conditionality, was amended, in the words of Professor Lowenfeld, to "at least confirm that the Fund could, and indeed should, place conditions on re-

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interplay between, the two important economists who crafted it—Harry Dexter White and John Maynard Keynes), and the economic forces that led to the collapse of the original exchange rate regime. For an overview of the changes in the IMF's role, see generally Robert Hockett, *From Macro to Micro to "Mission Creep": Defending the IMF's Emerging Concern with the Infrastructural Prerequisites to Global Financial Stability*, 41 COLUM. J. TRANSNAT'L L. 153 (2002). For a discussion of Keynes' role in the formation of the IMF, see R.F. HARROD, THE LIFE OF JOHN MAYNARD KEYNES 526-31, 550-51 (1963).

52. *See* Hockett, *supra* note 51, at 165-73 (for a discussion of the IMF's original role and its collapse).

53. *See* Dorkin, *supra* note 47, at 250.

54. *See* Articles of Agreement of the International Monetary Fund, *supra* note 27, art. IV, secs. 1-3, 29 U.S.T. at 2231; Hockett, *supra* note 51, at 172-73. It should be noted that Article IV, Section 4 does leave room for the reestablishment of a par value (i.e., fixed exchange rate) system, but only if supported by an 85% or greater vote. Articles of Agreement of the International Monetary Fund, *supra* note 27, art. IV, sec. 2(c), 29 U.S.T. at 2231.

55. *See* Lowenfeld, *supra* note 15, at 262 (observing that while Article IV is phrased weakly, under it the Fund retained its ability to tell countries what to do).

quests for drawings" of fund resources.[56] This permitted the evolution of the IMF's current conditionality regime.

Equally importantly, the borrowing clientele of the Fund changed dramatically. Previously, almost all member states borrowed from the Fund at one time or another; during the 1970s, however, industrialized states generally ceased their borrowing, and the debtor ranks became almost entirely populated by developing states.[57]

These developments led to a radical revision of the nature and scope of the Fund's central practices. The traditional role of the IMF had been to provide mainly short-term loans to remedy state balance-of-payments deficits. The IMF's loan conditions, surveillance, and consultations had accordingly focused on the most immediately influential issues: macroeconomic factors, exchange rate policy, and a few significant structural policies like trade policy.[58] Indeed, the IMF's first codification of conditionality guidelines limited conditions to macroeconomic factors, and contemporary commentary emphasized that the Fund was not seeking to become involved in the details of domestic policies.[59]

During the 1970s and the 1980s, however, surveillance, specifically Article IV consultations, gained importance as a central IMF function and began to cover an ever-broader range of topics that affect the market value of currencies.[60] The Fund responded to its increasingly "developing" clientele

56. *Id.* Prior to this amendment, the IMF had utilized conditionality in practice, but it was not explicitly addressed in the Articles. Andre Newburg, *The Changing Roles of the Bretton Woods Institutions: Evolving Concepts of Conditionality, in* INTERNATIONAL MONETARY LAW: ISSUES FOR THE NEW MILLENNIUM 81, 84-85 (Mario Giovanoli ed., 2000).

57. Lowenfeld, *supra* note 15, at 263. *See also* Daniel D. Bradlow, *Should the International Financial Institutions Play a Role in the Implementation and Enforcement of International Humanitarian Law?*, 50 KAN. L. REV. 695, 708 (2002) (discussing the clientele shift) [hereinafter Bradlow, *International Humanitarian Law*]. This pattern would last until the 1990s, when the former Soviet states became fund clients. Lowenfeld, *supra* note 15, at 263.

58. *See* Goldstein, *supra* note 16, at 12 (detailing typical macroeconomic issues addressed by IMF conditionality); Dorkin, *supra* note 47, at 251 (discussing the shift to expanded facility loans).

59. Newburg, *supra* note 56, at 85.

60. Daniel D. Bradlow, *The World Bank, the IMF, and Human Rights,* 6 TRANSNAT'L L. & CONTEMP. PROBS. 47, 69-70 (1996) [hereinafter Bradlow, *The World Bank*].

by creating extended facility loans that addressed issues related to the structuring of the borrowing states' economies.[61] This new focus on structural problems led the IMF to pay more attention to other microeconomic matters[62] like states' banking systems.[63] It also permitted the Fund to consider supply-side economic factors, specifically the "economic, social, and cultural impediments [to production growth] in the Member State[s]."[64] Within approximately a decade, the IMF transformed itself from addressing the macroeconomic policies of all its Member States to working almost exclusively with developing states on a large mix of macro- and microeconomic matters.

In the middle of this shift in the Fund's focus, Latin America suffered a series of debt crises in which many major international banks incurred huge financial losses after liberally investing deposits from newly wealthy oil producers in the region's markets.[65] Following these crises, the banks began to mimic the IMF in making loans, so if a country failed to comply with IMF loan conditions and lost (or never initially received) that source of "public" funding, it would likely lose most, if not all, private market funding as well.[66] This makes the content of the IMF's loan packages all the more significant; instead of affecting one financing option among many, the Fund's conditions are now attached to nearly all sources of funding, making compliance with them effectively mandatory.

The Fund's first significant attempt to wholly design a state's microeconomic policies occurred in its technical assistance to Russia in the early 1990s. In 1991, the G-7 countries, meeting in Houston, Texas, decided that the IMF should take the lead in assisting the transition of the former Soviet bloc states, particularly Russia, from socialist to market economies.[67] For the first time, the IMF would not just provide loans to these states, but would also use its Article IV consulta-

61. *See id.* at 70-72; Dorkin, *supra* note 47, at 250-51.

62. *See* Dorkin, *supra* note 47, at 251.

63. Hockett, *supra* note 51, at 156.

64. Bradlow, *The World Bank*, *supra* note 60, at 71-72. Supply side policies are defined as those that focus on encouraging production, typically by making markets work more efficiently. BISHOP, *supra* note 10, at 224.

65. Lowenfeld, *supra* note 15, at 263.

66. *Id.*

67. Dorkin, *supra* note 47, at 252.

tions to provide explicit "technical assistance" to guide the creation of new laws and policies.[68] The subjects of this remarkable advising were extensively microeconomic, with a heavy emphasis on topics as elemental to markets as contract rights and the creation of property law.[69]

2. *The IMF's Concern with Standards and Codes*

The current IMF focus on standards and codes, which is discussed at length in the next section, finds its roots in the 1997 East Asian Currency Crisis.[70] During the thirty-odd years preceding the crisis, many countries in East Asia had been successfully transitioning to market economies, expanding their industrial sectors, and developing broader and deeper connections with international financial markets.[71] Beginning in July 1997, however, a crisis of confidence hit investors in Thailand, Malaysia, Korea, the Philippines, and Indonesia.[72] Temporary drops in demand for various goods led investors to scrutinize the countries' markets more closely; when they did, they found that many firms had large, short-term debts in foreign currencies, non-transparent balance sheet data, and interlocking, if not corrupt, arrangements with domestic banks, other firms, and the government.[73] In light of these discoveries, investors and international banks rapidly pulled their investments from firms that suddenly became risky. These withdrawals, along with (related) speculative attacks on currency values, quickly emptied central bank reserves and drove regional exchange rates down radically.[74]

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68. *Id.*

69. Hockett, *supra* note 51, at 156.

70. *See id.* at 156-57.

71. JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 90-95 (2002). It should be noted that the IMF has protested Stiglitz's analysis with astounding vehemence. *See, e.g.*, Open Letter from Kenneth Rogoff, Economic Counsellor and Director of Research, International Monetary Fund, to Joseph Stiglitz (July 2, 2002), *at* http://www.imf.org/external/np/vc/2002/070202.htm.

72. Head, *supra* note 6, at 71; Martin Feldstein, *Refocusing the IMF*, FOREIGN AFF., Mar.-Apr. 1998, at 20, 22-26 (discussing in detail the roots of the East Asian Currency Crisis, state by state).

73. Hockett, *supra* note 51, at 175.

74. *See* STIGLITZ, *supra* note 71, at 94-95 (discussing Korea and Thailand as examples of the two "familiar patterns" creating the crisis). These pat-

It was "a classic 'exit,' run, or panic,"[75] and the sudden loss of investment prompted a dramatic downturn in these states' economies. Countries that had previously been experiencing rapid growth and high employment levels plummeted into deep recessions. The resulting slowdown in global consumption caused commodity prices to fall, and the dependence of other developing state economies on those products instigated further "capital flight" as concerns about other impending market collapses grew.[76] In the end, this "contagion" adversely affected the markets of nearly every single developing country.[77]

While the root causes of this crisis are contested, the IMF's analyses led it to conclude that a lack of transparency and sound fiscal regulation were the central culprits because they created a background of uncertainty that heightened investors' willingness to withdraw their investments when the news turned bad.[78] As Robert Hockett argues, "Currency values now ride heavily upon private investors' and traders' confidence in the domestic banking, corporate, and regulatory environments."[79] The IMF began concerning itself with banking regulation, the cross-holdings between firms within conglomerates, and the nepotism and corruption of "Crony Capitalism."[80]

These new concerns moved IMF loan conditionality even more into microeconomic matters. For example, while Korea's loan arrangement still contained macroeconomic targets regarding growth rates and the size of usable foreign exchange reserves, the IMF also required the Korean government to meet, *inter alia*, the following conditions: It would require firms to use the Generally Accepted Accounting Principles (GAAP), i.e., follow U.S. accounting practices; permit the acquisition of Korean firms by foreign buyers; modify domestic

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terns caused the Thai Bhat to lose 25 percent of its value in a single day's trading. *Id.* at 89.

75. Hockett, *supra* note 51, at 175.

76. STIGLITZ, *supra* note 71, at 98.

77. *Id.*

78. *See* Hockett, *supra* note 51, at 175. For a counterargument that the IMF's promotion of capital account liberalization is the most important factor precipitating the crisis, see STIGLITZ, *supra* note 71, at 89-132.

79. Hockett, *supra* note 51, at 176.

80. Lowenfeld, *supra* note 15, at 267-68.

labor laws, including regulations regarding layoff procedures, employment insurance, and the minimum wage; and change its regulations on firm financial statements, auditing, shareholder rights (including officially considering the possibility of permitting shareholder class action lawsuits), and board-of-director composition.[81] Other changes regarding regulation of internal financial markets, trade liberalization, and foreign investment policies were also demanded.[82] The IMF's 1999 loan arrangement with the Russian Federation contained similarly detailed micro-level prescriptions.[83]

As this list of conditions reveals, the game changed: What were traditionally domestic regulatory matters became issues of international concern.[84] IMF conditionality, surveillance, and consultations now routinely include topics like financial-sector reform, privatization and public-sector reform, and policies regarding social safety nets, taxes and spending, labor markets, agriculture, the environment, corruption, and money laundering.[85] While beyond the scope of this paper, the expansion has generated many criticisms of excessive IMF "mission creep"[86] and equally vociferous responses.[87] The impor-

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81. *Id.* at 268-70. *See also* Michael Camdessus, The Role of the IMF: Past, Present, and Future, Remarks at the Annual Meeting of the Bretton Woods Committee (Feb. 13, 1998) (discussing the new features of the Korean, Indonesian, and Thai loan arrangements in the wake of the East Asian financial crisis), *at* http://www.imf.org/external/np/speeches/1998/021398.htm [hereinafter Camdessus, The Role of the IMF].

82. Lowenfeld, *supra* note 15, at 268-70.

83. Newburg, *supra* note 56, at 90-91.

84. Lowenfeld, *supra* note 15, at 270. *See* Herbert V. Morais, *The Globalization of Human Rights Law and the Role of International Financial Institutions in Promoting Human Rights*, 33 GEO. WASH. INT'L L. REV. 71, 86-87 (2000) [hereinafter Morais, *The Globalization of Human Rights Law*].

85. Goldstein, *supra* note 16, at 19. *See also* Newburg, *supra* note 56, at 93.

86. *See, e.g.*, Bradlow, *International Humanitarian Law*, *supra* note 57, at 709-10 (giving an overview of these criticisms); Goldstein, *supra* note 16, at 21 (presenting arguments that this expansion: promotes state delay in turning to the Fund until their economies are in extraordinarily deep, and more difficult to resolve, crises; makes the fund seem socially and culturally insensitive to interstate variance; and pushes the IMF beyond its staff's realm of expertise, risking poor advice and damage to the Fund's reputation); Feldstein, *supra* note 72, at 27-32 (arguing that the expansion of IMF conditionality illegitimately intrudes into nation-states' regulatory realms, violating the sovereignty of those states' governments, and promotes delays in seeking Fund assistance that only cause greater problems in the future).

tant point for this analysis is that the expansion could, and did, happen.[88]

As the focus on domestic policies developed, so too did a desire for international consistency and "best practices" regarding them. The Fund began to focus on initiatives, as IMF Managing Director Michael Camdessus explained in February 1998, to "strengthen the architecture of the international financial system," including "disseminat[ing] a set of 'best practices' in the banking area."[89] Within a short period of time, this IMF emphasis on banking codes was expanded to the

87. *See, e.g.*, Hockett, *supra* note 51, at 162-74, 191-92 (arguing that the modern IMF's role developed as a rational response to economic realities and is only in keeping with the initial Keynesian model for the institution; the Articles of Agreement contain the antecedents for globalization—advancing monetary cooperation and collaboration, expansion of trade, exchange stability, and market confidence, while limiting restrictions hampering growth and periods of exchange disequilibria—a framework within which these new practices are fitting); Stanley Fischer, *In Defense of the IMF*, FOREIGN AFF., Jul.-Aug. 1998, at 103 (responding directly to Feldstein, *supra* note 72, and defending the propriety of the Fund's East Asian policies). The theme of the IMF as a promoter of broad "globalization" goals has also been echoed by former IMF Managing Director Michael Camdessus. *See* Camdessus, The Role of the IMF, *supra* note 81 (discussing the history, and consistently broad economic goals, of the Fund).

88. From a legal texts perspective, the IMF Articles addressing conditionality are worded broadly enough to arguably permit this expansion. Hockett, *supra* note 51, at 184-89. Similarly, Article XXIX's grant of interpretive power to the Fund itself has meant that the internal desire to pursue these policies was enough to make them happen. *See* Articles of Agreement of the International Monetary Fund, *supra* note 27, art. XXIX, 29 U.S.T. at 2256-57 (giving the Executive Board or, in case of subsequent state protest, the Board of Governors power to decide questions of interpretation of the Articles); Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents, and Legitimacy*, 17 NW. J. INT'L L. & BUS. 681, 692-93 (1996-1997) (observing the application of this interpretation in the realm of conditionality specifically); Hockett, *supra* note 51, at 178-80. *See also* Morais, *The Globalization of Human Rights Law*, *supra* note 84, at 89-90 (observing that, despite some legal debate, the expansion has continued apace).

89. Camdessus, The Role of the IMF, *supra* note 81. *See also* Lawrence L.C. Lee, *The Basle Accords as Soft Law: Strengthening International Banking Supervision*, 39 VA. J. INT'L L. 1, 2-3, 28 (1998) (discussing the need for international banking standards, specifically for preventing a race to the bottom in risk management practices).

practices of financial institutions and regulatory systems in general.[90]

The IMF was not alone in this new focus on standards, nor in seeing a role for itself in the standards system; the states that dominate the IMF's management had begun to address standards and codes issues, including Fund-enforced implementation, several years earlier under the aegis of the G-7. The next section details the content, history, and key actors in the international standards movement.

II. Modern Standards and Codes Initiatives: Concentrated Control in a Decentralized Structure

A. *What Are Standards and Codes?*

Some commentators have labeled the work of the current standards and codes movement as "the construction of a new international financial architecture." This billing somewhat overstates the current elemental, non-integrated standards-setting practice,[91] but the optimistic tone is indicative of the importance being placed upon standards and codes by international institutions. Standards are usually seen as embodying minimum requirements in a given practice or regulatory area,[92] and they strive to promote international financial stability through uniform domestic legislative implementation.[93] In terms of content, standards run the gamut from specific to general provisions,[94] but they tend to be worded generally and

90. *See, e.g.*, Michael Camdessus, From the Asian Crisis Toward a New Global Architecture, Address to the Parliamentary Assembly of the Council of Europe (June 23, 1998), *at* http://www.imf.org/external/np/speeches/1998/062398.htm.

91. *See, e.g.*, Giovanoli, *supra* note 38, at 9 ("The expression sounds rather ambitious, when confronted with reality, as it suggests some sort of Taj Mahal or Versailles-type structure, whereas the reality of existing arrangements, despite undeniable accomplishments, looks rather like a series of construction sites scattered throughout the markets with little regard for town-planning considerations."). For a sense of the scope of some visions of the "architecture" project, see generally Joseph J. Norton, *A "New International Financial Architecture?"—Reflections on the Possible Law-Based Dimension*, 33 Int'l Law. 891 (1999).

92. *See* Michele Fratianni & John Pattison, *International Financial Architecture and International Financial Standards*, 579 Annals Am. Acad. Pol. & Soc. Sci. 183, 191 (2002).

93. Giovanoli, *supra* note 38, at 9-10.

94. *Id.* at 40.

are often accompanied by clarifying statements and operating procedures called "methodologies."[95] Their subject matter similarly varies. Some, like the *Basel Concordat*, establish ground rules for managing the interactions of overlapping domestic regulatory regimes, while others, like the *Basel Capital Accord*, lay down highly specific regulatory rules (e.g., regarding bank capital and risk policies).[96] With a few rare exceptions, standards are not formally legally binding, nor do they accompany binding treaties; they fall into the realm of stand-alone international "soft law" that cannot be enforced through legal mechanisms.[97] Individual states or firms apply and enforce the standards.

At least eight different standards-setting bodies have developed the eleven standards upon which the IMF has focused: the Fund itself, the Basel Committee on Banking Supervision (the "Basel Committee" or BCBS), the International Organization of Securities Commissions (IOSCO), the International Association of Insurance Supervisors (IAIS), the Committee on Payments and Settlements Systems (CPSS), the Organization for Economic Cooperation and Development (OECD), the International Accounting Standards Committee (IASC), and the International Federation of Accountants (IFAC).[98]

95. Fratianni & Pattison, *supra* note 92, at 191.

96. Giovanoli, *supra* note 38, at 39-40.

97. *Id.* at 35, 37. There are only a few exceptions to this statement, for example, the obligations contained in the IMF Articles of Agreement and some European laws. *Id.* at 38. The theoretical issues of the specific soft law nature of these standards is beyond the scope of this paper. For some commentary on the issue, see generally *id.* at 34-39; Michael Bothe, *Legal and Non-Legal Norms—A Meaningful Distinction in International Relations?*, 11 NETH. Y.B. INT'L L. 65, 79-85 (1980) (discussing the functions of soft law in international economic relations); and Joseph Gold, *Strengthening the Soft International Law of Exchange Arrangements*, 77 AM. J. INT'L L. 443 (1983).

98. *See* INT'L MONETARY FUND & THE WORLD BANK, ASSESSING IMPLEMENTATION OF STANDARDS: A REVIEW OF EXPERIENCE AND NEXT STEPS 5-6, 17 (2001), *available at* http://www.imf.org/external/np/pdr/sac/2001/eng/review.pdf [hereinafter IMF, ASSESSING IMPLEMENTATION OF STANDARDS]. Specifically, these standards are the IMF's own *Special Data Dissemination Standard* and *General Data Dissemination System* (SDDS & GDDS, respectively), *Code of Good Practices on Fiscal Transparency*, and *Code of Good Practices on Transparency in Monetary and Financial Policies*; the Basel Committee's *Core Principles for Effective Banking Supervision*; IOSCO's *Objectives and Principles for Securities Regulation*; the IAIS's *Insurance Supervisory Principles*; the CPSS's *Core Principles for Systemically Important Payments Systems*; the OECD's *Principles of Corporate*

For a concrete example of an international standard and a demonstration of its domestic importance, consider the Basel Capital Accord. The Accord fixes the minimum amount of capital that a bank must hold in its reserves; the riskier the bank's loan portfolio, the more capital the bank must set aside in case of loan failure.[99] Capital left in reserve is money that a bank is not loaning out to potential borrowers and from which it is not profiting—it is effectively a business expense. The Accord thus imposes a cost on banks with "risky" loans on their books. This makes it harder, for example, for U.S. citizens in low-income urban housing to get home loans, because loans for the multiple-family dwellings common in such areas are classified as "risky" by the Federal Reserve, so banks will either be reluctant to make such loans, lest they incur this additional capital reserve cost, or else they will make the loans but will have less total capital available for that use.[100]

To put it simply, despite their technicality and relative obscurity, financial standards and codes, by affecting the way banks, insurance companies, and other businesses operate, have a real impact on the everyday lives of people. Despite these domestic effects, however, standards and codes are being increasingly promulgated at an international level. The next part of this Note discusses the origin of the international movement.

Governance; the IASC's *International Accounting Standards*; the IFA's *International Standards on Auditing*; and insolvency and creditors' rights standards currently being developed by The United Nations Commission of International Trade Law (*Model Law on Cross Border Insolvency*), the IMF (*Orderly and Effective Insolvency Procedures—Key Issues*), and the International Federation of Insolvency Practitioners (principles for out-of-court workouts). *Id.* I say "at least" because, for the purposes of this analysis, I am leaving out the mix of organizations addressing insolvency and creditors' rights because, to date, no one uniform standard has been developed, and it is not immediately clear how much weight any of these documents is being given. I am also omitting the new OECD Financial Action Task Force anti-money laundering standards because their national security-based motivation distinguishes them from all the other financial standards endorsed by the IMF. By "standards-setting bodies" I mean international organizations actively engaged in formulating financial standards and codes.

99. Richard Falk & Andrew Strauss, *On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty*, 36 STAN. J. INT'L L. 191, 212 n.88 (2000).

100. *Id.* The U.S. is a party to the Basel Accord. *Id.*

B. *History*

The G-7 countries held their 1995 annual economic summit in Halifax, Nova Scotia. The agenda featured financial crises, including the recent currency crisis in Mexico, and how best to address them.[101] Thus began the Halifax I process.[102] Following the 1996 summit in Lyon, France, the G-7 formed a working group on the issue, comprised of finance ministers and central bankers from key industrial countries and emerging markets, as well as representatives from the IMF, World Bank, the Basel Committee, and IOSCO.[103] This working group issued a report for the 1997 G-7 summit in Denver, Colorado, that recommended improving supervision of "the key elements of a robust financial system" and foresaw a larger role for the IMF in the process.[104] The following July, the East Asian financial crisis erupted, and in its wake government officials supporting the Halifax I process realized they needed to take more concrete steps to create and implement international financial standards.[105]

In April 1998, U.S. Treasury Secretary Robert Rubin and U.S. Federal Reserve Bank Chairman Alan Greenspan convened and chaired a special meeting of the finance ministers and central bank governors of 22 nations, initiating the G-22, or Halifax II, process.[106] Once again working groups were formed, involving representatives from these states and the major international financial bodies, and again they recommended an expansion of international standards and codes with a heightened monitoring and compliance role for the IMF.[107] In response to these groups' concern about overlap

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101. William Murden, *Banking Supervision and Government Policy: The Role of Regulators in International Financial Reform*, 4 FORDHAM FIN. SEC. & TAX L.F. 35, 35 (1999).

102. *See id.* at 35-36.

103. *Id.* at 36.

104. *Id.*

105. *Id.* at 37-38.

106. *Id.* at 37. *See* Giovanoli, *supra* note 38, at 7.

107. Murden, *supra* note 101, at 37-39. The standards the working group focused upon included the Basel *Core Principles for Effective Banking Supervision*, the IOSCO *International Disclosure Standards for Cross-Border Offerings and Initial Listings by Foreign Issuers*, and the developing International Accounting Standards and OECD corporate governance standards. *Id.* at 38-39; *see also*, Morais, *The Quest for International Standards*, *supra* note 9, at 789-90.

between developing standards, in 1999 their members formed the Financial Stability Forum (FSF) to serve as an international standards coordinating body that compiles, prioritizes, and strategizes ways to implement the standards proposed by other organizations.[108] Relatedly, a new grouping of states, the G-20, was also formed in 1999 to replace the G-22 and integrate some developing states into the process.[109]

C. *Modern Standards-Creating Bodies*

The bodies that set modern-day standards vary greatly in type: Some, like the IMF, are international organizations; others are groups of financial supervisors, regulators or industry heads; still others, the various "G" groups, are affiliations of governments whose officials meet occasionally to discuss standards issues.[110] The practice of standards setting, however, is beginning to settle into a routine: Standards setting groups comprised of national representatives and experts draft the codes, and the IMF serves as the multilateral organization to monitor and pressure countries to comply with them.[111]

Part IV evaluates the information about these bodies in light of the claim that people should have a say in the laws that govern their behavior and thus that states, as representatives and agents of their people, should have input into any internationally-created regulations with which they are forced to comply. Given the multiplicity of actors discussed, however, three patterns present in these standards-setting bodies deserve mention at the beginning, in order to help frame the discussion.

First, the G-7 states are present in all these standard-setting organizations, were instrumental in the creation of many of them, and are central to the agendas of several of them. This holds true at both the standards-creation and implementation levels. Second, while the standards and codes process is highly decentralized, the only overall management institution, the FSF, has a highly limited membership. Third, beyond G-7 presence, there is a great deal of variance in the composition and processes of the various standards-and-codes generating

108. Giovanoli, *supra* note 38, at 7-8, 25-27.
109. *Id.* at 8, 20.
110. *Id.* at 11.
111. *Id.* at 33.

institutions. Consideration of the system's overall openness to developing state access and influence, therefore, must take account of these wrinkles.

Before diving into the details, I feel I should offer the reader a word of warning: Despite attempts at simplification through summary and organization, the following discussion is lengthy and complicated. Pertinent facts regarding membership and structure are mentioned during the argument in Part IV, so you can skip this discussion if you simply cannot stand it. But this detailed presentation is chosen consciously, for two reasons. First, as noted above, an accurate assessment of the system's democratic openness is impossible absent consideration of its complicated nature. Second, the mind-numbing complexity of the system itself presents a challenge to democratic accountability, and thus that complexity should be laid bare. With these goals and the aforementioned patterns in mind, I turn to the facts.

1. *International Organizations*

The IMF has already been discussed: Its role in standards and codes setting is becoming increasingly central as a standards-creator in its own right (e.g., establishing standards on data dissemination and financial transparency), as a participant in other standards-setting bodies, and as the principal monitoring and implementation body for standards compliance.[112] Its two principle standards, the *General Data Dissemination System* and the *Special Data Dissemination Standard*, were created by the Fund's Interim Committee (now named the International Monetary and Financial Committee, or IMFC).[113] The IMFC is composed of 24 Fund Governors, exactly mirroring the Executive Board's seat allocation, and it permits some international institutions to participate as observers.[114]

112. *See, e.g.*, *id.* at 14-15.

113. Int'l Monetary Fund, *What Is the General Data Dissemination System (GDSS)?*, *at* http://dsbb.imf.org/Applications/web/gdds/gddswhatgdds/ (at "A brief history") (last visited May 1, 2004).

114. The specific states with Governors on the IMFC are Algeria, Angola, Argentina, Australia, Belgium, Brazil, Canada, China, France, Gabon, Germany, Iceland, India, Italy, Japan, the Netherlands, Russia, Saudia Arabia, Switzerland, Thailand, the United Arab Emirates, the United Kingdom, the United States, and Venezuela. Int'l Monetary Fund, *A Guide to Committees, Groups, and Clubs (2003)*, *at* http://www.imf.org/external/np/exr/facts/

The Bank for International Settlement (BIS) is a bank in Basel, Switzerland that assists with transactions between its fifty central bank members, though it is now better known as a forum for central bank cooperation.[115] Its annual meeting gathers representatives from over 100 central banks.[116] Most importantly for standards and codes initiatives, it plays physical host to several standards-setting bodies, including the CPSS, the G-10, and the Basel Committee.[117]

The Organisation for Economic Cooperation and Development (OECD) also participates in some standards-setting tasks, most notably regarding corporate governance.[118] Its membership is comprised of 30 wealthy countries from Europe, North America, and Asia.[119] Its governance standards were generated principally through input from those states via several OECD committees, though non-member states, the IMF and World Bank, and other private actors also gave input through consultations and a notice-and-comment-type period after draft proposals were posted on the OECD website.[120]

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groups.htm. These Governors are typically ministers of finance or central bank governors, and at the time of this writing the Chairman of the Committee was Gordon Brown, Chancellor of the Exchequer of the United Kingdom. *Id.*

115. Giovanoli, *supra* note 38, at 16; BANK FOR INT'L SETTLEMENTS, PROFILE 1 (2002), *available at* http://www.bis.org/about/profil2002.pdf [hereinafter BIS PROFILE]. BIS members include some countries traditionally seen as "developing" states. *See id.* (for a list of BIS member state central banks).

116. BIS PROFILE, *supra* note 115, at 2.

117. *Id.* at 3-4. These organizations are detailed *infra*. *See infra* discussion accompanying notes 153-154 (CPSS), 125-128 (G-10), 133-143 (Basel Committee).

118. Giovanoli, *supra* note 38, at 17. The OECD also promotes conventions against bribery and corruption, and is home to the Financial Action Task Force (FATF), an international task force on money laundering. *Id.*

119. These states are Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. OECD, RATIFICATION OF THE CONVENTION ON THE OECD: OECD MEMBER COUNTRIES, *at* http://www. oecd.org/document/58/0,2340,en_2649_201185_1889402_1_1_1_1,00.html.

120. *See* OECD, OECD PRINCIPLES OF CORPORATE GOVERNANCE 1 (2004), *available at* http://www.oecd.org/dataoecd/32/18/31557724.pdf. The term "notice and comment" refers to a system of informal rulemaking in the United States system of administrative law in which agencies publish pro-

2. *Government Groupings*

Industrialized state government representatives meet in three different groupings. These groupings do not promulgate standards themselves, but they provide another forum for cooperation and discussion of standards issues and, as discussed below, their member states dominate the international organizations involved in standards setting and promotion. The Group of 7 (G-7) was formed at the Rambouillet Conference in 1975 and is comprised of the seven countries with the world's largest economies: the United States, Japan, Germany, France, the United Kingdom, Italy, and Canada.[121] Representatives of these states meet several times a year: Their heads of state meet once; their finance ministers and central bank governors (in combination), three times; and those ministers' deputies, ten times (plus twice more at FSF meetings).[122] As detailed above, the modern standards and codes push began as a G-7 initiative, the G-7 has created several standards and codes initiatives,[123] and it is often viewed as a quasi-global-governance group.[124]

The Group of Ten (G-10) is comprised of the world's wealthiest states as of 1962, all of which committed themselves to General Agreements to Borrow with the IMF.[125] In fact, the G-10 is really the G-11: The G-7 countries plus the Netherlands, Belgium, Sweden and, as of 1984, Switzerland.[126] They hold many meetings every year: the finance ministers and central bank governors (combined) meet twice, while their deputies meet four times and the central bank governors (alone) meet six times.[127] The G-10 has its own secretariat—provided jointly by the BIS, IMF, and OECD—and two major interna-

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posed regulations, receive public comments on them for a fixed period of time, and then consider those comments when promulgating the final rule. *See* BLACK'S LAW DICTIONARY 1332 (7th ed. 1999) ("rulemaking").

121. Giovanoli, *supra* note 38, at 18-19.

122. *Id.* at 18, 19 fig.3.

123. These include the FATF, now administered by the OECD, G-22, G-20 and FSF. *Id.* at 19-20.

124. *Id.*

125. *Id.* at 18-19. General Agreements to Borrow are one mechanism the IMF uses to back up its own reserves in cases of extreme financial crisis. *See What Is the IMF?*, *supra* note 6 (at "Where Does the IMF Get Its Money?").

126. Giovanoli, *supra* note 38, at 18-19.

127. *Id.* at 19, 19 fig.3.

tional standards-setting bodies report to the G-10 central bank governors: the BCBS and the CPSS.[128]

The G-20 is a successor to the G-22 and is comprised of the G-7, twelve "systemically significant emerging market economies," and representatives from the EU, IMF, and World Bank.[129] The G-20 is "designed to encourage the informal exchange of views and the formation of consensus on international economic and financial issues" and is explicitly designed to permit greater participation from developing states.[130] Structurally, the G-20 is an annual conference with no permanent Secretariat; instead, each year's chairing country establishes a temporary Secretariat to coordinate that year's meeting and the Group's work.[131]

3. *Financial-Sector-Specific Bodies*

In addition to these intergovernmental organizations and groupings of governments, there are a number of financial-sector-specific bodies that develop standards and codes. Many of them were created by, or report to, either the G-7 or the G-10.[132] Prominent among them is the Basel Committee, or BCBS, which was formed in 1974.[133]

Composed of the central bank governors of the G-10 states,[134] the BCBS has published three sets of standards for international banking regulation. The first set of standards,

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128. *Id.* These committees are run by G-10 members, though occasionally they will perform some outside consultation with other states' central banks on specific questions. BIS PROFILE, *supra* note 115, at 3-4.

129. Giovanoli, *supra* note 38, at 20. The additional member countries are Argentina, Australia, Brazil, China, India, Indonesia, Mexico, Russia, Saudi Arabia, South Africa, Korea, and Turkey. G-20 Mexico, *G-20 Background Information, at* http://www.hacienda.gob.mx/g20-2003/background.html (last visited Feb. 4, 2003) [hereinafter G-20 Mexico].

130. G-20 Mexico, *supra* note 129.

131. *Id.* The three chairs to date have been from Canada (1999-2001), India (2002), and Mexico (2003). *Id.*

132. Giovanoli, *supra* note 38, at 20-21.

133. *Id.* at 21.

134. Lee, *supra* note 89, at 4-5. Authorities with formal responsibility for "the prudential supervision of banking business," but that are not central banks, are also members of the Committee. The Basel Comm. on Banking Supervision, *The Basel Comm. on Banking Supervision, at* http://www.bis.org/bcbs/aboutbcbs.htm (last visited May 1, 2004) [hereinafter *The Basel Comm. on Banking Supervision*].

the Basel Concordat (now renamed the Principles for the Supervision of Banks' Foreign Establishments) was issued in 1975 and revised in 1983; it provides "jurisdiction rules" dividing up international bank supervision among states.[135]

The second, and perhaps most important, is the Basel Capital Accord, a very specific set of regulations governing capital adequacy requirements, risk-management supervision, and cross-border regulator information exchange.[136] Designed to lend stability to the international banking system, the Accord regulations have become standard for international banks. The Basel Committee lobbies jurisdictions that have not adopted the standards to do so, and market pressures often lead banks in those countries to comply anyway.[137] Third, and finally, are the Core Principles for Effective Banking Supervision, which provide "a comprehensive blueprint for an effective [banking] supervisory system."[138]

Although the Basel Committee's formal membership is limited to the G-10, it began consulting with non-G-10 authorities while generating the Core Principles for Effective Banking Supervision. It has subsequently continued this consultation process with a range of banking supervision authorities.[139] The most recent iteration of this model can be seen in the current process of revising the Basel Capital Accord, which involved releasing a proposed draft of the Accord followed by a period for public comment.[140] The bulk of this outside input has come from financial firms and organizations in industrialized states.[141]

In addition to the BCBS, there are five other organizations whose standards have been included in the IMF's standards initiative.[142] The International Organization of Securi-

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135. Giovanoli, *supra* note 38, at 21.

136. Lee, *supra* note 89, at 5.

137. *See id.* at 5-6.

138. *Id.*

139. *The Basel Comm. on Banking Supervision*, *supra* note 134.

140. *See* Press Release, The Basel Committee on Banking Supervision, Basel Committee Reaches Agreement on New Capital Accord Issues (Jul. 10, 2002), *at* http://www.bis.org/publ/bcbsca.htm.

141. *See* The Basel Comm. on Banking Supervision, *The New Basel Capital Accord: Comments Received on the Second Consultative Package* (Aug. 21, 2002), *at* http://www.bis.org/bcbs/cacomments.htm.

142. *See* Giovanoli, *supra* note 38, at 23-24. For discussion of the IMF's standards initiative, see *supra* note 98 and accompanying text.

ties Commissions (IOSCO) is comprised of 105 national securities regulators and promotes securities regulation standards.[143] IOSCO is managed by the Presidents' Committee, which meets annually and is comprised of representatives from every member agency, and by the Executive Committee, which handles the operations of the Organization.[144] The Executive Committee has 19 members: Two come from each of four Regional Standing Committees (Africa/Middle East, Asia-Pacific, European, and Interamerican), nine are elected at random by the Presidents' Committee, and the remaining two seats are filled by the Chairmen of the Technical and Emerging Markets Committees.[145] Every member of IOSCO has one vote, and the Organization also permits some groups to act as consultative observers under an "associate" or "affiliate" membership arrangement.[146]

IOSCO's standards are generated by its two specialized Working Committees: the Technical Committee, which addresses issues involving developed markets, and the Emerging Markets Committee, which focuses on the challenges facing developing securities markets.[147] While details about this process are not clear from readily available sources, the membership of the two committees is both broad and numerous, so, at least in theory, the perspectives of both developed and developing states are represented in the final standards.[148]

143. Int'l Org. of Sec. Comm'n, *General Information on IOSCO (2004)*, *at* http://www.iosco.org/about/; Int'l Org. of Sec. Comm'n, *Ordinary Members of IOSCO (2003)* (listing member names and contact information), *at* http://www.iosco.org/lists/display_members.cfm?memid=1 (last visited May 1, 2004).

144. Int'l Org. of Sec. Comm'n, *Structure of the Organization*, *at* http://www.iosco.org/about/about.cfm?whereami=page2 (last visited May 1, 2004).

145. *Id.*

146. Int'l Org. of Sec. Comm'n, *Categories for Members*, *at* http://www.iosco.org/about/about.cfm?whereami=page5 (last visited May 1, 2004). "Ordinary" (i.e., full) membership is restricted to national securities regulators, "associate" membership is designed for other securities regulation bodies, and "affiliate" membership is provided for international bodies "with an appropriate interest in securities regulation." Int'l Org. of Sec. Comm'n, *Applications for Membership*, *at* http://www.iosco.org/about/about.cfm?whereami=page6 (last visited May 1, 2004).

147. Int'l Org. of Sec. Comm'n, *IOSCO Working Committees*, *at* http://www.iosco.org/about/about.cfm?whereami=page3 (last visited May 1, 2004).

148. As of this writing the Technical Committee is comprised of two members from the United States and Canada, and one member from Australia,

The International Association of Insurance Supervisors (IAIS) brings together insurance regulators from 100 countries and promotes the development of insurance standards, mutual assistance, and information exchange.[149] The IAIS is headed by an Executive Committee whose members represent different geographic regions.[150] Its standards are developed by a Technical Committee comprised of twelve subcommittees, working groups, and task forces.[151] Unfortunately, the IAIS does not readily provide information regarding its standards-drafting process or its Committee membership. Its bylaws, however, indicate that while any member organization can be on the Committee, no jurisdiction is permitted to have more than one Committee member.[152]

The Committee on Payment and Settlement Systems (CPSS) is comprised of G-10 central bank representatives and promotes standards related to these systems. The Core Principles were developed by a Task Force on Payment System Principles and Practices, which was comprised of representatives from the G-10 states, eleven other states at various stages of development, and representatives of the IMF and World

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France, Germany, China, Mexico, Italy, Japan, the Netherlands, Spain, Switzerland, and the United Kingdom. Int'l Org. of Sec. Comm'n, *Members of the Technical Committee*, *at* http://www.iosco.org/lists/display_committees.cfm?cmtid=3 (last visited May 1, 2004). The Emerging Markets Committee is comprised of members from 74 developing states. Int'l Org. of Sec. Comm'n, *Members of the Emerging Markets Committee*, *at* http://www.iosco.org/lists/display_committees. cfm?cmtid=8 (last visited May 1, 2004).

149. *See* Int'l Assoc. of Ins. Supervisors, *About IAIS*, *at* http://www.iaisweb.org/132_ENU_HTML.asp (last visited May 1, 2004) [hereinafter *About IAIS*]. *See also* Int'l Assoc. of Ins. Supervisors, *Members* (posting a selective list of members who have provided links to their websites), *at* http://www.iaisweb.org/132_176_ENU_HTML.asp (last visited May 1, 2004); Int'l Assoc. of Ins. Supervisors, *Observers* (posting a selected list of observers—both international organizations and national entities—who have provided links to their websites), *at* http://www.iaisweb.org/132_177_ENU_HTML.asp (last visited May 1, 2004).

150. *About IAIS*, *supra* note 149.

151. *See* INT'L ASSOC. OF INS. SUPERVISORS, IAIS ORGANISATIONAL CHART (2003), *available at* http://www.iaisweb.org/173orgchart.pdf.

152. INT'L ASSOC. OF INS. SUPERVISORS, INTERNATIONAL ASSOCIATION OF INSURANCE SUPERVISORS BY-LAWS pt. 3 ¶ 22(c) (1999), *available at* http://www.iaisweb.org/bylaws.pdf.

Bank.[153] The Task Force consulted with groups of central banks on all continents, published a draft of the Core Principles for comment from the "wider financial community," and incorporated some of those comments (including the generation of a "second part" discussing interpretation and implementation of the Principles) into the final document.[154]

The U.S.-based International Federation of Accountants (IFAC) is comprised of 157 national professional accountancy organizations (called "Member Bodies") from 118 countries, many of which are developing states.[155] The IFAC is governed by the IFAC Council, comprised of one representative from each Member Body, that holds one annual meeting and a Board, comprised of 21 representatives from 17 countries, that meets three times annually.[156] The Board is tasked with setting policy and overseeing Federation activities, including accepting and approving the work of the technical committees.[157]

Those technical committees include the International Auditing and Assurance Standards Board (IAASB). It is the IAASB that generates the IFAC's auditing standards after "tak[ing] cognizance" of national standards on auditing and related services and the differences between them.[158] Before issuing its standards, the IAASB holds open meetings, posts drafts on its website until final decisions are made, and solicits input from its member bodies (and their accountant mem-

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153. Tommaso Padoa-Schioppa, *Foreword* to COMM. ON PAYMENT AND SETTLEMENT SYS., NO. 43, CORE PRINCIPLES FOR SYSTEMICALLY IMPORTANT PAYMENT SYSTEMS (2001), *available at* http://www.bis.org/publ/cpss43.pdf.

154. *Id.*

155. Int'l Fed'n of Accountants, *About IFAC (2004)*, *at* http://www.ifac.org/About/. For a detailed list of its member bodies, *see* Int'l Fed'n of Accountants, *Member Bodies (2004)*, *at* http://www.ifac.org/About/Member Bodies.tmpl.

156. Int'l Fed'n of Accountants, *Structure & Governance (2004)*, *at* http://www.ifac.org/About/Structure.php [hereinafter *IFAC Structure*]. The organizations currently represented on the IFAC Board are overwhelmingly from industrialized states; they are: Argentina, Australia, Belgium, Brazil, Canada, China, France, Germany, India, Japan, Kenya, the Netherlands, Singapore, South Africa, Thailand, the United Kingdom, and the United States. Int'l Fed'n of Accountants, 2004 IFAC BOARD MEMBERS, *at* http://www.ifac.org/About/BoardMembers.php (last visited October 7, 2004).

157. *IFAC Structure*, *supra* note 156.

158. Int'l Fed'n of Accountants, *Standards & Guidance (2003)*, *at* http://www. ifac.org/Guidance/.

bers), the general public, and a Consultative Advisory Group comprised of international financial organizations.[159]

The London-based International Accounting Standards Board (IASB)[160] is a wholly private organization that works to promote standard global accounting rules (in loose cooperation with IOSCO and the IFAC).[161] The nineteen Trustees of the IASC Foundation hold ultimate authority in the IASB; they appoint the members of the IASB and its committees, including the members of the Standards Advisory Council (SAC) who draft the accounting standards.[162] According to the IASC Foundation Constitution, these Trustees are selected partially by the IFAC and partially through consultation with other account preparers, users, and academics. Six must be from North America, six from Europe, four from the Asia/Pacific region, and three from any area of the globe, chosen in an effort to create geographical balance.[163] The IASB, in turn, is

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159. Int'l Fed'n of Accountants, *International Auditing and Assurance Standards Board (2003)*, *at* http://www.ifac.org/IAASB/; Int'l Fed'n of Accountants, *International Auditing and Assurance Standards Board: IAASB Consultative Advisory Group (2003)* (listing participating organizations), *at* http://www.ifac.org/IAASB/CAG.php.

160. Formerly the International Accounting Standards Committee (IASC). *See* Int'l Accounting Standards Bd., *History* (discussing the IASB's replacement of the IASC on April 1, 2001), *at* http://www.iasb.org/about/history.asp.

161. Int'l Accounting Standards Bd., *Mission Statement*, *at* http://www.iasb.org/about/index.asp (last visited May 1, 2004); Int'l Accounting Standards Bd., *Frequently Asked Questions: What is IOSCO, and What Role Does it Have in IASB's Activities? (2004)*, *at* http://www.iasb.org/about/faq.asp?showPageContent=no&xml=18_17_24_17122003.htm.

162. Int'l Accounting Standards Bd., *IASC Foundation*, *at* http://www. iasb.org/about/iascf.asp (last visited May 1, 2004). A diagram of the IASB's structure is available at Int'l Accounting Standards Bd., *Structure*, *at* http://www.iasb.org/about/structure.asp (last visited May 1, 2004). This odd arrangement comes about because the IASC Foundation, a not-for-profit corporation incorporated in Delaware, U.S.A., is the parent entity of the IASB. Int'l Accounting Standards Bd., *General Information*, *at* http://www.iasb.org/about/general.asp (last visited May 1, 2004) [hereinafter *IASB General Information*].

163. INT'L ACCOUNTING STANDARDS COMM. FOUND., INTERNATIONAL ACCOUNTING STANDARDS COMMITTEE FOUNDATION CONSTITUTION pt. A, ¶¶ 6-8 (2002), *available at* http://www.iasb.org/uploaded_files/documents/8_11_iascf-constitution.pdf.

composed of private experts: five auditors, three preparers, three users, one academic, and two "others."[164]

Much of the IASB's standard-setting work, as noted above, is performed by the forty-five member SAC.[165] The SAC members are appointed in regional groups, with the bulk of the seats held by members from the European Union, East Asia, and North America.[166] The IASB's standard-setting project has been ongoing since the organization's founding and published its first report within its first year.[167] Every proposed standards component is prepared in an "Exposure Draft," submitted for comments, and then revised based upon the feedback.[168] In addition to this basic notice-and-comment model, the IASB follows detailed procedures including, *inter alia*, meetings generally open to the public with agendas available in advance; the possible use of public hearings and field tests; coordination with the "due process" requirements of national standards setters; equal voting power for all members; and the publication of a "Basis for Conclusions" document to accompany every published standard to explain the reasoning behind it.[169]

4. *The Financial Stability Forum*

Lastly is the important Financial Stability Forum (FSF), which coordinates the activities of this alphabet soup of groups and exchanges information from them with national regula-

164. *Id.* pt. B, ¶ 22.

165. Int'l Accounting Standards Bd, *Standards Advisory Council*, *at* http://www.iasb.org/about/sac.asp (last visited May 1, 2004).

166. *See* Int'l Accounting Standards Bd., *Standards Advisory Council Members* (providing a list of all members by region), *at* http://www.iasb.org/about/sac_members.asp (last visited Sept. 1, 2003).

167. Int'l Accounting Standards Bd., *History*, *at* http://www.iasb.org/about/history.asp (last visited May 1, 2004).

168. Int'l Accounting Standards Bd., *IASB's Operating Procedures*, *at* http://www.iasb.org/about/due_process.asp (last visited May 1, 2004) [hereinafter *IASB Due Process*].

169. *Id.* The IASB also contains the International Financial Reporting Interpretations Committee (IFRIC) that provides consensus-based authoritative interpretations of the accounting standards. *See IASB General Information*, *supra* note 162; Int'l Accounting Standards Bd., *International Financial Reporting Interpretations Committee*, *at* http://www.iasb.org/about/ifric.asp (last visited May 1, 2004).

tors.[170] A G-7 creation, the FSF is composed of representatives from the BIS, BCBS, IOSCO, IAIS, CPSS, and all of the G-7 countries plus Australia, Hong Kong, the Netherlands, and Singapore.[171] The majority of the seats on its board (26 out of 43) are filled by representatives from these states' national financial authorities.[172]

The most important task currently undertaken by the FSF is publishing the Compendium of Standards, which whittles down the over sixty-four sets of standards[173] produced by various bodies to forty-three that are "internationally accepted as relevant to sound, stable and properly functioning financial systems."[174] It highlights twelve as "key standards" which the FSF has designated as "deserving of priority implementation," taking account of country circumstances.[175] Also of importance is the FSF's Task Force on the Implementation of Standards, which works to identify key standards (the twelve highlighted in the Compendium) and strategize ways to implement them.[176] To date, the Task Force has published three influential reports on implementation;[177] the most recent report, published in 2001, focused heavily on the role of the IMF

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170. Giovanoli, *supra* note 38, at 25, 22 fig.4.

171. *Id.* at 25-26.

172. *Id.* at 26 fig.5. For a more detailed list of participants, *see* Financial Stability Forum, *Who We Are*, *at* http://www.fsforum.org/about/who_we_are .html (last updated April 5, 2004).

173. *See* Fratianni & Pattison, *supra* note 92, at 190-91 (describing the wide scope of international financial standards).

174. Giovanoli, *supra* note 38, at 27 & n.57. The FSF is considering adding an additional twenty-three sets of standards, however, bringing any screening function of general compendium inclusion into question. *Id.* at 14 n.25.

175. Fin. Stability Forum, *About the Compendium of Standards*, *at* http://www.fsforum.org/compendium/about.html. As a sign of the influence of the FSF, this list is identical to the one used by the IMF. *Compare* Fin. Stability Forum, *12 Key Standards for Sound Financial Systems (2004)*, *at* http://www.fsforum.org/compendium/key_standards_for_sound_financial_system.html, *with* IMF, ASSESSING IMPLEMENTATION OF STANDARDS, *supra* note 98, at 17. The additional standard used by the FSF is The Forty Recommendations of the Financial Action Task Force/8 Special Recommendations Against Terrorist Financing, which the IMF is considering whether to implement into its ROSCs. Int'l Monetary Fund, *The IMF and the Fight Against Money Laundering and the Financing of Terrorism (2003)*, *at* http://www.imf.org/external/np/exr/facts/aml.htm.

176. Giovanoli, *supra* note 38, at 27.

177. *See* Fin. Stability Forum, *Publications*, *at* http://www.fsforum.org/publications/publication_22_10.html (last visited May 1, 2004).

through its various standards and codes initiatives, and envisions a continued heavy implementation role for the Fund as one of its "next steps."[178]

5. *Summary*

The democracy-deficit present in these organizations is discussed in greater detail below, but two observations deserve (re-) mention here. The first observation is the most obvious: This system of standards- and codes-setting is extraordinarily complex and rather confusing. I half-expect that your eyes, diligent reader, glazed over somewhere in the middle of the section; indeed, the creation of the FSF as an organizing and simplifying agency shows that the governments involved experienced the very same reaction. Such complexity, however, inhibits the understanding of affected populations and muddies lines of political accountability. Second, as the section's three introductory themes suggest, an elite group runs these organizations. It is this membership, and its lack of broad representation, that will be returned to below.

Given that domestic implementation is necessary to give force to the standards, the critical issue for those promoting them is how to persuade states to adopt them with little or no modification, lest the "standards" become no longer standard. The discussion therefore turns to a consideration of these implementation mechanisms to see whether developing states can avoid the democracy-deficit problem altogether by opting out of the standards and codes process.

III. Implementation: No Opting Out for Developing States

As noted above, the governments' standing behind the standards-setting bodies have made the IMF the principal implementation mechanism for standards and codes compliance. The Fund has three tools at its disposal to motivate compliance and punish non-compliance: conditionality; the inclusion of standards and codes compliance in its surveillance and Article IV consultations; and the financial market pressure for

178. Fin. Stability Forum, Final Report of the Follow-Up Group on Incentives to Foster Implementation of Standards ¶¶ 51-71 (2001), *available at* http://www.fsforum.org/publications/Final_Incentives01.pdf.

standards adoption and compliance generated by the publication of compliance data.

The result of this combined leverage is that states that even remotely anticipate borrowing funds from the IMF in the future have little choice but to comply with international standards and codes. As compliance with these standards becomes increasingly mandatory, the democracy-based case for increased developing state input becomes more compelling.[179] The argument begins with individual consideration of the IMF's three enforcement mechanisms.

A. *Conditionality*

The most direct leverage the IMF has over any member state consists of the conditions it imposes when that state borrows Fund resources. Under the Revised Guidelines on Conditionality ("Conditionality Guidelines"), which govern the IMF's conditionality practices,[180] "[c]onditions will normally consist of macroeconomic variables and structural measures that are within the Fund's core areas of responsibility."[181] These "core areas" are defined as "macroeconomic stabilization; monetary, fiscal, and exchange rate policies, including the underlying institutional arrangements and closely related structural measures; and financial system issues related to the functioning of both domestic and international financial markets."[182]

The imposition of standards and codes seems, on its face, to qualify easily under the "underlying institutional arrangements" and "financial system issues" sections, and thus are well within the scope of IMF conditionality. The fact that these

179. See *infra* Part IV for a development of this democracy argument. For a broader parallel of this argument, see Anne Orford, *Locating the International: Military and Monetary Interventions after the Cold War*, 38 HARV. INT'L L.J. 443, 466-67 (1997).

180. *See* Press Release, No. 02/43, IMF Executive Board Approves New Conditionality Guidelines (Sept. 26, 2002) (discussing board approval of the guidelines and emphasizing their role in guiding IMF conditionality), *at* http://www.imf.org/external/np/sec/pr/2002/pr0243.htm.

181. LEGAL AND POL'Y DEV. AND REVIEW DEP'T, INT'L MONETARY FUND, GUIDELINES ON CONDITIONALITY 2 (2002), *available at* http://www.imf.org/External/np/pdr/cond/2002/eng/guid/092302.pdf [hereinafter CONDITIONALITY GUIDELINES].

182. *Id.* at 3.

standards come from sources other than the IMF could theoretically pose a problem because the Fund generally prohibits cross-conditionality with the objectives of other organizations; however, as IMF General Counsel Francois Gianviti has stated, "If the Fund concludes . . . that certain reforms need to be made to give effect to its own purposes, the fact that these actions will give effect to other treaties . . . cannot bar the Fund from making them a condition of its financial assistance."[183]

The IMF thus has the ability to include standards and codes compliance in its loan packages. An empirical study of its practices reveals that it makes these inclusions. In addition to the evidence from the East Asian and Russian loan packages discussed above, an internal search of country Letters of Intent contained on the IMF's website[184] reveals that the Fund includes almost all of its officially supported standards and codes in loan arrangements with states. Specifically, at a minimum, compliance with the IMF's Special Data Dissemination Standard was a condition of ten loan arrangements;[185] compliance

183. François Gianviti, *The Reform of the International Monetary Fund (Conditionality and Surveillance)*, 34 INT'L LAW. 107, 115 (2000).

184. The data discussed *infra* were gathered using the search function contained within the "Country Policy's Intention Documents" section of the "Publications" division of the IMF's website, http://www.imf.org/external/np/loi/mempub.asp. I ran exact phrase searches for the titles of the eleven standards the IMF uses in its ROSCs and the names and acronyms of the organizations, other than the IMF itself, that promulgate those standards. The resulting documents were then reviewed to ensure that the standards were being mentioned in the context of a loan arrangement conditionality regime. This methodology is not perfectly thorough; it fails to capture loan arrangements in which the standards and codes are included, but referred to in non-specific terms, for example a statement that a state "will continue our review of national accounting practices in an attempt to bring them into conformity with international standards." It does, however, provide a simple way of examining whether standards are present in conditionality regimes.

185. Letter of Intent, Memorandum of Economic Policies & Technical Memorandum of Understanding, from Pedro Sampaio Malan, Minister of Finance, Brazil, and Armínio Fraga Neto, President, Central Bank of Brazil, to Horst Köhler, Managing Director, International Monetary Fund (Nov. 3, 2000), *available at* http://www.imf.org/external/np/loi/2000/bra/02/index.htm; Letter of Intent & Memorandum of Economic Policies from Milan Velchev, Minister of Finance, Bulgaria, and Svetoslav Gavriiski, Governor, Bulgarian National Bank, to Horst Köhler, Managing Director, International Monetary Fund ¶ 29 (Feb. 12, 2002), *available at* http://www.imf.org/external/np/loi/2002/bgr/01/index.htm; Letter of Intent & Technical Memorandum of Understanding, from the Government of Columbia, to Horst

with the IMF's General Data Dissemination Standard was a condition of five loan arrangements;[186] compliance with the

Köhler, Managing Director, International Monetary Fund ¶ 30 (Dec. 20, 2001), *available at* http://www.imf.org/external/np/loi/2001/col/02/index.htm; Letter of Intent, Memorandum of Economic Policies & Technical Memorandum of Understanding, from Jore Guzmán, Minister of Finance and Public Credit, Ecuador, and Modesto Correa, President, Board of Central Bank of Ecuador, to Stanley Fisher, Acting Managing Director, International Monetary Fund ¶ 54 (Apr. 4, 2000), *available at* http://www.imf.org/external/np/loi/2000/ecu/01/index.htm; Letter of Intent and Memorandum of Economic Policies, from Mart Laar, Prime Minister, Estonia, and Vahur Kraft, Governor, Bank of Estonia, to Michael Camdessus, Managing Director, International Monetary Fund ¶ 10 (Feb. 14, 2000), *available at* http://www.imf.org/external/NP/LOI/2000/est/01/INDEX.HTM [hereinafter Estonia Letter of Intent]; Letter of Intent & Memorandum of Economic and Financial Policies, from Mar'ie Muhammed, Minister of Finance, Indonesia, and J. Soedradjad Dijwandono, Governor, Bank of Indonesia, to Michael Camdessus, Managing Director, International Monetary Fund ¶ 48 (Oct. 31, 1997), *available at* http://www.imf.org/external/np/loi/103197.HTM; Letter of Intent, Memorandum of Economic and Financial Policies, and Technical Memorandum of Understanding, from Michel Marto, Minister of Finance, Jordan, and Umayya Toukan, Governor, Central Bank of Jordan, to Horst Köhler, Managing Director, International Monetary Fund ¶ 25 (June 19, 2003), *available at* http://www.imf.org/external/np/loi/2003/jor/01/index.htm; Letter of Intent, Memorandum of Economic and Financial Policies, and Technical Memorandum of Understanding, from Shaukat Aziz, Minister of Finance and Economic Affairs, Pakistan, and Ishrat Husain, Governor, State Bank of Pakistan, to Horst Köhler, Managing Director, International Monetary Fund ¶ 24 (Memorandum of Economic and Financial Policies) (May 29, 2003), *available at* http://www.imf.org/External/NP/LOI/2003/pak/02/index.htm; Statement of the Government of the Russian Federation and Central Bank of Russia on Economic Policy ¶ 56 (July 13, 1999), *available at* http://www.imf.org/external/NP/LOI/1999/071399.HTM; Letter of Intent from Victor Youshchenko, Prime Minister, National Bank of Ukraine, and Volodymyr Stelmakh, Chairman, National bank of Ukraine, to Horst Köhler, Managing Director, International Monetary Fund ¶ 27 (Dec. 5, 2001), *available at* http://www.imf.org/external/NP/LOI/2000/ukr/01/index.htm.

186. Letter of Intent & Memorandum of Economic Policies, from Herbert Müller, Minister of Finance, Bolivia, and Juan Antonio Morales, President, National Bank of Bolivia, to Michael Camdessus, Managing Director, International Monetary ¶ 27 (Dec. 20, 1999), *available at* http://www.imf.org/external/np/loi/1999/122099.htm; Letter of Intent & Memorandum of Economic and Financial Policies from Omar Davies, Minister of Finance and Planning, Government of Jamaica, and Derick Latibeaudiere, Governor, Bank of Jamaica, to Horst Köhler, Managing Director, International Monetary Fund ¶ 29 (Memorandum) (July 19, 2000), *available at* http://www.imf.org/external/NP/LOI/2000/jam/01/INDEX.HTM [hereinafter Jamaica

IMF's Code of Good Practices on Fiscal Transparency was a condition of three loan arrangements;[187] compliance with the IMF's Code of Good Practices on Transparency in Monetary and Financial Policies was a condition of one loan arrangement;[188] compliance with the Basel Committee's Core Principles for Effective Banking Supervision was a condition of seven loan arrangements;[189] compliance with IOSCO's Objectives

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Letter of Intent]; Letter of Intent, Memorandum of Economic and Financial Policies, & Amendments to the Technical Memorandum of Understanding, from Shaukat Aziz, Adviser to the Prime Minister on Finance and Economic Affairs, Pakistan, and Ishrat Husain, Governor, State Bank of Pakistan, to Horst Köhler, Managing Director, International Monetary Fund ¶ 22 (Feb. 8, 2003), *available at* http://www.imf.org/External/NP/LOI/2003/pak/01/index.htm; Letter of Intent, from Daniel Yona, Minister for Finance, Tanzania, to Horst Köhler, Managing Director, International Monetary Fund ¶ 34 (July 18, 2000), *available at* http://www.imf.org/external/NP/LOI/2000/tza/02/INDEX.HTM; Letter of Intent & Technical Memorandum of Understanding, from Hon. Emmanuel G. Kasone, Minister of Finance and National Planning, Zambia ¶ 33 (Nov. 8, 2002), *available at* http://www.imf.org/External/NP/LOI/2002/zmb/02/index.htm.

187. Estonia Letter of Intent, *supra* note 185, ¶ 20; Letter of Intent & Memorandum of Economic Policies, from Gabriela Nuñez de Reyes, Minister of Finance, Estonia, and Victoria Asfura de Diaz, President, Central Bank of Honduras, to Stanley Fischer, Acting Managing Director, International Monetary Fund ¶ 7 (Apr. 13, 2000), *available at* http://www.imf.org/external/NP/LOI/2000/hnd/01/index.htm; Letter of Intent, Supplementary Memorandum of Economic Policies, and Technical Memorandum of Understanding of the Government, from Algirda Brazauskas, Prime Minister, Lithuania, and Reinoldijus Sarkinas, Chairman of the Board, Bank of Lithuania, to Horst Köhler, Managing Director, International Monetary Fund ¶ 22 (Technical Memorandum) (Dec. 20, 2001), *available at* http://www.imf.org/External/NP/LOI/2001/ltu/03/index.htm.

188. Estonia Letter of Intent, *supra* note 185, ¶ 20.

189. Estonia Letter of Intent, *supra* note 185, ¶ 9; Letter of Intent, Memorandum of Economic and Financial Policies, Indonesia, & Technical Memorandum of Understanding, from Dorodjatun Kuntjoro-Jakti et al., to Horst Köhler ¶ 25 (Dec. 13, 2001), *available at* http://www.imf.org/External/NP/LOI/2001/idn/02/Index.htm; Letter of Intent & Memorandum on Economic Policies, from Chol-Hwan Chon, Governor, Bank of Korea, and Kyusung Lee, Minister of Finance and Economy, Korea, to Michael Camdessus, Managing Director, International Monetary Fund tbl. "Prudential regulations and supervision" (Mar. 10, 1999), *available at* http://www.imf.org/external/np/loi/1999/031099.htm; Letter of Intent and Memorandum of Economic Policies, from Gundars Berzins, Minister of Finance, Latvia, and Elinars Repse, Governor, Bank of Latvia, to Horst Köhler, Managing Director, International Monetary Fund ¶ 5 (Mar. 21, 2001), *available at* http://www.imf.org/external/NP/LOI/2001/lva/01/index.htm; Letter of Intent &

and Principles for Securities Regulation was a condition of one loan arrangement;[190] compliance with the IAIS' Insurance Supervisory Principles was a condition of one loan arrangement;[191] compliance with the International Accounting Standards Board's International Accounting Standards was a condition of seventeen loan arrangements;[192] and compliance

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Memorandum on Economic Policies, from José Angel Gurría Treviño, Secretary of Finance and Public Credit of Mexico, and Guillermo Ortiz Martinez, Governor, Bank of Mexico, to Michael Camdessus, Managing Director, International Monetary Fund ¶ 23 (June 15, 1999), *available at* http://www.imf.org/external/np/loi/1999/061799.htm; Letter of Intent, from Gerald Ssendaula, Minister of Finance, Planning, and Economic Development, Uganda, to Michael Camdessus, Managing Director, International Monetary Fund ¶ 33 (July 15, 1999), *available at* http://www.imf.org/external/np/loi/1999/071599.htm; Letter of Intent & Technical Memorandum of Understanding, from Anatoliy Kinakh, Prime Minister, Ukraine, and Volodymyr Stelmakh, Chairman, National Bank of Ukraine, to Horst Köhler, Managing Director, International Monetary Fund ¶ 13 (Aug. 31, 2001), *available at* http://www.imf.org/External/NP/LOI/2001/ukr/01/index.htm.

190. Jamaica Letter of Intent, *supra* note 186, at ¶ 16.

191. Letter of Intent, from Ali Babacan, Minister of State for Economic Affairs, Turkey, and Süreyya Serdengeçti, Governor of the Central Bank of Turkey to Horst Köhler, Managing Director, International Monetary Fund ¶ 32 (Apr. 5, 2003), *available at* http://www.imf.org/External/NP/LOI/2003/tur/01/index.htm [hereinafter Turkey Letter of Intent].

192. Letter of Intent from Artur Rasi-zade, Prime Minister, Azerbaijan Republic et al., to Horst Köhler, Managing Director, International Monetary Fund ¶¶ 36, 39 (Apr. 23, 2003), *available at* http://www.imf.org/external/np/loi/2003/aze/01/index.htm; Letter of Intent, Memorandum of Economic and Financial Policies, & Technical Memorandum of Understanding of the Government, from M. Saifur Rahman, Minister for Finance and Planning, Bangladesh, to Horst Köhler, Managing Director, International Monetary Fund ¶ 33 (Memorandum of Economic and Financial Policies) (June 4, 2003), *available at* http://www.imf.org/external/np/loi/2003/bgd/01/index.htm [hereinafter Bangladesh Letter of Intent]; Letter of Intent, Memorandum of Economic and Financial Policies, & Technical Memorandum of Understanding of the Government, from Carlos Augusto Duarte Burgo, Minister of Finance and Economic Planning, Cape Verde, to Horst Köhler, Managing Director, International Monetary Fund ¶ 17 (Memorandum of Economic and Financial Policies) (June 9, 2003) (applying the standards to the central bank only), *available at* http://www.imf.org/external/np/loi/2003/cpv/01/index.htm; Letter of Intent, Memorandum of Economic and Financial Policies, & Technical Memorandum of Understanding, from Roberto Junguito, Minister of Finance and Public Credit, Columbia, and Miguel Urrutia, General Manager, Bank of the Republic to Horst Köhler, Managing Director, International Monetary Fund ¶ 11 (Memorandum of Economic Policies) (May 23, 2003) (applying the standards to the central bank only), *available at* http://www.imf.org/external/np/loi/2003/col/01/in-

dex.htm; Letter of Intent, Memorandum on Economic and Financial Policies for 2003, & Technical Memorandum of Understanding, from Joseph Kabila, President, Democratic Republic of the Congo, to Horst Köhler, Managing Director, International Monetary Fund ¶ 44 (Memorandum on Economic and Financial Policies) (July 3, 2003) (applying the standards to the central bank only), *available at* http://www.imf.org/external/np/loi/2003/cod/02/index.htm; Letter of Intent, Memorandum of Economic and Financial Policies, & Technical Memorandum of Understanding, from Hon. Yaw Osafo-Maafo, Minister of Finance, Ghana, and Hon. Paul A. Acquah, Governor, Bank of Ghana, to Horst Köhler, Managing Director, International Monetary Fund ¶ 42 (Memorandum of Economic and Financial Policies) (Mar. 31, 2003) (applying the standards to the central bank only), *available at* http://www.imf.org/External/NP/LOI/2003/gha/01/index.htm; Letter of Intent & Memorandum on Economic Policies, from Erzhan A. Utembaev, Deputy Prime Minister, Kazakhstan, and Grigori A. Marchenko, Chairman, National Bank of Kazakhstan, to Michael Camdessus, Managing Director, International Monetary Fund ¶ 20 (Memorandum) (Nov. 22, 1999), *available at* http://www.imf.org/external/np/loi/1999/112299.htm; Letter of Intent and Memorandum on Economic Policies, from Chol-Hwan Chon, Governor, Bank of Korea, and Hun-Jai Lee, Minister of Finance and Economy, Korea, to Horst Köhler, Managing Director, International Monetary Fund tbl. "Prudential Regulations and Supervision" (July 12, 2000), *available at* http://www.imf.org/external/NP/LOI/2000/kor/01/INDEX.HTM; Letter of Intent, Memorandum of Economic and Financial Policies, & Technical Memorandum of Understanding of the Government, from Chansy Phosikham, Minister of Finance, Lao P.D.R., and Phoumy Thipphavone, Governor, Bank of the Lao P.D.R., to Horst Köhler, Managing Director, International Monetary ¶ 22 (Memorandum) (Aug. 28, 2003) (applying the standards to the central bank only), *available at* http://www.imf.org/External/NP/LOI/2003/lao/01/index.htm [hereinafter Lao P.D.R. Letter of Intent]; Letter of Intent, Memorandum on Economic and Financial Policies, and Technical Memorandum of Understanding of the Government, from Mohlabi K. Tsekoa, Minister of Finance and Development Planning, Lesotho, to Horst Köhler, Managing Director, International Monetary Fund ¶ 23 (Memorandum on Economic and Financial Policies) (July 10, 2001), *available at* http://www.imf.org/External/NP/LOI/2001/lso/02/index.htm; Letter of Intent, Memorandum on Economic and Financial Policies & Technical Memorandum of Understanding, from Benjamin Andriamparany Radavidson, Minister of Economy, Finance, and the Budget, Madagascar, and Gaston Ravelojaona, Governor, Central Bank of Madagascar, to Horst Köhler, Managing Director, International Monetary Fund ¶ 36 (June 10, 2003), *available at* http://www.imf.org/External/NP/LOI/2003/mdg/01/index.htm; Letter of Intent, Memorandum of Economic and Financial Policies & Technical Memorandum of Understanding, from Ch. Ulaan, Minister of Finance, and Economy, Mongolia, and O. Chuluunbat, Governor, Bank of Mongolia, to Horst Köhler, Managing Director, International Monetary Fund ¶ 28 (Aug. 29, 2003) (applying the standards to the central bank only), *available at* http://www.imf.org/External/NP/LOI/2003/mng/01/index.htm; Letter of Intent & Memorandum of Economic and Financial Policies, from Luísa

with the International Federation of Accountants' International Standards on Auditing was a condition of three loan arrangements.[193] The only standards not explicitly included in at least one loan arrangement are the Committee on Payments and Settlements Systems' Core Principles for Systemically Important Payments Systems and the OECD's Principles of Corporate Governance.

The data above suggest that the frequency of standards' inclusion varies widely by standard, though the ability to draw such conclusions is limited by the research method used.[194] The Conditionality Guidelines provide that each loan arrange-

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Dias Diogo, Minister of Planning and Finance, Mozambique, and Adriano Afonso Maleiane, Governor, Bank of Mozambique, to Horst Köhler, Managing Director, International Monetary Fund ¶ 20 (Memorandum) (June 4, 2002), *available at* http://www.imf.org/External/NP/LOI/2003/moz/01/index.htm; Letter of Intent, Memorandum on Economic and Financial Policies & Technical Memorandum of Understanding, from Mihai Tanasescu, Minister of Public Finance, Romania, and Mugur Isarescu, Governor, National Bank of Romania, to Horst Köhler, Managing Director, International Monetary Fund ¶ 24 (Oct. 17, 2001), *available at* http://www.imf.org/External/NP/LOI/2001/rom/01/index.htm; Letter of Intent, Memorandum of Economic and Fiscal Policies & Technical Memorandum of Understanding, from Branko Lukovac, Minister of Foreign Economic Relations, Serbia and Montenegro, et al. to Horst Köhler, Managing Director, International Monetary Fund ¶ 21 (July 11, 2003), *available at* http://www.imf.org/External/NP/LOI/2003/yug/02/index.htm; Turkey Letter of Intent, *supra* note 191, at ¶ 44; Letter of Intent, Memorandum of Economic and Financial Policies & Technical Memorandum of Understanding, from Le Duc Thuy, Governor, State Bank of Vietnam, to Horst Köhler, Managing Director, International Monetary Fund ¶ 23 (June 3, 2002), *available at* http://www.imf.org/External/NP/LOI/2002/vnm/01/index.htm.

193. Bangladesh Letter of Intent, *supra* note 192, ¶ 33 (Memorandum of Economic and Financial Policies); Letter of Intent, Memorandum of Economic Policy & Technical Memorandum of Understanding, from Roberto Junguito, Minister of Finance, and Public Credit, Columbia, and Miguel Urrutia, General Manager, Bank of the Republic, to Horst Köhler, Managing Director, International Monetary Fund ¶ 24 (Dec. 2, 2002), *available at* http://www.imf.org/external/np/loi/2002/col/01/index.htm; Letter of Intent, Supplementary Memorandum of Economic and Financial Policies, & Technical Memorandum on Program Monitoring, from Soukanh Mahalath, Minister of Finance, Lao P.D.R., and Phouphet Khamphounvong, Acting Governor, Bank of the Lao P.D.R., to Horst Köhler, Managing Director, International Monetary Fund ¶ 22 (Feb. 7, 2002), *available at* http://www.imf.org/External/NP/LOI/2002/lao/01/Index.htm.

194. *See infra* note 184 (discussing the research methodology and its limitations).

ment will be tailored to the needs of the borrowing state, suggesting that standards and codes compliance should not be a component of every loan package.[195] Yet other observers have also noted that the Fund routinely includes the standards and codes it deems significant,[196] notably the Basel Capital Accords, in its loan packages.[197] The Staff Statement on Principles Underlying the Guidelines on Conditionality, which accompanies the Guidelines, also notes that "it is expected that arrangements supporting longer-term programs will have more extensive structural conditionality than shorter-term arrangements. . . ."[198] This suggests that developing states—those typically with long-term arrangements—will likely have standards and codes implementation included in their loan arrangements.

Looking toward the future, the Fund's use of conditionality in its Contingent Credit Line loan facility (CCL) indicates that standards and codes performance will be factored into loan conditions. The Conditionality Guidelines provide that prior state actions can be taken into consideration, and sometimes even required, when developing loan arrangements.[199] Pursuant to that authority, in 1999 the IMF established its Contingent Credit Line (CCL) loan facility.[200]

Designed as a preventive measure against East-Asian-Crisis-style contagion, the CCL provided large amounts of short-term financing as an addition to the Special Reserve Facility if a state met four *ex ante* criteria: (1) it was "implementing policies that are considered unlikely to give rise to a need to use Fund resources;" (2) its policies "ha[d] received a positive assessment from the Fund at its last Article IV consultation," continued to be viewed positively, and it was adhering to "relevant internationally-accepted standards"; (3) it was maintaining

195. *See* CONDITIONALITY GUIDELINES, *supra* note 181, at 1-2, 8-9.

196. *See* Morais, *The Quest for International Standards*, *supra* note 9, at 815 ("In a few cases, the IMF has used conditionality under its stand-by arrangements to seek a country's adherence to key international standards."). Inclusion in SBAs is particularly striking because this facility is frequently used by the Fund and, because it is for a short-term only, is not a facility that uses conditionality to promote deep structural reforms.

197. Lee, *supra* note 89, at 8.

198. CONDITIONALITY GUIDELINES, *supra* note 181, at 10.

199. *Id.* at 4.

200. *The IMF's Contingent Credit Lines*, *supra* note 24.

good relations with private creditors; and (4) it had "submitted a satisfactory economic and financial program . . . ."[201] In a sense, CCLs functioned like a kind of insurance: If, for example, capital markets panicked and suddenly started withdrawing from an entire region, affected states could have accessed their CCLs to soften the blow or convince investors that their financial positions are secure and they need not sell their investments.

While the CCLs were permitted to expire in 2003, the important aspect of them here is their unique use of *ex ante* conditionality. While the imposition of these *ex ante* conditions was officially justified as necessary to prevent moral hazard[202] difficulties with CCL-approved states,[203] François Gianviti described this integration of standards compliance into conditionality as "[p]erhaps the best example of the use of Fund conditionality in the context of the new [financial] architecture . . . ."[204] This statement suggests that future IMF practice will include *ex ante* conditionality when providing access to fund resources.

In short, evidence from current practice and comments about the future strongly indicate that standards are, and will probably increasingly be, a part of IMF loan conditionality.

201. Int'l Monetary Fund, Executive Board Decision No. 11627-(97/123) SRF, Contingent Credit Lines, Apr. 23, 1999, para. 14, *reprinted in* Press Release, Int'l Monetary Fund, No. 99/14, IMF Tightens Defenses Against Financial Contagion by Establishing Contingent Credit Lines (April 25, 1999), *at* http://www.imf.org/external/np/sec/pr/1999/pr9914.htm. The standards and codes included in the conditionality are the Basel Core Principles for Banking Supervision, "the code of transparency in the area of fiscal policy and, when it is agreed, the code of transparency in monetary and financial policy," though "[o]ther standards . . . could also be added as they are developed . . . ." Summing Up by the Chairman: Contingent Credit Lines, Executive Board Meeting 99/48, April 23, 1999, *in* Press Release, *supra*.

202. "Moral hazard" refers to the problem that parties with insurance will be more likely to engage in risky behavior because they know that, should something go wrong, they are financially protected. BISHOP, *supra* note 10, at 161.

203. *See* Stanley Fischer, Reducing Vulnerabilities: The Role of the Contingent Credit Line, Remarks to the Latin American Central Bank and Finance Ministry Network at the Inter-American Development Bank (April 25, 2001), *at* http://www.imf.org/external/np/speeches/2001/042501.htm (at "Structure and Principles of the CCL").

204. Gianviti, *supra* note 183, at 115.

B. *Surveillance and Consultations*

While the Fund's most powerful persuasive device is loan conditionality, its most frequently used device is the consultation process. In consultations, the Fund pressures state central bank heads to follow its economic advice and then publishes its policy recommendations—recommendations from which one can readily infer degrees of compliance.[205] Officially, the IMF is performing its standards implementation role purely by producing Reports on the Observance of Standards and Codes (ROSCs).[206] ROSCs are optional for states and avoid giving a simple compliance rating or grade, instead "reflect[ing] the country's particular circumstances, including its stage of development and institutional capacity."[207] But the reality is more complex.

The context of ROSCs is important to understanding their place in the overall surveillance and consultation system. ROSCs are one "module" in the larger joint IMF-World Bank Financial Sector Assessment Program (FSAP), which analyzes the strengths and vulnerabilities of a country's financial sector and eventually generates Financial System Stability Assessments that are used during IMF surveillance and Article IV consultations.[208] Standards and

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205. Beth A. Simmons, *Money and the Law: Why Comply with the Public International Law of Money?*, 25 YALE J. INT'L L. 323, 339 (2000); Gianviti, *supra* note 183, at 114 (observing that "[a]rticle IV consultations are effectively an exercise of peer pressure on each member country"). Michael Camdessus, former Managing Director of the IMF, has also emphasized the importance of these consultations in the Fund's overall operations. Camdessus, The Role of the IMF, *supra* note 81.

206. *See* Int'l Monetary Fund, *Standards and Codes: The Role of the IMF (2003)*, *at* http://www.imf.org/external/np/exr/facts/sc.htm (at "Assessing Compliance with Standards and Codes") [hereinafter *IMF Role in Standards and Codes*].

207. *See id.* For a more detailed discussion of the processes involved in producing an ROSC, see IMF, ASSESSING IMPLEMENTATION OF STANDARDS, *supra* note 98, at 12 box.2.

208. *See IMF Role in Standards and Codes*, *supra* note 206; Int'l Monetary Fund, *Financial Sector Assessment Program (FSAP)*, *at* http://www.imf.org/external/np/fsap/fsap.asp (last visited May 1, 2004); Paul Hilbers, *The IMF/World Bank Financial Sector Assessment Program*, ECON. PERSP., Feb. 2001, at 24, 25-26, *available at* http://usinfo.state.gov/journals/ites/0201/ijee/ijee0201.htm. For a discussion of the division of labor between the IMF and World Bank in generating the modules, see The World Bank Group, *Reports on the*

codes compliance is also integrated into Fund technical assistance programs.[209]

The ROSCs themselves are successors to three initial "Transparency Report" experimental case studies performed by the IMF beginning in 1999 to consider the modalities of monitoring standards and codes compliance.[210] The ROSC program rapidly expanded and, by November 2002, 310 ROSC modules for 84 states had been generated, of which 227 modules for 68 states had been published.[211] Interestingly, the bulk of the states that have participated in ROSCs are developing states.[212] This point is of some significance and will be returned to below.

What about states that have not submitted to the ROSC or FSAP processes? The IMF has been discussing financial system

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Observance of Standards & Codes, *at* http://www.worldbank.org/ifa/rosc_more.html.

209. *IMF Technical Assistance*, *supra* note 48.

210. IMF, ASSESSING IMPLEMENTATION OF STANDARDS, *supra* note 98, at 8. For a sense of the Fund's initial thoughts regarding standards and codes implementation, see generally Int'l Monetary Fund, *Report of the Managing Director to the Interim Committee on Progress in Strengthening the Architecture of the International Financial System (1999)*, *at* http://www.imf.org/external/np/omd/1999/042699.htm#1.

211. POL'Y DEV. & REVIEW DEP'T, INT'L MONETARY FUND, QUARTERLY REPORT ON THE ASSESSMENTS OF STANDARDS AND CODES—NOVEMBER 2002 ¶ 3, *at* http://www.imf.org/external/pubs/ft/stand/q/2002/eng/112602.htm [hereinafter NOVEMBER 2002 QUARTERLY REPORT].

212. The states and areas with published ROSCs are: Albania, Algeria, Argentina, Republic of Armenia, Australia, Azerbaijan Republic, Bangladesh, Barbados, Benin, Bolivia, Botswana, Brazil, Bulgaria, Burkina Faso, Cameroon, Canada, Chile, Columbia, Costa Rica, Republic of Croatia, the Czech Republic, Ecuador, Republic of Estonia, the Euro Area, Fiji, Finland, France, Gabon, Georgia, Germany, Ghana, Greece, Honduras, Hong Kong Special Administrative Region, People's Republic of China, Hungary, Iceland, India, Islamic Republic of Iran, Ireland, Israel, Italy, Japan, Jordan, Republic of Kazakhstan, Republic of Korea, Kyrgyz Republic, Republic of Latvia, Republic of Lithuania, Luxembourg, former Yugoslav Republic of Macedonia, Malawi, Mali, Malta, Islamic Republic of Mauritania, Mauritius, Mexico, Mongolia, Morocco, Republic of Mozambique, Namibia, Nicaragua, Norway, Pakistan, Papua New Guinea, Peru, the Philippines, Republic of Poland, Portugal, Romania, Rwanda, Senegal, the Slovak Republic, Republic of Slovenia, South Africa, Sri Lanka, Sweden, Switzerland, Tanzania, Tunisia, Turkey, Uganda, Ukraine, the United Arab Emirates, the United Kingdom, and Uruguay. Int'l Monetary Fund, *Reports on the Observance of Standards and Codes (ROSCs)*, *at* http://www.imf.org/external/np/rosc/rosc.asp (last visited May 1, 2004).

reforms during Article IV consultations for several years, though, at the time of the 1999 External Evaluation of IMF Surveillance, the discussion of specific standards and codes was not yet a major component of the consultation process.[213] But even in 1999 there was an expectation that, given G-7 pressure for an expanded IMF monitoring role, there would be further integration of standards assessments into general surveillance and consultations.[214]

In keeping with that expectation, the 2001 IMF and World Bank staff report, "Assessing the Implementation of Standards," recommended pressuring countries to provide the Fund with information on standards compliance.[215] Standards compliance, it argued, should be used as a "benchmark . . . to assist in understanding the implications for macroeconomic and financial stability of a member's policies and practices."[216] To reconcile this with the optional nature of the ROSC process, the report simply observes that surveillance for different members will have to rely on different information sets—ROSC data will be used if available, but if unavailable, data would be gleaned from member state self-assessments, the results of technical assistance on standards, and, if necessary, reports from standards-focused specialists who would accompany IMF staff on their consulting missions.[217] If all this still yields insufficient information on a given state, the Fund would encourage that state to undergo an ROSC or FSAP.[218]

As the staff report itself noted, the standards and codes initiatives raised concerns among developing IMF member states that the process would become too much of a "one size fits all" affair that failed to recognize the nuances of their individual conditions.[219] The report recommended a number of

213. INT'L MONETARY FUND, EXTERNAL EVALUATION OF IMF SURVEILLANCE: REPORT BY A GROUP OF INDEPENDENT EXPERTS ¶¶ 39-41 (1999), *available at* http://www.imf.org/external/pubs/ft/extev/surv/eval.pdf. Indeed, at the time of this report there was serious debate and doubt regarding whether the IMF had the ability to do such monitoring. *Id.* ¶¶ 42, 131-34.

214. *Id.* ¶ 134.

215. IMF, ASSESSING IMPLEMENTATION OF STANDARDS, *supra* note 98, at 21.

216. *Id.* at 22.

217. *Id.* at 22-23.

218. *Id.* at 23-24.

219. *Id.* at 18.

ameliorative measures,[220] but, during the subsequent Executive Board consideration of the report, some representatives, presumably from developing states, maintained their concern that their countries were being left out of the development of standards and implementation policies and expressed disfavor at the inclusion of standards and codes in general surveillance through the means recommended in the report.[221] Nevertheless, while the Board did not embrace all of the specific modalities linking standards and surveillance proposed in the report, it did endorse the use of non-ROSC data sources to continue evaluations of standards and codes compliance within the

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220. These remedies, all of which have obvious limitations, include considering standards as aspirational goals (which runs contrary to the notion of using them as benchmarks for analysis); viewing standards implementation as a gradual, "multi-track" process (but will financial markets listen?); permitting member states in FSAP and ROSCs to have more voice in how their compliance is assessed (though all eleven standards are still considered); performing more standards assessments on industrialized states (how this resolves the problem, beyond making application appear more balanced, is unclear); keeping the ROSC process voluntary (except that standards are considered in general surveillance anyway, so the effects of this are also unclear); and keeping standards discussions nuanced (which appears, on its face, the best solution, though again, market interpretation may vary). *Id.* at 19-20. The report also supports enhancing "[o]wnership and commitment to implementing standards" by "fostering more intensified research on the relationship between implementation of standards and macroeconomic and financial stability development," *id.* at 20, which appears to mean little more than providing a more detailed case to persuade states to accept standards as they are. All of this is limited by the stated need "to preserve consistency of definitions so that comparisons can be made across countries." *Id.* This goal, if taken seriously, undercuts all of the above tailoring notions by necessitating the creation of some bottom line for contrast that could be seized upon by financial markets for their evaluative needs.

221. Int'l Monetary Fund, Public Information Notice (PIN) No. 01-17, Assessing the Implementation of Standards—An IMF Review of Experience and Next Steps (Mar. 5, 2001), *available at* http://www.imf.org/external/np/sec/pn/2001/pn0117.htm [hereinafter PIN No. 01-17]. The PIN makes for interesting reading because it includes the Managing Director's summation of the Executive Board discussions. The summation synthesizes positions and often understates disagreements. *See* Gold, *supra* note 97, at 464-65 (discussing the power of the Managing Director in terms of his or her drafting the Conclusions of the Board). Thus, disagreement with the recommended expansion of standards and codes into surveillance is masked by the summation's indication that "most" directors held a certain view. *See id.* We are left to guess whom the other Directors were, or what their specific reasons for concern were, because the actual discussions of the board are confidential, *see id.* at 483.

Fund's general surveillance operations.[222] One way or another, all states are evaluated on their compliance with standards and are pressured to improve that compliance.

The developing state protest about standards processes begs an important question: Why would so many states concerned about the evolving standards and codes processes participate in the purely voluntary ROSCs and FSAPs and be evaluated under those standards? The answer to that question reveals the heart of the case for states having effectively no option but to work to adopt international standards as they are. The IMF's survey of its mission chiefs asked a similar question and found that countries participated in ROSCs "to signal their transparency; to complement their own efforts to observe standards; to make further progress toward observing international standards; and, for some emerging market and developing countries, to signal their intention to improve their regulatory framework."[223] These states are not sending a signal to the IMF alone; they are also sending a signal to the global financial markets.

C. *Market Effects*

IMF publications and decisions play an important role in financial markets' treatment of states during both normal and crisis times. Most of the capital provided to developing states comes from commercial banks, and, as Eva Riesenhuber states, the Fund's modern role is "being the judge of creditworthiness of countries by providing its seal of approval on a member's policy to private lenders. By restoring the country's creditworthiness it cataly[zes] additional private financial support and also bilateral support which is tied to the implementation of the IMF program."[224]

In non-crisis times, private financial institutions and investors routinely use IMF surveillance reports to guide their investment decisions.[225] This general rule is also specifically true for standards compliance assessments. For example, the e-Standards Forum provides a subscription-based database of states' standards compliance that utilizes ROSC information;

222. PIN No. 01-17, *supra* note 221 (at "Surveillance").
223. IMF, ASSESSING IMPLEMENTATION OF STANDARDS, *supra* note 98, at 14.
224. RIESENHUBER, *supra* note 12, at 36.
225. Hockett, *supra* note 51, at 182-83.

similarly, PricewaterhouseCoopers (PwC) has developed an "opacity index" that incorporates Fund data and is used to evaluate risk premia[226] on states' debt.[227] The California Public Employees Retirement System, one of the largest pension funds in the U.S., and several NGOs have conducted similar investment analyses with IMF-provided data.[228] Several state bond prospectuses have also noted the state's compliance with the SDDS, and surveys and interviews conducted by the Financial Stability Forum with senior managers at major investment banks, commercial banks, and ratings agencies found that a majority used ROSCs and other standards evaluations in their risk assessments.[229]

These examples are confirmed by other, more systematic research of differential market treatment of states that vary in their standards and codes compliance. Studies by PwC and the Institute for International Finance have found that states with better standards and code compliance (particularly on transparency matters) have lower debt risk premia than those with less-compliant practices.[230] Even more specifically, Fitch Ratings reported in 2002 that it found "a highly significant relationship between the publications of ROSCs and changes in sovereign ratings" over the preceding 3 years, suggesting a di-

226. The risk premium is "the extra return that investors require to hold a risky asset instead of a risk-free one," quantified as "the difference between the expected returns from a risky investment and the risk-free rate." BISHOP, *supra* note 10, at 208.

227. POL'Y DEV. & REVIEW DEP'T, INT'L MONETARY FUND, QUARTERLY REPORT ON THE ASSESSMENTS OF STANDARDS AND CODES—JUNE 2001 ¶ 11 (2001), *at* http://www.imf.org/external/pubs/ft/stand/q/2001/eng/062901.htm [hereinafter JUNE 2001 QUARTERLY REPORT].

228. POL'Y DEV. & REVIEW DEP'T, INT'L MONETARY FUND, QUARTERLY REPORT ON THE ASSESSMENTS OF STANDARDS AND CODES—DECEMBER 2001 ¶ 12 (2002), *at* http://www.imf.org/external/pubs/ft/stand/q/2001/eng/020602.htm [hereinafter DECEMBER 2001 QUARTERLY REPORT].

229. POL'Y DEV. & REVIEW DEP'T, INT'L MONETARY FUND, REPORT OF THE MANAGING DIRECTOR TO THE INTERNATIONAL MONETARY AND FINANCIAL COMMITTEE: THE FUND'S CRISIS PREVENTION INITIATIVES 20-21 (2001), *available at* http://www.imf.org/external/np/omd/2001/111401.pdf.

230. JUNE 2001 QUARTERLY REPORT, *supra* note 227, ¶ 11; POL'Y DEV. & REVIEW DEP'T, INT'L MONETARY FUND, QUARTERLY REPORT ON THE ASSESSMENTS OF STANDARDS AND CODES—JUNE 2002 ¶ 20 (2002) (discussing the Institute for International Finance Study), *at* http://www.imf.org/external/pubs/ft/stand/q/2002/eng/062102.htm [hereinafter JUNE 2002 QUARTERLY REPORT].

rect connection between standards compliance and market perceptions of creditworthiness.[231]

As the Fitch study suggests, one vision of the Fund's ROSC program is as an intentional way to "name names" and link market leverage to the Fund's standards initiatives via the provision of information.[232] Such specific information, even in non-"grade" form, is critical to generating market incentives because absent it states could comply in name only, leaving the underlying structures that concern investors unchanged.[233] Just as the Fund takes these needs and effects into consideration when designing its programs, so too do countries when they choose to sign onto those programs.

Announced standards compliance, as noted by Fund mission chiefs, is often a "signaling device" used by governments to show their regulatory seriousness in an attempt to gain benefits of increased trade, investment, and capital flows.[234] As more governments sign on, demand for compliance snowballs and non-compliance becomes harder and harder to maintain because states' financial reputations suffer increasingly as they become troubled outliers from the market norm.[235] State reputations are critical to financial market success, so much so that an empirical study of compliance with IMF Article VIII obligations suggests that market-focused reputation factors are the most powerful at predicting compliance with international monetary standards.[236] The reason for this is simple: Even

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231. NOVEMBER 2002 QUARTERLY REPORT, *supra* note 211 ¶ 7.

232. *See* Goldstein, *supra* note 16, at 30. From a broader, theoretical perspective, this sort of monitoring is the standard method for promoting compliance with soft-law norms, using political and, here, economic pro-compliance forces to form the beginnings of what can be viewed as an essentially legal force. Bothe, *supra* note 97, at 78-79. Non-compliance within the international monetary realm edges even more toward the boundary between politics and law because of the negative implications that directly result from such action. *See id.* at 83 (discussing the conditions to an IMF stand-by arrangement as a form of legal obligation). *See also* Tadeusz Gruchalla-Wesierski, *Framework for Understanding "Soft Law"*, 30 MCGILL L.J. 37, 86 (1984) (describing the use of reports to generate political pressure as a means of implementing soft law).

233. *See* Katharina Pistor, *The Standardization of Law and its Effect on Developing Economies*, 50 AM. J. COMP. L. 97, 125 (2002).

234. Simmons, *supra* note 205, at 324.

235. *Id.* at 324-25, 331.

236. *See id.* at 351-57.

small changes in the market-demanded risk premia can cost a country millions of dollars in extra interest charges, and that sort of financial weight gives tremendous power to market preferences.[237]

A country's reputation for having "good" policies is also significant in negotiating IMF loan packages during future crises. For example, Mexico's international reputation as a model country for fiscal policies created political pressure that earned it more favorable loan package terms (i.e., fewer conditions) in its 1995 loan arrangement than it obtained in its 1982 package, which was designed at a time when the state was pursuing policies unpopular with creditor states.[238] This leads to the second area in which IMF emphasis on standards and codes can have profound market effects: as a condition in borrowing arrangements.

As discussed above, the IMF often includes standards compliance as a condition in its arrangements with borrowing states, either as a precondition to the package or as a condition in the package for the release of a given tranche of funds. Meeting these conditions is obviously necessary for reception of IMF money, but a great many private investors also explicitly condition their loans on the existence, or successful implementation, of an IMF program.[239] This means that if the IMF cuts off funds, a state may have nowhere else to turn for funding, leading one commentator to conclude that IMF denial of assistance on the grounds of conditionality non-compliance is "perhaps the most potent sanction that any international organization can use against a state."[240]

Most dramatically, the IMF understands the power of its position, and it uses this power to dictate more freely the terms of its arrangements.[241] For example, in 1997, the IMF suspended its ESAF program to Ethiopia, rather than negotiate a

237. *See id.* at 326 (arguing that the risk of deterring international business is what gives international monetary law its power; states overcome deterred business by offering larger financial incentives, such as higher interest rates, that cost the state more money).

238. Nora Lustig, *Mexico in Crises, the U.S. to the Rescue: The Financial Assistance Packages of 1982 and 1995*, 2 UCLA J. INT'L L. & FOREIGN AFF. 25, 65 (1997).

239. Goldstein, *supra* note 16, at 12.

240. Gruchalla-Wesierski, *supra* note 232, at 85.

241. STIGLITZ, *supra* note 71, at 42-46.

compromise, when Ethiopia rejected IMF requests to "open" its banking sector by breaking the state-owned bank into several competing pieces and permitting foreign banks to enter the market.[242] That same year, South Korean economic officials did not even bother arguing with the IMF about its fiscally stringent policy requirements, despite their strong disagreement with them, because they feared that the IMF would not listen, and any open disagreement would result in the IMF either cutting off its funds or sending subtler signals to the market (e.g., postponing negotiations) that would result in the state paying higher interest rates.[243] States in need have little ability to argue with the IMF; they usually must accept its conditions or risk massive financial repercussions.

D. *Potential Responses, Rebuttals, and Conclusions*

To summarize the above argument, consider the perspective of a developing state government that might need to borrow funds from the IMF in the future, perhaps under a long-term facility. For a more concrete example, this hypothetical state could be impoverished and be tapping into global capital markets to fund a large number of projects, such as building roads, housing, and irrigation systems, because its domestic capital and tax bases are too small and unstable to support its needs. The state sees these projects as necessary for the good of its people, but they also expose the state to increased financial risk, from both unstable global markets and the unstable domestic revenue flows it uses to repay its project loans. This instability could cause investment capital to dry up, leaving the state owing money to construction firms, or it could cause domestic tax revenues to shrink, leaving the state owing its international creditors money. The state could therefore encounter balance-of-payments problems sometime in the future, which would cause it to need to borrow funds from the IMF; as a poor state, it may opt to borrow under a long-term facility.

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242. *Id.* at 30-32. Ethiopia feared that, as happened in Kenya in 1993-94, liberalization in its regulation-poor environment would result in multiple bank failures and higher interest rates, thereby harming its many poor farmers who borrow money for seeds or fertilizer and could not afford any interest rate increases. *Id.* at 32.

243. *Id.* at 42-43.

As a prudent state, it does what it can to make sure any future negotiations it has with the IMF are as successful as possible. So it reads the Fund's political signs. In its consultations and surveillance analyses, it is under pressure to adopt and work toward implementing the IMF's set of core standards; it is also being pushed toward ROSC participation, but if it does not participate, data on its current non-compliance will be compiled and released anyway. It may consider additional borrowing on the private markets, but its access to those funds is somewhat limited and it fears the financial cost of non-compliance that bond purchasers will charge based upon the Fund's compliance assessment. If it decides borrowing from the Fund is the wiser course, its loan arrangement will, in all likelihood, include standards compliance as a condition. Even if standards compliance is not presented as a current condition, it sees the possibility that its future access to funds—either at all or on improved terms—may be conditioned on some *ex ante* standards and codes compliance. Given this set of facts, can one say the state truly possesses the option not to comply with the standards the IMF encourages?

The Fund has at least three possible responses to this claim. Its first argument is that any notion of "coercion" in the policies listed above is misplaced because the IMF is a universal membership organization and all states are represented on the Executive Board, so in effect all states signed off on these policies.[244] The response to this, however, is to look at the practical politics of the IMF Board. As argued below,[245] developing states are highly underrepresented on the Board in terms of seats and, more importantly, voting power. Decisions by consensus are similarly made against the background of this power imbalance, and the IMF's own documents reveal that "consensus" decisions are made in the face of developing state concern. Such a democratic deficit makes claims of universal policy acceptance suspect.

Second, the IMF can argue that membership in the Fund, seeking a loan from Fund resources, and compliance with

244. *See* Newburg, *supra* note 56, at 94 (citing IMF Managing Director Michael Camdessus's presentation of this argument regarding expanded conditionality and the allegations of illegitimate mission creep).

245. *See infra* Part IV.B.

Fund surveillance are wholly voluntary.[246] Indeed, the act of becoming an IMF member state might itself signify an approval of the modern conditionality system because it was part of the "contract" the state knowingly entered into when it ratified the Fund's Articles of Agreement.[247] Given the realities of the international financial markets, however, and the fact that IMF membership is a precondition to World Bank membership[248] (which is particularly valuable for developing states as a source of funding for development projects like infrastructure construction), the actual voluntariness of Fund membership and compliance is doubtful. The "contract" component of the argument speaks more to the overall legitimacy of the Fund's modern conditionality practices, an issue that, as noted above,[249] is beyond the scope of this paper but is hotly challenged.

Third, the IMF could reply that this argument still does not prove that compliance is mandatory. ROSCs are still optional, standards compliance is not a feature of every loan arrangement, and standards' incorporation into surveillance is being done hesitatingly. All of these things are true; the Fund has not, so far, made standards compliance formally mandatory. Short of that, the case for "effective necessity" of compliance will always rely on some inference. Given all the conditions that do exist regarding standards implementation, however, and the strong internal and external political pressures for an enhanced Fund role in the future, that inference seems justified.

IV. DEMOCRACY PROBLEMS

This Note's second argument is that the substance of the standards and codes being imposed upon states represent political decisions that require state input for validity and effectiveness—state input that is notably lacking at present. In

246. Hockett, *supra* note 51, at 182.

247. Galano, *supra* note 29, at 346-47.

248. Articles of Agreement of the International Bank for Reconstruction and Development, Dec. 27, 1945, art. II, sec. 1, 60 Stat. 1440, T.I.A.S. No. 1502, 2 U.N.T.S. 134, *as amended* Feb. 16, 1989, *available at* http://www.worldbank.org.

249. See *supra* notes 86 & 87 for a list of some of the articles debating the validity of the IMF's role expansion.

other words, the process of international standards and codes production and implementation needs to be democratized.[250]

A. *The Need for Developing State Participation in Standards-Setting*

There are three reasons why increased developing state input is needed in the creation of standards and code; all revolve around the value and effects of policymaking participation embodied in notions of democracy. "Democracy" is a slippery term, meaning different things to different people. As even a cursory review of dictionary definitions reveals, democracy can refer to a specific government structure consisting of elected representatives, a country possessing that structure, majority rule, or the idea that political power comes from the people.[251] It is at once a term describing a process of rulemaking and one adopting a set of norms regarding how government should be run.

The normative value that lies behind the idea of democratic government provides the first reason why increased developing state input is needed. The pro-democracy case rests on a claim that all people should have some degree of input, through a representative process, in the formulation and substance of the laws that govern their behavior.[252] Some schol-

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250. This argument provides a specific, detailed instance of the broader debate over the growing role of transnational governance networks in creating international regulation and the potential democratic problems that growth poses. *See, e.g.*, Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, 24 MICH. J. INT'L L. 1041 (2003) (surveying the literature related to governance networks, providing a typology of government networks, and assessing democracy and accountability concerns regarding them).

251. *See, e.g.*, AMERICAN HERITAGE DICTIONARY 497 (3d ed. 1992); BLACK'S LAW DICTIONARY 444 (7th ed. 1999).

252. I readily concede that the validity of my normative claim is, for the purposes of this article, only an assertion; within political theory the notion of democracy as the "right" theory of government is hotly contested, and a discussion of the debate is well beyond the scope of this piece. As a starting point for the defense of my claim, see generally JOHN LOCKE, *The Second Treatise, in* TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION (Ian Shapiro ed., Yale University Press 2003) (1690). Thomas Franck has also argued persuasively that a "right to democratic governance" is rapidly becoming a "normative expectation of the community of states." *See generally* Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 46 (1992) (the quoted language is taken from page 46).

ars, including Anne Orford, have levied significant critiques regarding a "right to democracy," arguing that the term is being used to mask a substantive ideal of minimal government interference in individual decision-making that favors civil and political rights over social and cultural rights.[253] My critical framework, however, is different; it is a procedural claim that the process of rule- and lawmaking must permit participation of the governed.

The process focus of this argument is important, because it addresses a central response to this Note. While there are indications that the current versions of international standards and codes may not be wholly appropriate for all developing states,[254] I do not attempt to argue that the content of currently-existing standards and codes is problematic. I do not need to. While a flawed process need not lead to bad policy—though there is reason to think that it would, because the exclusion of input from certain populations can lead to the non-recognition of problems uniquely encountered by those populations—that process itself can still be problematic for normative and practical reasons. Conversely, changing a flawed process may not lead to better policy—though again, it might—but it will still result in reaching policy answers through more legitimate means.

In short, the deliberative process of rulemaking is more just, and more legitimate, when the full spectrum of parties affected by those rules are permitted to comment upon and influence them. This provides a value framework by which governmental systems should be judged.

Second, on an international level, developing states have a claim that sovereign equality mandates their equal participation in forming the rules by which international finance is conducted. If all states are legally equal, and the standards being

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Gregory Fox has developed this thinking—in a direction particularly fitting to my argument here—to argue that there is a developing international legal right to domestic political participation. *See generally* Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 539, 544-70 (1992).

253. *See* Orford, *supra* note 179, at 460-63 (providing this critique and citing groups of scholars who advocate aspects of it).

254. *See supra* note 221 and accompanying text (noting developing state concern that the standards and codes being promoted by the IMF were too one-size-fits-all).

formulated are universal, then all states must have input into the content of those standards.[255] Otherwise, at the level of international lawmaking, industrialized and developing states cease to have level standing. This argument also sounds in the domestic democracy claim made above: If all people have a right to have some input in the laws that govern them, and lawmaking moves from the national to the international level, then all states must be involved in that process lest some people's voices be precluded by the absence of their government representatives in the law- and policy-making process.

Third, and perhaps of most immediate concern, a lack of institutional democracy has important practical effects: Institutions seen as non-democratic suffer from credibility problems that lessen their ability to achieve program goals.[256] Theorists note that these effects are felt on two levels. First, on a purely domestic level, rules imposed without support from the people or government of a state suffer from a lack of policy ownership that undermines political support for the rules and hampers the rules' implementation.[257] Second, on an international level, as the values behind democratic governance become universally accepted norms, their absence in the realm of international economic regulation undermines the legitimacy of those regulations.[258] The "democratic" participation of all states in international rulemaking serves, as Profes-

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255. This was the core argument behind developing states' push for a New International Economic Order during the 1970s and is present, *inter alia*, in Article 10 of the Charter of Economic Rights and Duties of States. TYRONE FERGUSON, THE THIRD WORLD AND DECISION MAKING IN THE INTERNATIONAL MONETARY FUND 7-9 (1988). Admittedly, respect for state sovereignty is conditional upon that state not posing a threat to international security. *See* U.N. CHARTER art. 2, para. 1 (basing the organization on the principle of sovereign equality), para. 4 (committing states to refrain from the use of force), para 7 (refusing to respect state domestic jurisdiction when the Security Council intervenes under Chapter VII to quell a threat or breach of the peace). The appropriate modification of the international economic policymaking role of such destabilizing states is outside the scope of this paper.

256. This is often referred to as a problem of program "ownership" in the IMF literature. *See* Goldstein, *supra* note 16, at 12 (mentioning borrowing country ownership failures as one of the problems encountered in implementing IMF loan conditions).

257. Carlos Santiso, *Good Governance and Aid Effectiveness: The World Bank and Conditionality*, 7 GEO. PUBLIC POL'Y REV. 1, 8 (2001).

258. Falk & Strauss, *supra* note 99, at 212-14.

sor Franck explains, as a form of symbolic validation for an organization; without it, the organization's legitimacy—which is the key to making its rules feel obligatory on states—suffers.[259] This lack of institutional legitimacy and rule "obligatoriness" felt by states spills over into the domestic sphere, undermining both the government's and the people's will to implement those rules as fully as possible.[260]

Even a cursory review of the IMF's recent past demonstrates how accurate the theorists' arguments have proven to be. It is common knowledge that the IMF is seen as politically illegitimate in many countries and populations, and this lack of legitimacy is often rooted in a vision of the IMF as an undemocratic outsider imposing its will on domestic governments.[261] This lack of legitimacy, in turn, has led to an explosion of anti-IMF protests.

Large-scale, sometimes violent, protests were held at the sites of the IMF's annual meetings in Seattle, Washington, and Prague, and now follow the Fund wherever it meets.[262] A study conducted by researchers with the World Development Movement reveals that between 1999 and 2000, protests against IMF-dictated policies occurred in 13 developing countries and included at least 15 organized strikes, 29 demonstrations, and 16 riots or other violent incidents.[263] Political leaders in Argentina, Indonesia, Ecuador, Honduras, and the Dominican Republic—to name but a few—have experienced heavy protest and resistance to the imposition of IMF-backed policies.[264] This protest leads both government officials and

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259. *See* THOMAS FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 100-01, 206-07 (1990).

260. Falk & Strauss, *supra* note 99, at 212-14.

261. Joseph S. Nye, *Globalization's Democratic Deficit: How to Make International Institutions More Accountable*, FOREIGN AFF., July-Aug. 2001, at 2, 2-6.

262. *See id.* (discussing the global protest movement against international economic organizations and globalization); *Angry and Effective*, ECONOMIST, Sept. 23, 2000, at 85 (discussing the global protest movement against the IMF in particular and globalization in general).

263. *See generally* JESSICA WOODROFFE & MARK ELLIS-JONES, STATES OF UNREST: RESISTANCE TO IMF POLICIES IN POOR COUNTRIES (2000), *at* http://www.globalpolicy.org/socecon/bwi-wto/imf/2000/protest.htm.

264. *See No Fund of Love for the IMF*, ECONOMIST, June 3, 2003, at 39 (discussing protests in Argentina); Sadanand Dhume, *Calling the IMF*, FAR E. ECON. REV., Jan. 23, 2003, at 18 (discussing protests in Indonesia); Patrice M. Jones, *Poor Flex Muscle in Bolivia*, CHI. TRIB., Oct. 19, 2003, at C3 (noting

private firms to question such policies and undermines commitment to their effective implementation.[265] Indeed, such unrest caused the resignation of Argentine President Fernando de la Rua in December 2001.[266] The promotion of IMF-backed policies like standards and codes thus becomes considerably more difficult when the Fund's undemocratic nature undermines its political legitimacy.

In short, for both principled and pragmatic reasons, the degree of democracy obtained by international standards-setting and standards-implementing organizations matters. This argument becomes even more persuasive if the standards being adopted are "political" in the sense that there is a compelling reason why populace-reflecting input is needed in their formulation. The next section evaluates this issue.

B. *Standards Are "Political" Policies Needing Broadly Based Input*

It seems at least theoretically possible that some regulations are purely technical, and thus that their creation by isolated "experts" would cause no real problem for democratic values. Are financial disclosure and regulatory policies such purely technical subjects? I argue that they are not, for four reasons.

First, the notion that choices of economic policies are somehow technical decisions, totally removed from the sorts of group-interest-saturated debates that characterize politics, is increasingly recognized as incorrect.[267] In one sense, this is obvious from a study of the process of generating U.S. fiscal and financial regulation, in which private parties routinely engage agencies in an attempt to get their interests reflected in

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protest movements in Ecuador and Honduras); Larry Habegger & James O'Reilly, *World Watch: Dominican Republic*, CHI. TRIB., Feb. 8, 2004, at C3 (discussing violent strikes and protests in the Dominican Republic against the conditions of an IMF loan arrangement).

265. STIGLITZ, *supra* note 71, at 20.

266. Héctor Tobar & Andrés D'Alessandro, *Argentine Politician Played Game of Survivor*, L.A. TIMES, May 18, 2003, at A5.

267. Morais, *The Globalization of Human Rights Law*, *supra* note 84, at 90-92. *See also* ROBERT GILPIN, THE POLITICAL ECONOMY OF INTERNATIONAL RELATIONS 21-22 (1987) (contrasting the realm of pure economic theory with the "real world" where "markets . . . give rise to powerful political reactions").

the rules.[268] Indeed, much regulation is justified as serving the public interest by improving the operations of private markets and/or redistributing wealth differently within them.[269] Such a defense implies an intimate connection between the political goals of the "public interest" and the market mechanisms used to achieve them.

Second, economic theory is increasingly emphasizing the unbreakable links between politics and economics.[270] The entire discipline of political economy, for example, revolves around the study of the interrelations of the state and markets as two interdependent forces that constantly influence and change each other.[271] As Robert Gilpin observes, "A market is not politically neutral; its existence creates economic power which one actor can use against another. Economic interdependence creates vulnerabilities that can be exploited and manipulated."[272] Similarly, theories of economic development are beginning to incorporate a focus on freedom (in its multiple political senses) as a central component of "development," recognizing that the politico-social norms of a state affect its economic markets' behavior, and vice-versa.[273]

In fact, some scholars have posited, quite persuasively, that this model of economic policymaking—policies made by technocratic elites[274]—undermines democratic values by modifying the discourse and vision of how these sorts of regulations are created. Anne Orford explains:

> The idea of a globalized economy legitimises the development of a culture in which political decisions that would once have been at least theoretically within the realm of parliamentary decision-making,

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268. RICHARD J. PIERCE ET AL., ADMINISTRATIVE LAW AND PROCESS 7-10 (3d ed., 1999) (discussing "The Nature of the Administrative Process").

269. *Id.* at 10-11.

270. This argument is a slight development of one made in Morais, *The Globalization of Human Rights Law, supra* note 84, at 90-92.

271. *See* GILPIN, *supra* note 267, at 9-10, 22-24.

272. *Id.* at 23. These general arguments have also been applied to monetary regulations as well. *See id.* at 24.

273. AMARTYA SEN, DEVELOPMENT AS FREEDOM 3-4, 120-23 (1999) (all of Chapter 5, "Markets, State and Social Opportunity," makes the same point more broadly, with an emphasis on labor markets).

274. Or, for the purposes of this argument, standards generated by groups of experts or solely by specially-trained representatives of economically powerful states (e.g., finance ministers).

> popular sovereignty, or democratic government, are now made by experts in economics. Internationalism serves to reinforce this political culture based on "continual assertion of the magic of expertise" and the authority generated by an "exquisite mastery of [economic] data." . . . The inability of most people to contest and challenge decisions about many issues that shape their lives is presented as inevitable and natural, as a consequence of the disciplines and requirements of international competitiveness and globalization. The result is the ascendancy of a technocractic vision of "democracy-as-management," in which governments and experts are engaged in management of the economy and "politics is treated as having somehow already happened elsewhere. . . ."[275]

Practical observations support this contention. The Fund's focus on "good governance," a corruption-fighting initiative targeting states' public resource management and general regulatory environment, provides one example of IMF "ideal" policies directly affecting, if not dictating, the design of local political structures while denying local political input in the process.[276] In addition, Professor Picciotto has observed that the policies produced by these "expert agencies" are less technocratically grounded than their regulatory model would

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275. Orford, *supra* note 179, at 476. *See also* Claudio Grossman & Daniel D. Bradlow, *Are We Being Propelled Towards a People-Centered Transnational Legal Order?*, 9 AM. U. J. INT'L L. & POL'Y 1, 6-7 (1993) (discussing how the internationalization of a variety of regulatory issues shifts power away from national legislatures, limiting the ability of civil society to affect policy). Joseph Stiglitz makes a similar observation regarding the IMF specifically: "The stance of the IMF . . . was clear: it was the font of wisdom, the purveyor of an orthodoxy too subtle to be grasped by those in the developing world. The message conveyed was all too often clear: in the best of cases there was a member of an elite—a minister of finance or the head of a central bank—with whom the Fund might have a meaningful dialogue. Outside of this circle, there was little point in even trying to talk." STIGLITZ, *supra* note 71, at 41. He goes on to explain the illegitimacy, even from a technocratic point of view, of this practice. *Id.* at 41-42.

276. *See* Chantal Thomas, *Does the "Good Governance Policy" of the International Financial Institutions Privilege Markets at the Expense of Democracy?*, 14 CONN. J. INT'L L. 551, 552-57 (1999) (discussing good governance policies and state sovereignty).

suggest, because actors encouraging standards choose between the agencies on the basis of political expediency: "The choice of one organization rather than another is influenced not only by the appropriateness of its concerns or formal competence, but often more by its membership and the effects of that on the nature and quality of outcomes from negotiations."[277]

Third, the imposition of externally formed standards may also check the growth and legitimization of democratic institutions in developing states in practical ways. Fund-imposed conditions often require newly established democracies to pursue policies that are contrary to the desires of their people; in so doing, they lessen those governments' popular legitimacy.[278] For example, in Bolivia the IMF's requirements of water industry privatization led to water price increases in Cochabamba, the country's third largest city; the high price led to violent protests, the government declared a state of emergency, and public perceptions of the government's legitimacy, as well as the strength of the country's democracy, plummeted.[279] In situations where the policies imposed are politically popular, the Fund's and standards-setting bodies' removal of decision-making power from state governments' hands still undermines democratic processes because the people's power to meaningfully influence the rules governing them has been substantially lessened.[280] Popular or not, government becomes less democratic.

Finally, by laying the ground-rules for individual international economic relationships, standards also guide the gen-

277. Sol Picciotto, *Linkages in International Investment Regulation: The Antinomies of the Draft Multilateral Agreement on Investment*, 19 U. PA. J. INT'L ECON. L. 731, 735 (1998).

278. *See* WOODROFFE & ELLIS-JONES, *supra* note 263.

279. *Id.*

280. *See* Orford, *supra* note 179, at 468-70 (observing that developing state governments are actively excluded from economic decisions dictated by the Fund, and that this shift "clearly impact[s] upon political participation, popular sovereignty, and substantive democracy"). While Orford's analysis addresses IMF fiscal austerity measures, for the reasons argued herein the same logic applies to more "technical" regulatory regimes. *Cf.* Bradlow, *International Humanitarian Law*, *supra* note 57, at 711 (observing that the IMF is often seen in developing states as an unaccountable political actor rather than a disinterested technical advisor).

eral direction of international economic development.[281] This reference-frame shifting is accomplished through the delegitimization of previous norms and their replacement with the norms underlying the new standards.[282] For example, while the standards and codes initiatives are generally rudimentary and fragmented, some proponents see them as the beginnings of the foundation of the New International Financial Architecture (NIFA), which will touch all levels of society by addressing everything from commercial and corporate law to environmental and healthcare concerns through a patchwork web of interconnecting laws governing all aspects of globalized business activity.[283]

The generation of the norms of the international financial system is a facially political exercise because it establishes rules that greatly affect peoples' lives, albeit in often indirect ways, and would therefore benefit from reflecting their desires. The difficulty of state exclusion is that while persons possess legal personality under national law, they do not normally have such personality under international law; this means they feel the effects of changing soft international law—effects which often implicate their vital interests—without possessing the ability to directly influence or address those soft laws.[284] People are left to rely upon their governments to represent their interests for them, and while the nascence of the NIFA underlines that its content is far from determined, when developing state governments aren't given a seat at the rulemaking table, their people are totally excluded and their interests left by the wayside.

281. *See* C.M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT'L & COMP. L.Q. 850, 852-53 (1989). *See also* W. Riphagen, *From Soft Law to* Ius Cogens *and Back*, 17 VICTORIA U. WELLINGTON L. REV. 81, 91-92 (1987) (arguing for a conception of law as positioned between "the realm of pure ought and that of pure be," and noting that "[soft law and *ius cogens*] necessarily transfor[m] both the original ought-statements and the original be-statements in narrowing the gap between them at the same time combining the various ought-statements and be-statements.").

282. Gruchalla-Wesierski, *supra* note 232, at 55-56. This can only occur, however, if the norms being replaced are not enshrined in "hard law" documents. *Id.* Given the historic lack of a coherent international financial framework, this limitation presents no difficulties here.

283. Norton, *supra* note 91, at 896-97, 919-20.

284. Gruchalla-Wesierski, *supra* note 232, at 65-66.

In short, the transfer of regulatory power from the state to the Fund—in traditionally state-controlled spheres—diminishes democratic control when it is unaccompanied by meaningful representation. This leads us to an analysis of whether all states are, in fact, represented within the standards-and-codes policy world, and if so, whether their influence is anything more than that of a token, easily ignored voice.

C. *The Lack of Developing State Input and Influence Make the IMF and Standards-Setting Bodies Minimally Democratic*

The policies governing global standards and codes initiatives are developed in two main stages: the standards-drafting stage, performed by a variety of bodies, and the implementation practices stage, performed principally by the IMF. An analysis of the democratic, or non-democratic, nature of this process must consider both levels. I begin with the standards-setting bodies.

1. *Standards-Setting: State-Composed Organizations*

In the rules-drafting stage, which involves the standards and codes-setting bodies themselves, legitimacy concerns fall into two general categories: To the extent that states are involved, the controlling power of only a few states makes it seem that they are imposing their regulatory will on the others; to the extent states are not involved, it seems that law-making power has been taken from parliaments and handed over to non-democratic, non-accountable agents.[285]

The main state-populated organizations writing financial standards are the IMF and the OECD (the BIS, while playing host to several standards-setting bodies, does not write standards itself). The IMF was discussed above and is considered again below;[286] the parallel structures of the IMF Executive Board and its standards-writing International Monetary and Financial Committee mean that the criticisms of the Fund as a whole are equally applicable to its standards-writing processes. The room for outside input in the OECD appears mixed. On the one hand, its membership is very restrictive, and it is often

285. The following discussion is drawn from the descriptions of these organizations provided *supra* Part II.C.

286. See *supra* Part I.A.2, for an introductory democracy-based critique of the IMF) and *infra* Part IV.C.3, for a more detailed critique.

seen as a club for rich countries that pursues only the policy goals of those countries. On the other hand, the process for standards-generation was considerably more open, with proposals circulated, comments received, and outside advice sought.

It is unclear, based on available data, how many suggested modifications came from non-OECD-member states and, of those, how many were incorporated into the standards themselves. Nor is submitting one opinion in a sea of comments terribly instrumental. Yet, while it pales in comparison to a seat at a level bargaining table, some developing state input is certainly better than none, and the procedural openness reveals a degree of institutional sensitivity to interstate differences. This evinces a possibility that such sensitivities will be reflected in the resulting standards and creates an awareness to build upon in the future.

The BCBS, like the OECD, has a very restricted membership—in this case, only the central bank governors of the G-10 states. Yet, also like the OECD, its standards drafting process provides some space for outside input through consultations and notice-and-comment periods. Still, the experience of BCBS comment solicitation regarding its revised Capital Accord reveals that this process principally generates input from industrialized state actors in the form of financial industry organizations or private firms. The degree of influence this process grants developing states is thus suspect, particularly when the final decisions are still being made solely by industrial state representatives.

2. *Standards-Setting: Industry-Expert-Composed Organizations*

The remaining five organizations are composed solely of industry "experts."[287] The lack of government oversight over expert groupings presents an additional set of problems by generating the risk, regardless of the representatives' nationality, that those experts will follow professional ideologies that do not reflect their states' popular will.[288] For example, if one gathers a body of particularly conservative banking officials to set minimum capital adequacy guidelines, they may generate a standard that requires keeping more capital in bank vaults,

287. See *supra* Part II.C.3 for a discussion of these groups.
288. Picciotto, *supra* note 277, at 734-35.

thereby raising interest rates and pricing more borrowers out of the market than would be preferred by a less risk-adverse population. In other words, the experts have the potential to engage in institutional or interest group "rent seeking": using their position to pursue their own goals instead of those that maximally benefit society as a whole.[289]

The strategies available for addressing such rent seeking—delaying domestic implementation of "bad" policies, scrutinizing them, or boosting transparency in standards-creating bodies to clarify and modify their components before issuance[290]—all assume that the state has some power to refuse to implement the standards, or else some voice in changing their contents. This, as I have argued, is exactly what developing states lack in the modern system. Whether rent seeking does, in fact, occur is a very complex question beyond the scope of this paper. What is significant is that the possibility for this problem exists, and that potential reemphasizes the need for some universal state approval of sanctions to prevent it from occurring.

In contrast with the BCBS and OECD, IOSCO has members from both developing and industrialized states, and its Executive Committee structure ensures that several seats are held by developing states. IOSCO's use of the "one state, one vote" principle also enhances developing state influence, though one cannot eliminate the possibility of extra-agency economic power affecting the Organization's final decisions. Still, these processes provide an excellent opportunity for developing state perspectives to be reflected in the promulgated standards, and that potential is boosted by the apparent interaction of the working committees (one of which is entirely comprised of developing state representatives) in standards-drafting. From a democracy-concerned perspective, IOSCO's

289. Stephan, *supra* note 88, at 706-19. "Rent seeking," a term often used in the field of law and economics, refers to "[c]utting yourself a bigger slice of the cake rather than making the cake bigger." Rent seeking is criticized because it creates no overall value. BISHOP, *supra* note 10, at 203; *see also* BLACK'S LAW DICTIONARY 1300 (7th ed. 1999) (for the link with law and economics). Rent seeking is problematic in this context because it results in regulations that are less beneficial to the population than other equally possible alternatives.

290. Stephan, *supra* note 88, at 721-34.

practices are the best of the organizations surveyed in this Note.

The IAIS's democratic openness is unclear. While the division of Executive Committee seats between geographic regions and multiplicity of groups informing the technical committee appear, in the abstract, to provide room for input from many sources, the lack of publicly available detail makes a more detailed assessment impossible.

The CPSS, a sister of the BCBS as another BIS-affiliated body, shares the BCBS's membership limitations, but unlike the BCBS it has augmented its outside consultations and notice-and-comment proceedings by integrating eleven non-members into its standards-drafting Task Force. While the final approval of the CPSS Core Principles rests with the G-10 representatives, giving them considerable control over the end product, assigning several developing states seats at the drafting table is a considerable step in the democratic direction.

The IFAC, like many of the above groups, is also limited by a Board dominated by industrialized state representatives. Its pursuit of highly transparent processes and extensive notice-and-comment procedures, however, may provide good opportunities for the inclusion of developing state input. The IASB, in contrast, has strayed from its fellow accountancy group's lead by limiting the number of developing states on its Board of Trustees and Standards Advisory Council to a distinct minority. At the same time, however, the IASB follows the most open, detailed, and widely consultative standards-drafting procedures of the organizations evaluated here. Developing-state access therefore exists, though the extent of those states' influence is, like the general rule itself, unclear and possibly suspect.

An objection to the membership-based critique presented here is that outside forces constrain the substantive policy options of standards-setting bodies even if their memberships do not. As "private legislatures" that make laws in the hope that states will enact them, standards-setting bodies must promulgate rules and principles that are well-enough constructed to be actually selected for adoption and effective in the long term; indeed, their prestige as organizations is dependent

upon this success.[291] This arguably constrains the bodies' discretion.

The flaw in this claim, however, is that it assumes that states can freely choose whether or not to implement the standards. As argued above, once the IMF incorporates a standard into its implementation initiatives, this free choice disappears for developing states. The "adopting" body thus becomes the IMF, and more specifically the small group of powerful states that control its management. These states frequently do not share the views and concerns of developing states, so the choices of the standards-setting bodies are not necessarily constrained by the concerns of developing states. Such constraints are only provided through membership and drafting processes, and those all stand in need of improvement.

3. *Implementation: The IMF*

The IMF is frequently criticized for the power differentials, noted above, that proportional voting creates on the Executive Board.[292] The governing power within the IMF is concentrated in the hands of the G-7 states, which control forty-seven percent of the votes between them and only comprise fourteen percent of the world's population; all of Africa, in contrast, has only two percent of the total votes and is mostly represented by one seat on the Board.[293] While the board officially makes almost all its decisions by consensus, the political reality of the differing voting (and general economic and political) power possessed by each Board member strongly influences the Fund's policies,[294] so much so that many have accused the IMF of being at the behest of the interests of the United States and/or the financial industry and global capital markets.[295] Striking examples of this include that the Manag-

291. *Id.* at 688-89.

292. *See supra* Part I.A.2.

293. *See supra* Part I.B; OXFAM INT'L, *supra* note 40.

294. UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 2002, at 113 (2002), *available at* http://hdr.undp.org/reports/global/2002/en/pdf/complete.pdf [hereinafter HUMAN DEVELOPMENT REPORT 2002].

295. *See, e.g., id.*; STIGLITZ, *supra* note 71, at 14-15, 19-20, 206-213, 216; Richard Falk, *Re-framing the Legal Agenda of World Order in the Course of a Turbulent Century*, 9 TRANSNAT'L L. & CONTEMP. PROBS. 451, 469 (1999) ("The present period exhibits an effort to bring the logic of international law into

ing Director of the IMF, by long-standing political convention, is always a European, while the head of the World Bank is always an American; and that many key IMF personnel come from developed states' financial industries and return there following their work at the Fund.[296]

The problem presented by this power imbalance is compounded by the large difference in IMF policy effects felt by developed and developing states. The IMF is principally run by a small group of developed states which will likely never borrow funds from the IMF; this means that while surveillance and consultations still occur, the lack of Fund leverage allows them to ignore any Fund advice or pressure with which their governments, guided by their domestic political environment, disagree.[297] In effect, a divide is created between (industrialized) creditor states—that control the Fund—and (overwhelmingly developing) debtor states—whose capital needs practically force them to follow the Fund's proscriptions and who bear almost all the risks when its policy requirements cause problems.[298]

The IMF has heard criticism from developing state representatives that the standards initiatives do not take the economic position and implementation abilities of developing states into full enough account,[299] but the Fund's response is

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greater conformity with the discipline of global capital . . . ."); Norton, *supra* note 91, at 916 ("[The International Financial Institutions] are, to a large extent, transmitters or implementers of the changing, and at times conflicting, objectives of their key member states . . . . Though designed as largely depoliticized institutions, in times of major crises and global uncertainty, the institutions appear to be influenced substantially, albeit indirectly, by the prevailing political and economic views of their key member states.").

296. *See* HUMAN DEVELOPMENT REPORT 2002, *supra* note 294, at 113 (discussing the political convention); STIGLITZ, *supra* note 71, at 207-08 (discussing the Fund's links with the financial industry).

297. *Cf.* Dorkin, *supra* note 47, at 250-51 (noting that the "IMF's surveillance powers have mostly been directed at developing countries, while the world's major industrial powers have gone about setting monetary policies among themselves"); STIGLITZ, *supra* note 71, at 48-49.

298. HUMAN DEVELOPMENT REPORT 2002, *supra* note 294, at 114. *See also* Bradlow, *The World Bank*, *supra* note 60, at 70 (contrasting the IMF's influence over developing states with its lack of influence over industrialized ones). I say "almost" because the lender bears the risk that the borrowing state will default on their loan.

299. Int'l Monetary Fund, *International Standards and Codes: Widespread Participation, Cooperation Are Key in Developing, Implementing Standards*, 30 IMF

almost Janus-like: On the one hand, the Fund claims to have been trying to balance and nuance its standards assessments in the ROSCs and avoiding giving a compliance grade,[300] but on the other hand its information dispersal function is performed with the knowledge and perhaps even with the hope that private market actors will take this more nuanced data and incorporate it into their investment risk analyses—which is effectively the same thing as grading that state.[301] If, as seems likely, the IMF is going to continue implementing standards in this manner, then the only influence over market conclusions available to developing states is control over the content of the standards by which they are being judged.

Expanding the pool of states to those beyond the G-7 who also participate in standards and codes setting only underscores the above analysis. The G-10 states control sixty-four percent of the total IMF Board votes, up from the G-7's forty-seven percent; the states in the FSF control fifty-six percent of the votes.[302] While the G-20 provides some broadening of the number of states with input, the power of those additional states within the Fund is diminished because several countries share a Director, and several Board constituencies are not represented in the G-20 at all.[303] The same states that write the standards and codes are also guiding IMF enforcement of those standards and codes, and there is minimal space for the influence of other marginalized states in those enforcement decisions.

4. *Coordination, Management, and Potential: The Financial Stability Forum*

The final organization requiring consideration is the Financial Stability Forum, which plays a critical role in directing the global standards and codes movement.[304] The FSF is, however, a G-7 creation couched within the BIS whose membership is limited to BIS states, a few other industrialized coun-

SURV. 101, 101, 105-07 (2001), *available at* http://www.imf.org/external/pubs/ft/survey/2001/040201.pdf.

300. *Id.* at 106-07.

301. See *supra* Part III.C for a more detailed version of this argument.

302. Giovanoli, *supra* note 38, at 30-31.

303. *Id.* at 31 & n.70.

304. See *supra* Part II.C.4 for a more detailed discussion of the FSF.

tries, and the other industry-expert organizations described above. The steering of the global standards agenda is thus controlled by the same few states that dominate the IMF and OECD and are centrally represented in every other organization listed here. All of this demonstrates that the realities of the current global economic power structure are mirrored in the standards-creating bodies, and with the exception of IOSCO, all possess some representation deficiencies in either their management or standards-generating processes, if not both.

At the same time, however, the FSF is the institution with the greatest potential for reformation into a body that corrects for the standards system's democratic deficit. The expansion of the policy design practices of any standards-setting body is not costless: The difficulty of reconciling divergent positions and drafting consistent, coherent standards increases with the size of the group doing the policymaking.[305] Providing a place for every state at every table risks grinding the entire standards initiative to a halt.[306] The obstacle to democratic reform is finding some way to increase the number and volume of voices in the standards process without it turning into an unmanageable cacophony.

Some authors have suggested changes including expanding the G-20 to a universal membership organization[307] or shifting much of the standards-generation and implementation processes to a branch of an existing universal membership organization such as the United Nations.[308] The difficulty with these approaches is that they risk the overexpansion problems discussed above. However, a two-tiered system, in which the formulation of rules is done by working groups but approval is handled by a universal membership body,[309] would avoid this problem by balancing the benefits of small group standards-formation with the back-up check of uniform gov-

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305. Giovanoli, *supra* note 38, at 30.

306. Whether this result would itself be a good thing is a separate question; in my opinion, however, the case for generating some uniform standards has merit, if for no other reason than that it should reduce the transaction costs of international business and permit those resources to be redirected to more efficient value-generating uses.

307. Giovanoli, *supra* note 38, at 32.

308. Morais, *The Quest for International Standards*, *supra* note 9, at 811-16.

309. *See* Giovanoli, *supra* note 38, at 30.

ernmental approval to ensure all views are evenly considered and negotiated between.

The Financial Stability Forum, as a young organization with a broad mandate, could be molded into the sort of body envisioned here. Its membership would need to be radically expanded to become "universal," and decisions would ideally be made by consensus or, when this is not possible, by vote under a one-vote-per-state system. The FSF sits at the intersection of standards creation and standards implementation, influencing the behavior of organizations in both realms. Giving increased governing power to developing states at this level would help remedy the faults of the organizations involved in both tasks.

The FSF could continue to advise the IMF to only integrate approved sets of standards into its implementation promotion mechanisms. This approval process, in turn, could serve as a means of increasing developing state input into the content of standards themselves. Standards-setting bodies would know that their codes would only receive widespread adoption if the FSF, and the developing states within it, approve them, so they should naturally seek more developing state input to facilitate that approval. In short, while the FSF currently reinforces industrialized state control of the standards-setting process, with modifications it could serve as the institution to correct for the flaws in the status quo system.

V. Conclusion: The Case for Change

If one accepts the democratic proposition that legitimate governing power comes from the will of the governed and that all people ought to have some say, through meaningful representation, in the rules that control their behavior, then the current international standards and codes regime is problematic. Standards are drafted by organizations that are principally populated by either a select group of industrialized countries or experts who operate outside government control. They are coordinated by an organization controlled by those same industrialized states, and their implementation procedures are designed and enacted by yet another body controlled by those states. The people of the world's developing countries are mostly left out of this process, appearing only

through a few Executive Committee and Board seats, from the text of a comment, or at the occasional consultative meeting.

Yet these standards weigh most heavily on those developing states, and they face extreme difficulty in opting-out of them. The standards perform the very sort of resource-distribution-affecting and norm-creating functions that demand popular input for their legitimacy and success. The status quo is democratically deficient, and for both normative and practical reasons, reform is needed.