

# LAW IN THE GLOBAL ORDER: THE IMF AND FINANCIAL REGULATION

ADAM FEIBELMAN\*

I.	INTRODUCTION . . . . .	687
II.	CONSENSUS ABOUT INTERNATIONAL FINANCIAL REGULATION . . . . .	693
III.	THE FUND'S LEGAL DOMAIN . . . . .	702
	A. <i>Members' Obligations</i> . . . . .	703
	B. <i>Fund Surveillance</i> . . . . .	706
	1. <i>Bilateral</i> . . . . .	706
	2. <i>Multilateral</i> . . . . .	709
	C. <i>Summary</i> . . . . .	711
IV.	FINANCIAL SURVEILLANCE . . . . .	711
	A. <i>Scope</i> . . . . .	711
	B. <i>The Financial Sector Assessment Program</i> . . . . .	716
	C. <i>Managing Cross-Border Capital Movements</i> . . . . .	720
	D. <i>Engagement with Europe</i> . . . . .	725
	E. <i>Impact</i> . . . . .	729
V.	REMAPPING AND IMPLICATIONS . . . . .	734
	A. <i>Remapping</i> . . . . .	734
	B. <i>Implications</i> . . . . .	739
VI.	CONCLUSION . . . . .	744

## I. INTRODUCTION

Over the last two decades, the framework for international financial regulation has emerged as a prime example of how contemporary international law works in the absence of

---

\* Sumter Davis Marks Professor, Tulane Law School. Thanks to Adeno Addis, Hilary Allen, Nicholas Almendares, Shu-Yi Oei, Ann Lipton, Steve Sheffrin, Martin Weiss, and David Zaring, and participants of the Azim Premji University faculty seminar, the American Society of International Law International Economic Law workshop at the Wharton School, the Texas International Law Journal symposium, *The Nation State and Its Banks: The Inter-Relationship among International Regulation of Financial Institutions, Derivatives and Sovereign Debt*, the Duke Journal of Comparative and International Law symposium, *Investment in Emerging Markets: the Challenges of Infrastructure Development*, the University of Pennsylvania Journal of International Law symposium, *International Regulation of Investment in the Rising Powers*, and the Tulane Law School faculty workshop series.

the familiar trappings of law.<sup>1</sup> As the literature on the topic emphasizes, traditional definitions of international law assume formal obligations and international institutions created by state-level agreements. According to this literature, one thing is certain: there is no traditional, state-level, treaty-based component of international financial regulation.<sup>2</sup> Instead, as Part II relates, the conventional account of international financial regulation describes a decentralized and cooperative framework built by domestic regulators and coordinated through a handful of sector-specific organizations, like the Basel Committee of Banking Supervision, and two important cross-sector agenda setting organizations, the G-20 and the Financial Stability Board. These organizations provide effective forums for identifying regulatory concerns, coordinating policies, articulating standards, and promoting compliance. According to this account, although the framework for international financial regulation is not based upon formal legal obligations, it features most of the crucial and defining attributes of law, such as coordination, compliance, and enforcement. This framework thus provides a compelling example of international coordination and a model of how contemporary international law works in the absence of formal, state-level obligation.

This account of international financial regulation has a significant blind spot. It misapprehends the scope of international monetary law and the role of the International Monetary Fund, a treaty-based international institution.<sup>3</sup> To the ex-

---

1. See, e.g., CHRIS BRUMMER, *SOFT LAW AND THE GLOBAL FINANCIAL SYSTEM: RULE MAKING IN THE 21ST CENTURY* (2012); ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004); David Zaring, *Finding Legal Principle in Global Financial Regulation*, 52 VA. J. INT'L L. 683 (2012) [hereinafter Zaring, *Finding Legal Principle*]; David Zaring, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*, 33 TEX. INT'L L.J. 281 (1998) [hereinafter Zaring, *Twilight*].

2. See Zaring, *Twilight*, *supra* note 1, at 285; BRUMMER, *supra* note 1, at 3, 60–63. Investment and trade agreements often include commitments regarding financial policies that affect the scope of permissible regulation by their signatories. These could fairly be construed as agreements regarding financial regulation. This article does not treat them as such, however, because they are not designed to define the content or operation of regulatory regimes; at most, they help define the outer limits of regulatory authority.

3. Notable exceptions to this account are ANNAMARIA VITERBO, *INTERNATIONAL ECONOMIC LAW AND MONETARY MEASURES: LIMITATIONS TO STATES' SOVEREIGNTY AND DISPUTE SETTLEMENT* (2012) (exploring the connections between the international monetary and financial systems, and exploring the

tent that international monetary law or the Fund are recognized in the framework of international financial regulation, the Fund is generally miscast as a monitor of its members' compliance with agreements forged among domestic regulators or as another forum for consultation among regulators and officials.

In fact, as described in Part III, although the Fund is largely known for its conditional lending function, it is a regulatory institution charged with enforcing formal obligations of its nearly universal membership, including members' obligations with regard to their financial policies.<sup>4</sup> Among other things, the Fund's Articles of Agreement, its foundational treaty, obliges member states to help maintain systemic stability by pursuing financial policies that promote their own domestic stability.<sup>5</sup> The Fund's primary regulatory role is to conduct bilateral surveillance of its members' performance of these obligations and multilateral surveillance to "oversee the international monetary system in order to ensure its effective operation."<sup>6</sup> Surveillance is thus a mode of enforcement, albeit one that relies primarily on persuasion and not on coercive sanctions.

Especially since the onset of the recent global financial crisis, financial surveillance has become an increasingly significant component of the Fund's broadening mandate. As a result, the Fund has asserted an expanding regulatory role re-

---

Fund's role in helping regulate both); Michael S. Barr, *International Lawmaking by Hybrid Bodies: The Case of Financial Regulation*, in RESEARCH HANDBOOK ON THE THEORY AND PRACTICE OF INTERNATIONAL LAWMAKING 262 (Catherine Brölmann & Yannick Radi eds., 2016) (describing the Fund's mandate regarding financial policies and its relationship to other international regulatory entities); Matthew C. Turk, *Reframing International Financial Regulation after the Global Financial Crisis: Rational States and Interdependence, Not Regulatory Networks and Soft Law*, 36 MICH. J. INT'L L. 59 (2014) (observing that, contrary to conventional accounts, the IMF is a formal treaty-based component of the international financial regulatory framework); Rosa M. Lastra, *The Role of the IMF as a Global Financial Authority* (Queen Mary University of London, Research Paper No. 55, 2010).

4. See *infra* Part III.

5. Arguably, member states are also obliged to avoid financial policies that undermine global stability even if those policies do not threaten their own domestic stability. See *infra* notes 82–84 and accompanying text.

6. Articles of Agreement of the IMF, art. 4, § 3(a), Dec. 27, 1945, 2 U.N.T.S. 39, 40 (current version at 15 I.L.M. 546, 547, Apr. 30, 1976).

garding the international financial system beyond its considerable influence over crisis-torn states that come to the Fund for financial assistance.<sup>7</sup> Part IV of this Article examines three aspects of the Fund's surveillance that illustrate its increasing concern with its members' financial policies and explores the formal legal basis for each: expansion of the Financial Sector Assessment Program,<sup>8</sup> the Fund's new "institutional view" on capital controls,<sup>9</sup> and its efforts to help promote the euro zone's emerging banking union.<sup>10</sup>

These activities reflect the scope of the Fund's mandate for financial surveillance and the nature of its efforts in pursuit of that mandate. Unfortunately, the literature on financial regulation generally misapprehends this mandate and largely ignores these efforts. As a result, scholars and commentators have not really considered the Fund's potential impact on its members' domestic and international financial policies or what that impact may tell us about global governance. This Article relocates the Fund within the framework of international financial regulation with the aim of promoting further study of the Fund's financial surveillance, its impact, and what that impact reflects about the operation of international law.

Part IV argues that the Fund plays a much more active and central role in the framework of international financial regulation than most commentators appreciate. It participates in the internal work of many of the other important actors within the framework, including agenda setters. Through its surveillance, the Fund plays a crucial, unique role in assessing sources of vulnerability and instability that flow from both the design and the operation of its members' financial policies, and in encouraging members to adopt reforms to address those sources of vulnerability and instability.

To be sure, financial policies are the product of numerous and complex determinants, so it is extremely difficult to identify the unique impact of the Fund's surveillance on members' policies. That said, as Part IV explains, there is evidence that, despite the well-known limits and weaknesses of Fund sur-

---

7. For a discussion of the Fund's influence through its conditional lending, see *infra* notes 201–04 and accompanying text.

8. See *infra* Part IV.B.

9. See *infra* Part IV.C.

10. See *infra* Part IV.D.

veillance, it is often a contributing determinant of its members' policies.<sup>11</sup> Although the Fund generally does not employ coercive sanctions to enforce members' obligations, its surveillance is nonetheless a formidable mode of engagement and enforcement. In the course of its surveillance, Fund missions have regular, candid discussions with members' policymakers. Its staff has technocratic expertise and considerable (perhaps too much) professional prestige, especially among economists. In its private consultations with members and in its public reports, the Fund often gives concrete policy advice buttressed by conventional economic theory and empirical evidence.<sup>12</sup> Furthermore, the staff and the Fund's Executive Board enjoy a unique vantage on how each member connects to, and is exposed to, the international monetary and financial systems. Its advice may at times—perhaps systematically, as some critics believe—be flawed,<sup>13</sup> but it is not easily ignored, especially for member states that do not have strong independent capacity for policy assessment.

Assuming that the Fund does have some meaningful impact on its members' financial policies, this requires a remapping of the Fund's place within the framework of international financial regulation, and it seriously complicates the account of financial regulation as exclusively the province of regulatory networks and informal coordination and cooperation. An accurate account must at least accommodate a formal international institution performing the distinctly traditional regulatory roles of enforcement and supervision. Part V argues that, in the taxonomy of network theory, international financial regulation is a vertical governance network with the Fund, a genuinely supranational institution, performing an enforcement function.

Furthermore, if Fund surveillance has more than a trivial impact on international financial regulation, this raises an interesting possibility: that states' formal commitments and the Fund's formal responsibilities under its Articles contribute to

---

11. See *infra* Part IV.E.

12. See *infra* notes 105-14. See also, NGAIRE WOODS, *THE GLOBALIZERS* (2006) (describing the evolving economic views and policy approaches at the Fund through the early 2000s in the context of its lending programs).

13. See generally WOODS, *supra* note 12 (critically evaluating the Fund's approach and advice to members since the collapse of the fixed exchange rate regime in the 1970s).

the design and operation of both domestic and international financial regulation. Part V proposes that these formal, treaty-based obligations and responsibilities do make such a contribution. Perhaps most significantly, they likely influence the Fund's staff and its officials in their performance of ongoing supervisory and regulatory activities. Internal governance at the Fund puts meaningful weight on the formal authority for the Fund's mandate and its activities, and such attention to formal authority likely gives Fund staff and officials some measure of confidence in their conduct of surveillance with members.

It is also possible that states' formal obligations pursuant to the Fund's Articles affect their engagement with Fund staff and officials in the course of surveillance. The formal articulation of these obligations certainly matters to the Fund's members. Throughout the history of the Fund, members have carefully delineated the substance and scope of their formal obligations, and the current set of obligations were the subject of prolonged debate after the collapse of the initial regime in the 1970s.<sup>14</sup> Officials in member states are likely aware that Fund surveillance is designed to enforce their obligations to maintain a stable system of exchange rates. It is no accident, for example, that surveillance missions are widely known as "Article IV consultations," referring to the provision in the Fund's Articles that sets out members' general obligations. This reflects at least some effort to employ the legal obligation itself as motivation for member states. While this motivation is probably not often determinative, it at least raises the possibility that members experience some tug of obligation in weighing the advice they receive in the process of surveillance.

In sum, international financial regulation is held out as a paradigmatic example of the regulatory work done by soft law and informal arrangements in global governance. While this account may be largely accurate, it ignores the role of the Fund in helping design and regulate the financial regulatory framework and the formal legal basis for that role. In ignoring this component of international financial regulation, scholars may be missing an important example of the utility of formal international legal arrangements.

---

14. See *infra* Part III.A.

## II. CONSENSUS ABOUT INTERNATIONAL FINANCIAL REGULATION

During the last few decades of the twentieth century, a distinctly international financial system materialized from the existing landscape of domestic financial markets.<sup>15</sup> This international system was made possible in large part by technological innovations and legal developments that helped increase the scope and speed of cross-border financial transactions, deepen linkages within and between financial markets, and expand the number of financial firms conducting business across national borders.<sup>16</sup> In the recent global financial crisis, these factors fueled and accelerated the spread of financial turmoil around the globe and these cross-border links complicated efforts to resolve the crisis.<sup>17</sup> The crisis thus revealed weaknesses in the regulatory framework governing this emergent international financial system: domestic and international policymakers had trouble coordinating approaches to regulating and resolving systemically significant institutions, managing global liquidity and capital flows, reducing regulatory arbitrage, anticipating cross-border spillover effects of domestic financial policies, and stemming contagion of domestic financial crises.<sup>18</sup> In

---

15. See VITERBO, *supra* note 3, at 4, 25–26; Zaring, *Twilight*, *supra* note 1, at 283; BRUMMER, *supra* note 1, at 10–12.

16. See VITERBO, *supra* note 3, at 4.

17. See Zaring, *Finding Legal Principle*, *supra* note 1, at 689.

18. See, e.g., BRUMMER, *supra* note 1, at 16 (“[C]ross-border regulatory cooperation has been increasingly viewed as a necessary tool for providing financial market stability and consumer protection.”); Yesha Yadav, *The Specter of Sisyphus: Re-Making International Financial Regulation After the Global Financial Crisis*, 24 EMORY INT’L L. REV. 83, 85 (2010) (“[T]he globally contagious spread of crisis has turned the analytical spotlight on the international regulatory framework and its ability to act to exert control over an increasingly consolidated financial market in products and services.”). See also IMF, FINANCIAL SURVEILLANCE STRATEGY 4 (Aug. 28, 2012), <http://www.imf.org/external/np/pp/eng/2012/082812.pdf> (“[S]eismic changes have inexorably linked national economies to each other, transferring risks across borders in ways that have become increasingly difficult to track. The realization that the failure of one bank in one country can bring the global economy down . . . has fundamentally shaken the contours of our thinking and policy making.”); VITERBO, *supra* note 3, at 22–23, 27 (discussing the G-20’s concern with regulatory reforms to promote global monetary and financial stability in the wake of the financial crisis); Douglas W. Arner & M.W. Taylor, *The Global Financial Crisis and the Financial Stability Board: Hardening the Soft Law of International Financial Regulation?*, 32 U. NEW S. WALES L.J. 488, 488 (2009).

the wake of the recent crisis, it was clear that the distinctly international aspects of this financial system pose acute challenges for the emerging framework of international financial regulation.<sup>19</sup>

From a traditional legal perspective, it might appear that there simply is no distinctly international apparatus of financial law and regulation.<sup>20</sup> It is widely believed that there are no traditional treaty-based institutions charged with regulating or coordinating the regulation of crucial transnational components of the international financial system.<sup>21</sup> Whether by design or not, international financial regulation “has had no truck with the relatively routinized mechanisms of treaties and formally created international organizations.”<sup>22</sup>

Scholars from various fields have observed that, nonetheless, the international financial system is subject to a regulatory framework of coordination and cooperation among domestic regulators.<sup>23</sup> This framework includes a number of sector-specific standard-setting international organizations, like the Basel Committee on Banking Supervision,<sup>24</sup> the International

---

19. See *infra* Section III.B.2.

20. See BRUMMER, *supra* note 1, at 3 (From a traditional perspective, “financial law does not qualify as ‘law,’ given the absence of a centralized coercive authority—a world government in effect—to implement its dictates.”).

21. See BRUMMER, *supra* note 1, at 3; Zaring, *Finding Legal Principle*, *supra* note 1, at 689 (“[T]here has been no concerted attempt to formalize the legal system that has emerged to oversee global finance through a treaty.”).

22. Zaring, *Finding Legal Principle*, *supra* note 1, at 690; see also SLAUGHTER, *supra* note 1, at 33–34.

23. See, e.g., Zaring, *Finding Legal Principle*, *supra* note 1, at 688–93 n.14 (describing the “emergence” of, and scholarship on, international financial regulation and the “New International Financial Architecture”); see also SLAUGHTER, *supra* note 1, 166–88; VITERBO, *supra* note 3, at 106–09 (citing ANDREAS F. LOWENFELD, *INTERNATIONAL ECONOMIC LAW* (2008)); Bart, *supra* note 3, at 281–84. *But see* Eric Pan, *Challenge of International Cooperation and Institutional Design in Financial Supervision: Beyond Transnational Networks*, 11 *CHI. J. INT’L L.* 243 (2010) (arguing that the “international financial architecture” is ill-equipped to carry out its regulatory task, and proposing a formal international regulator and supervisor for the international financial system); Yadav, *supra* note 18.

24. The Basel Committee was formed in 1974 by the governors of the central banks of the G10 countries with the overarching aim of improving and coordinate banking supervisory practice. Now comprised of representatives of 27 jurisdictions, the Committee provides a forum for central bankers and other banking supervisors to share information and discuss ongoing supervisory challenges, and, significantly, determines minimum standards for



Organization of Securities Commissions (“IOSCO”),<sup>25</sup> the International Association of Insurance Supervisors (“IAIS”),<sup>26</sup> and the International Swaps and Derivatives Association (“ISDA”).<sup>27</sup> The OECD is another important standard-setting institution, although the scope of its activities is not sector specific.<sup>28</sup> These organizations provide institutionalized, technocratic forums for sharing information and for reaching agreements or recommendations regarding best regulatory ap-

---

domestic banking supervisors. Centerpieces of this activity are the Committee’s Core Principles for Effective Banking Supervision and its capital adequacy framework popularly known as the Basel Accords. See *History of the Basel Committee*, BANK FOR INT’L SETTLEMENTS (Dec. 30, 2016), <http://www.bis.org/bcbs/history.htm>; see also Zaring, *Finding Legal Principle*, *supra* note 1, at 695–98; BRUMMER, *supra* note 1, at 74–80.

25. IOSCO evolved from a regional cooperative forum for securities regulators in the Americas formed during the 1970s. See *About IOSCO*, INT’L ORG. OF SEC. COMM’NS, [http://www.iosco.org/about/?subsection=about\\_iosco](http://www.iosco.org/about/?subsection=about_iosco) (last visited Mar. 9, 2017). It expanded its membership beyond the Americas and adopted its current formal structure in the early 1980s. It now includes over 100 jurisdictions representing most of the global market for securities. In 1998, IOSCO articulated standards for domestic securities regulators, set forth in its Objectives and Principles of Securities Regulation. See INT’L ORG. OF SEC. COMM’NS, OBJECTIVES AND PRINCIPLES OF SECURITIES REGULATION (May 2003), <http://www.iosco.org/library/pubdocs/pdf/IOS-COPD154.pdf>. In 2002, it adopted a “multilateral memorandum of understanding” regarding cross-border enforcement of securities regulation. Since that time, the organization has worked to encourage its members to adopt the principles and join the memorandum of understanding. See Zaring, *Finding Legal Principle*, *supra* note 1, at 699–700; BRUMMER, *supra* note 1, at 74–80; Roberta S. Karmel, *IOSCO’s Response to the Financial Crisis*, 37 J. CORP. L. 849 (2012).

26. The IAIS, established in 1994, has members representing insurance supervisors from over 200 jurisdiction and numerous observers from the industry as well as the public sector. It has promulgated the Insurance Core Principles as well as the Common Framework for supervision of transnational insurance firms. See BRUMMER, *supra* note 1, at 74–80.

27. See generally *About ISDA*, INT’L SWAPS AND DERIVATIVES ASS’N, <http://www2.isda.org/about-isda/> (last visited Mar. 19, 2017). Other international financial regulatory standard-setting organizations include the International Accounting Standards Board, Committee on Payments and Market Infrastructure, Financial Action Task Force, and International Association of Deposit Insurers. See BRUMMER, *supra* note 1, at 80–89.

28. See generally *About the OECD*, ORG. FOR ECON. CO-OPERATION & DEV., <http://www.oecd.org/about/> (last visited Mar. 19, 2017). As discussed below, the OECD also provides a forum for formal international agreements, including the Code of Liberalisation of Capital Movements. See *infra* notes 164–65 and accompanying text.

proaches and practices.<sup>29</sup> They promote compliance with these agreements and standards through peer-review processes, consultation, and suasion.<sup>30</sup>

The framework also includes two important cross-sector “agenda setting” entities, the G-20 and the Financial Stability Board, which play critical roles at the center of this web of international organizations.<sup>31</sup> The G-20 has emerged since the onset of the recent crisis as the primary forum for government officials and central banks to confer regularly on economic policies.<sup>32</sup> It convenes regular summits, where its members’ heads of government or state deliberate, reach informal agreements, and articulate goals regarding broad matters of domestic and transnational policymaking.<sup>33</sup>

The Financial Stability Board is a forum for government officials, central bankers, international financial institutions, and international sector-specific standard-setting entities.<sup>34</sup> Its mandate is to coordinate the efforts of these various policy-making and regulatory actors.<sup>35</sup> It monitors developments of

---

29. See Zaring, *Finding Legal Principle*, *supra* note 1, at 693–94; VITERBO, *supra* note 3, at 101–10.

30. See, e.g., BRUMMER, *supra* note 1, at 5 (“[I]nternational financial regulation, though not emanating from traditional authoritative sources, is indeed bolstered by a range of often complex enforcement technologies that render it more coercive than traditional theories of international law predict.”); see also Zaring, *Finding Legal Principle*, *supra* note 1, at 692 (“[T]hese networks have developed an increasingly elaborate architecture of oversight and procedure as they have taken on more and more responsibility for overseeing international finance.”).

31. See BRUMMER, *supra* note 1, at 67–74; VITERBO, *supra* note 3, at 116–21 (noting that the Financial Stability Board “appears to be in a controlling position over standard-setting bodies”); SLAUGHTER, *supra* note 1, at 135, 273 n.6 (describing the Financial Stability Forum, which became the Financial Stability Board, as a “networks of networks”); Barr, *supra* note 3, at 273–84.

32. See G20, <https://g20.org/> (last visited Mar. 19, 2017). Since the crisis, it has replaced the smaller G-7 and G-8 groups that had previously formed the core of economic collaboration. See, e.g., VITERBO, *supra* note 3, at 22–23; Pan, *supra* note 23.

33. The G-20 provided a forum for designing the post-crisis international financial regulatory framework, which included an enhanced role for the Fund. VITERBO, *supra* note 3, at 113, 128; Leader’s Statement on the G-20 Pittsburgh Summit, at 5–6, 10–11 (Sept. 24–25, 2009), available at <http://www.pittsburghsummit.gov/mediacenter/129639.htm>.

34. See FIN. STABILITY BD., [www.fsb.org](http://www.fsb.org) (last visited Mar. 19, 2017).

35. See Stavros Gadinis, *The Financial Stability Board: The New Politics of International Financial Regulation*, 48 TEX. INT’L L.J. 157 (2013); THE FINANCIAL

regulatory concern within the international financial system, advises its members on how to respond to those developments, adopts principles and recommendations regarding regulatory approaches, reviews the work of standard-setting institutions, and helps its members devise advance plans for crisis management.<sup>36</sup> It enforces its own agreements and those that its members make in other forums through periodic peer-review assessments.<sup>37</sup>

Various writers have characterized the work by and among domestic regulators, sector-specific international organizations, and agenda setters as a model of an increasingly dominant mode of international cooperation.<sup>38</sup> It is, on this view, a prime example of domestic and international policy-makers creating “an effective regulatory enterprise,”<sup>39</sup> without a significant role for international state-level formal agreement or treaty-based institutions.<sup>40</sup>

---

STABILITY BOARD: AN EFFECTIVE FOURTH PILLAR OF GLOBAL ECONOMIC GOVERNANCE? (Stephany Griffith-Jones et al eds., 2010), <https://www.cigionline.org/publications/financial-stability-board-effective-fourth-pillar-global-economic-governance>; Arner & Taylor, *supra* note 18; Zaring, *Finding Legal Principle*, *supra* note 1, at 698 (“The FSB has been active in every area of financial sector policy and regulation; indeed, some American regulators have suggested privately that it is already becoming a Frankensteinian behemoth.”); BRUMMER, *supra* note 1, at 70–74.

36. See Gadinis, *supra* note 35, at 164–67; Zaring, *Finding Legal Principle*, *supra* note 1, at 698–99.

37. Zaring, *Finding Legal Principle*, *supra* note 1, at 698–99.

38. See sources cited *supra* note 1.

39. See, e.g., VITERBO, *supra* note 3, at 106–07 (suggesting that a framework of international financial regulation emerged with the creation of the Financial Stability Forum, the predecessor of the FSB, which was designed to coordinate the other existing networks of financial regulators); Zaring, *Finding Legal Principle*, *supra* note 1, at 701.

40. See, e.g., BRUMMER, *supra* note 1, at 61 (“[I]n the international financial system, the production of international standards and rules arises through largely informal institutional arrangements grounded in non-binding bylaws, charters, and accords . . . .”); see also SLAUGHTER, *supra* note 1, at 34 (“Overall . . . the entire world of transgovernmental relations remains largely hidden from the formal rules and foundational principles of . . . international law.”); Pierre-Hugues Verdier, *The Political Economy of International Financial Regulation*, 88 IND. L.J. 1405, 1417 (2013) (describing the Fund as playing a “supporting role” in the framework of international financial regulation); Pan, *supra* note 23, at 251–52 (same, explaining that the Fund’s regulatory role is limited by the fact that its jurisdiction does not extend to private firms and markets).

Anne Marie-Slaughter provided an early and influential account of this decentralized model of regulation.<sup>41</sup> According to her, international coordination through formal agreement and legal institutions at the state level is increasingly giving way to what she describes as governance arrangements.<sup>42</sup> The emerging global order is, in her view, built primarily of networks of regulators,<sup>43</sup> with regulators having become “the new diplomats.”<sup>44</sup> Governance through such networks facilitates international cooperation, promotes compliance with rules and standards negotiated in international forums, and leads to “convergence and informed divergence” in domestic regulatory approaches.<sup>45</sup>

Slaughter describes agenda- and standard-setting organizations like the G-20 and Basel Committee as horizontal government networks.<sup>46</sup> Where horizontal networks of financial regulators interact with formal “supranational” institutions, they form vertical networks.<sup>47</sup> “The prerequisite for a vertical government network,” writes Slaughter, “is the relatively rare decision by states to delegate their sovereignty to an institution above them with real power—a court or a regulatory commission.”<sup>48</sup> Such vertical networks may be “enforcement networks,” and Slaughter cites the European Court of Justice and the International Criminal Court as examples of such networks.<sup>49</sup> Alternatively, vertical networks may operate as “harmonization networks” that aim to harmonize national and international rules, or as “information networks” that provide information and benchmarks of progress to other regulatory

---

41. See generally SLAUGHTER, *supra* note 1.

42. *Id.* at 5. (“Stop imagining the international system as a system of states . . . subject to rules created by international institutions that are apart from, ‘above’ these states. Start thinking about a world of governments . . . .”); *id.* at 9–10 (describing “the shift from government to governance”).

43. *Id.* at 16 (“Financial regulators are becoming accustomed to describing the new international financial architecture as a combination of networks . . . .”).

44. *Id.* at 36–65.

45. *Id.* at 24.

46. *Id.* at 13.

47. *Id.* at 13, 20–22.

48. *Id.* at 13.

49. *Id.* at 21.

networks.<sup>50</sup> Furthermore, Slaughter distinguishes “convening structures for networks” from “genuinely ‘supranational’” organizations.<sup>51</sup> In passing, she asserts that the International Monetary Fund primarily performs a convening function in the framework of international financial regulation.<sup>52</sup> According to Slaughter, the Fund is a treaty-based institution with governance features of traditional supranational organizations, but it is “effectively run [by] national finance ministers and central bankers.”<sup>53</sup>

In a series of articles, David Zaring has extended and refined this analysis of international financial regulation as a system of networks.<sup>54</sup> He writes, “[f]or whatever reason . . . it is only networks that are used to regulate international finance.”<sup>55</sup> He characterizes this system of voluntary coordination among networks of industry-specific, standard-setting institutions as a “form of the rule of law.”<sup>56</sup>

Zaring identifies organizing aspects, or “fundamentally legal principles,” that give the framework of international financial regulation its legal quality.<sup>57</sup> These include national treatment, most-favored-nation treatment, emphasis on rulemaking rather than adjudication, “subsidiarity,” peer review in enforcement, and “a network model of institutionalization.”<sup>58</sup> According to Zaring, these principles “that bind all and enjoy compliance”<sup>59</sup> are the essential components of formal, conventional international legal systems.<sup>60</sup> As he writes,

---

50. *Id.* at 21–22 (citing the Commission on Environmental Cooperation created by NAFTA as an example of a vertical informational network).

51. *Id.* at 22–23.

52. *Id.* at 45–46 (describing the IMF as an example of government networks within an international organization); *id.* at 22–23 (describing the IMF and the World Bank as “convening” and “supranational” institutions).

53. *Id.* at 23.

54. See generally Zaring, *Finding Legal Principle*, *supra* note 1; Zaring, *Twilight*, *supra* note 1.

55. Zaring, *Finding Legal Principle*, *supra* note 1, at 713.

56. *Id.* at 701 (“Global financial regulation, while idiosyncratic, has become a form of the rule of law.”).

57. *Id.* at 685–87.

58. *Id.* at 685, 701–14.

59. *Id.* at 686.

60. *Id.* at 687 (“[T]hey look a great deal like the sort of legal and institutional principles that are found in hard variants of international economic law.”).

[H]ow legal obligation works in the absence of a central enforcement authority . . . is a hardy and perennial problem in international law. [T]he formality of the obligation is no talisman when it comes to observance, and that obligation, if the stakes are high and the regulated industry is international, can be found outside of the traditional legal streams.<sup>61</sup>

Zaring acknowledges the possibility that networks may be less resilient than treaty-based regimes, especially in moments of crisis, and that they may be more amenable to manipulation by private interests.<sup>62</sup> In any event, however, “[g]lobal financial regulation now works like a legal system, even as it is propped up by institutions that do not claim to be acting with the force of law.”<sup>63</sup> In his estimation, it is a legal system that “may be more effective than many hard law instruments.”<sup>64</sup> Interestingly, Zaring gives little attention to Slaughter’s vertical networks, and so formal treaty-based institutions largely drop out of the story; in his account, the Fund and the World Bank simply monitor compliance with commitments made in other networks.<sup>65</sup>

Chris Brummer has also persuasively described international financial regulation as a species of international law.<sup>66</sup> He has advanced a “compliance-based theory of international financial law,”<sup>67</sup> arguing “that the degree to which an instrument is coercive or ‘binding’ is less a matter of obligation than enforcement.”<sup>68</sup> Rather than a web of regulatory networks, he describes a system of discrete soft-law regimes and assertive institutional actors. In his account, international financial regulation illustrates that soft law is more law-like than traditional

---

61. *Id.* at 686; see also BRUMMER, *supra* note 1, at 137 (criticizing the distinctions between hard and soft law based on “legal obligation”).

62. Zaring, *Finding Legal Principle*, *supra* note 1, at 714. See also SLAUGHTER, *supra* note 1, at 28; BAIT, *supra* note 3, at 10–13.

63. Zaring, *Finding Legal Principle*, *supra* note 1, at 685.

64. *Id.* at 701; see also BRUMMER, *supra* note 1, at 138 (“A more comprehensive structural analysis is thus required that focuses not only on the degree of obligation . . . but also on the context and the political economy in which international financial law operates.”).

65. Zaring, *Finding Legal Principle*, *supra* note 1, at 692–93, 711.

66. See generally, BRUMMER, *supra* note 1.

67. *Id.* at 115–77.

68. *Id.* at 5.

theories would predict and can be more coercive and effective in promoting international coordination than conventional modes of hard law.<sup>69</sup> This is because international financial regulatory institutions have significant, if informal, enforcement powers.<sup>70</sup> They can exert discipline, for example, through conditional lending, strategic disparagement (“name and shame”), actions against private actors from particular jurisdictions, and threatening membership.<sup>71</sup>

Critiquing the network account of these institutions,<sup>72</sup> he describes them as “highly sophisticated institutional players” with “hierarchical systems of regulatory influence and power.”<sup>73</sup> In this account, agenda setters—the G-20 and the Financial Stability Board—sit at the top of the hierarchy<sup>74</sup> and “operate at the core of the international system.”<sup>75</sup> The various standard setters are effectively subordinate to the agenda setters and determine the rules that should actually govern market participants.<sup>76</sup> In Brummer’s account, the Fund and the World Bank are “among the most high-profile actors in the international financial system,”<sup>77</sup> but they are at the bottom of the hierarchy of influence and power. Like Zaring, he argues that the Fund’s role in financial regulation is to monitor national regulators for compliance with rules devised by agenda and standard setters.<sup>78</sup> According to Brummer, this monitor-

---

69. *Id.* at 5 (“[I]nternational financial regulation, though not emanating from traditional authoritative sources, is indeed bolstered by a range of often complex enforcement technologies that render it more coercive than traditional theories of international law predict.”).

70. *Id.* at 5 (“[T]he toolbox of options available to regulators is broader and deeper than commonly assumed.”).

71. *Id.* at 147–56.

72. *Id.* at 61, 65–67 (describing “[n]etwork theory as a descriptive framework” and noting the limitation of the theory as a “conceptual tool”).

73. *Id.* at 61.

74. *Id.* at 67–74.

75. *Id.* at 68.

76. *Id.* at 68.

77. *Id.* at 69.

78. *See id.* at 20 (stating that monetary law is beyond the scope of international financial regulation); *id.* at 69, 90–95. While these institutions “may act as sounding boards for policy development,” they “are not the main drivers of regulatory standard setting, and they do not generally originate best practices for capital market participants. Instead, they are primarily responsible for identifying whether . . . regulators comply with international financial law.” *Id.* at 90.

ing has primarily been conducted through the Financial Sector Assessment Program,<sup>79</sup> discussed below.<sup>80</sup>

In sum, a prominent account of international financial regulation in legal scholarship describes a framework that, despite the lack of formal legal obligations, has most of the essential trappings of a traditional international legal regime: coordination, compliance, and enforcement. This framework is something that one can fairly call international financial regulation or, perhaps, international financial law. In this account, the Fund and the World Bank, both formal treaty-based institutions, participate in the international financial regulatory framework as monitors of agreements made and agendas set in other institutions or as an additional forum for regulators. As the following Part explains, this account seriously mischaracterizes the formal role assigned to the Fund under international monetary law.

### III. THE FUND'S LEGAL DOMAIN

The Fund's constitutive treaty, its Articles of Agreement, is the centerpiece of international monetary law. Among other things, the Articles create formal state-level commitments regarding policies that affect exchange rate stability. The Fund is responsible for enforcing these commitments through its bilateral surveillance of members' policies, and is charged more broadly with multilateral surveillance of members' policies affecting the stability of the international monetary system. In light of the deep connections between monetary and financial systems,<sup>81</sup> states' financial policies generally implicate their commitments regarding exchange rate stability under the Fund's Articles. This Part describes these state-level obligations regarding financial policies created under international mone-

---

79. *Id.* at 92 (describing the Financial Sector Assessment Program as "central to the global surveillance system administered by the IMF and World Bank").

80. *See infra* Part IV.B.

81. Monetary and financial systems are related but distinct. *See generally* VITERBO, *supra* note 3; Adam Feibelman, *Europe and the Future of International Monetary Law*, 22 *TRANSNAT'L L. & CONTEMP. PROBS.* 101, 113 (2013). The size and scope of domestic financial systems, which provide financial resources to individuals and firms, are important factors affecting the performance of their related monetary systems, including the exchange rate of the domestic currency.



tary law, the Fund's role in enforcing those obligations, and the Fund's broader responsibility of surveillance of the international monetary system. Part IV describes important examples of the Fund's financial surveillance and addresses the Fund's actual impact on international financial regulation. Part IV also remaps the Fund's mandate within the framework of international financial regulation and discusses some implications of this remapping for theories of how international law works.

### A. *Members' Obligations*

Although the Fund is widely viewed as a financial institution, it was designed in the wake of the Great Depression and World War II as a regulatory entity.<sup>82</sup> Among other things, its founding Articles provided that its members would refrain from manipulating their currencies for economic advantage and would maintain fixed exchange rates.<sup>83</sup> These were acute concerns after the interwar period that had seen competitive devaluations and dramatic exchange rate instability.<sup>84</sup>

The fixed exchange rate regime collapsed in the 1970s, however, and the Fund's Articles were amended to provide that members were free to adopt whatever exchange rate regime they desired, including floating exchange rates.<sup>85</sup> The Articles were also amended at that time to replace the previous

---

82. See Francois Gianviti, *Decision Making in the International Monetary Fund*, 1 CURRENT DEV. IN MONETARY & FIN. L. 31, 31 (1999).

83. See KENNETH DAM, THE RULES OF THE GAME 88–98 (2001).

84. See generally NGAIRE WOODS, *supra* note 12, at 15–27; DAM, *supra* note 83, at 60–93; John Park Young, *Developing Plans for an International Monetary Fund and a World Bank*, 23 STATE DEPARTMENT BULLETIN, no. 593, 1950, at 778–790; J. KEITH HORSEFIELD, THE INTERNATIONAL MONETARY FUND: 1945–1965, 3–10 (1969). The Fund's purposes, set forth in Article I of its Articles of Agreement, include “promot[ing] international monetary cooperation,” “facilitat[ing] the expansion and balanced growth of international trade,” “promot[ing] exchange stability,” and “assist[ing] in the establishment of a multilateral system of payments.” IMF Articles, art. I. These purposes inform other provisions of the Articles and, thereby, help define the Fund's jurisdiction. See Gianviti, *supra* note 82, at 54–57.

85. See, e.g., DAM, *supra* note 83, at 253–67; Ngaire Woods & Domenico Lombardi, *The Political Economy of IMF Surveillance* 6–9 (Ctr. for Int'l Governance Innovation, Working Paper No. 17, 2007), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=964917](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=964917); Michael Mussa, *IMF Surveillance*, 87 AM. ECON. REV. 28 (1997).

regime with a new set of responsibilities for the Fund and obligations for its members under the newly liberalized exchange rate system.<sup>86</sup> These are set forth in Section 1 of Article IV:

[E]ach member undertakes to collaborate with the Fund and other members to assure orderly exchange arrangements and to promote a stable system of exchange rates. In particular, each member shall:

(i) endeavor to direct its economic and financial policies toward the objective of fostering orderly economic growth with reasonable price stability, with due regard to its circumstances;

(ii) seek to promote stability by fostering orderly underlying economic and financial conditions and a monetary system that does not tend to produce erratic disruptions;

(iii) avoid manipulating exchange rates . . . to gain an unfair competitive advantage over other members . . . .<sup>87</sup>

In 2007, the Fund's Executive Board formally interpreted "a stable system of exchange rates" in Article IV, Section 1 to mean "systemic stability."<sup>88</sup> "Systemic stability is most effectively achieved by each member adopting policies that promote its own balance of payments stability and domestic stability . . . ." <sup>89</sup> Furthermore:

In the conduct of their domestic economic and financial policies, members are considered by the Fund to be promoting balance of payments stability when they are promoting domestic stability—that is, when they (i) endeavor to direct their domestic economic and financial policies toward the objective of fostering orderly economic growth with reasonable price stability, with due regard to their circumstances,

86. See, e.g., DAM, *supra* note 83, at 258–60.

87. Articles of Agreement of the IMF, *supra* note 6, art. 4, § 1. Furthermore, members are obligated to provide the Fund with information necessary for it to execute its responsibilities. See *id.* art. 8, § 5.

88. IMF, *Modernizing the Legal Framework for Surveillance: An Integrated Surveillance Decision, Revised Proposed Decision* ¶¶ 5–6 (July 17, 2012), <http://www.imf.org/external/np/pp/eng/2012/071712.pdf>.

89. *Id.*

and (ii) seek to promote stability by fostering orderly underlying economic and financial conditions and a monetary system that does not tend to produce erratic disruptions.<sup>90</sup>

Thus, among other things, members of the Fund undertake an express, treaty-based obligation to “endeavor” or “seek” to pursue financial policies<sup>91</sup> that promote their own domestic stability.<sup>92</sup> Because these obligations require best efforts, the Fund itself describes them as “soft” compared to the “hard” obligation to avoid manipulating exchange rates.<sup>93</sup> But this refers to the type of the obligations, not their legal status. To be clear, the Fund’s members are formally bound under international law to exercise best efforts and, as discussed below, these obligations are enforced by the Fund through surveillance.

An aggressive reading of the Articles might suggest that members are also obligated to avoid policies that might cause external or systemic instability, perhaps through spillovers or contagion, regardless of whether they threaten domestic stabil-

---

90. *Id.* ¶ 7.

91. See, e.g., IMF, *Integrating Stability Assessments Under the Financial Sector Assessment Program into Article IV Surveillance* 7–8 (Aug. 27, 2010) (“A member’s policies respecting the financial sector are central to domestic stability and fall within the scope of the member’s domestic policy obligations under Article IV, Section 1 . . . . [T]he 2007 Surveillance Decision specifically requires the Fund’s bilateral surveillance . . . to include an analysis of the member’s ‘financial sector policies . . . .’”).

92. VITERBO, *supra* note 3, at 121–22; IMF, *supra* note 91, at 5 (“Financial stability is a key component of members’ domestic and external stability and is important for the promotion of the ‘stable system of exchange rates’ envisaged under Article IV.”). “However, the Fund will not require a member that is complying with Article IV, Sections 1(i) and (ii) to change its domestic policies in the interests of balance of payments stability.” IMF, *Decision on Bilateral and Multilateral Surveillance*, SM/12/156 Supp. Attachment 1, ¶ 7 (July 18, 2012).

93. See IMF, *Article IV of the Fund’s Articles of Agreement: An Overview of the Legal Framework* 14–17 (June 28, 2006), <http://www.imf.org/external/np/pp/eng/2006/062806.pdf> (distinguishing between members’ hard and soft obligations under Article IV, Section 1); see, e.g., Edwin M. Truman, *The International Monetary Fund and Regulatory Challenges* 2 (Peterson Inst. for Int’l Econ., Working Paper No. 09-16, 2009), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1521658](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1521658) (characterizing the Fund’s regulatory role as principles-based and, thus, an example of soft law (citing Louis Pauly, *The Institutional Legacy of Bretton Woods: IMF Surveillance, 1973–2007*, in *ORDERLY CHANGE: INTERNATIONAL MONETARY RELATIONS SINCE BRETTON WOODS* 189 (David Andrews ed., 2008))).

ity.<sup>94</sup> After all, “each member undertakes to collaborate with the Fund and other members to assure orderly exchange arrangements and to promote a stable system of exchange rates [i.e., systemic stability].”<sup>95</sup> The Fund has expressly rejected this interpretation of the Articles, however, and has limited members’ formal obligations to “assur[ing] orderly exchange arrangements” and avoiding policies that might yield *domestic* instability.<sup>96</sup> As discussed below, however, such policies are subject to the Fund’s multilateral surveillance.

## B. *Fund Surveillance*

### 1. *Bilateral*

For the first few decades of its existence, the Fund’s central function was to enforce its members’ commitments to the Bretton Woods fixed exchange rate regime.<sup>97</sup> The concept and practice of surveillance were introduced after the collapse of the fixed exchange rate system “to ensure that each member country complied with its new obligations after the Second Amendment [to the Fund’s Articles of Agreement].”<sup>98</sup> Surveillance of those obligations continues to be a central pillar of the Fund’s regulatory function.<sup>99</sup> Section 3 of Article IV requires the Fund to “oversee the international monetary system in order to ensure its effective operation, [to] oversee the compliance of each member with its obligations under Section 1,”<sup>100</sup> and to “exercise firm surveillance over the exchange rate

---

94. For example, a large nation pursuing expansionary monetary policy with benign or beneficial effects domestically can impact capital flows in other smaller economies causing vulnerability or instability abroad. See Maria Socorro Gochoco-Bautista & Changyong Rhee, *Capital Controls: A Pragmatic Proposal* 1–2 (Asian Dev. Bank, Working Paper No. 337, 2013), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2236562](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2236562); IMF, *The Liberalization and Management of Capital Flows: An Institutional View* 32 (Nov. 14, 2012), <http://www.imf.org/external/np/pp/eng/2012/111412.pdf> (discussing the Fund’s role in identifying and helping contain such spillovers).

95. Articles of Agreement of the IMF, *supra* note 6, art. 4, § 1.

96. See IMF, *supra* note 88, ¶ 5.

97. See, e.g., Woods & Lombardi, *supra* note 85, at 3–6.

98. JAMES M. BOUGHTON, *SILENT REVOLUTION: THE INTERNATIONAL MONETARY FUND, 1978–89*, at 68 (2001).

99. *Id.* at 67 (2001) (“Surveillance [is] a central pillar of IMF activities and responsibilities in the modern era . . .”).

100. Articles of Agreement of the IMF, *supra* note 6, art. 4, § 3(a).

policies of members.”<sup>101</sup> The Fund has interpreted this—along with the preamble to Section 1, Article IV<sup>102</sup> and the purposes of the Fund set forth in Article I<sup>103</sup>—as requiring it to conduct bilateral surveillance of all the obligations of members under Section 1, not only their exchange rate policies.<sup>104</sup> This effectively means that the Fund has the responsibility to conduct surveillance of all members’ policies that potentially impact domestic economic and financial stability.

As a regulatory practice, surveillance involves much more than monitoring, but it is difficult to characterize.<sup>105</sup> The core of the Fund’s bilateral surveillance of its members’ Article IV obligations is its annual consultation with each of its members regarding their policies affecting domestic stability.<sup>106</sup> To initiate these Article IV consultations, as they are widely known, the Fund’s staff gathers relevant available economic information from and about the state.<sup>107</sup> A Fund mission then travels to the member state to meet with policymakers and to gather additional information.<sup>108</sup> Thereafter, the Fund’s staff writes a report for the Fund’s Executive Board that evaluates the member’s policies affecting its domestic and external stability.<sup>109</sup>

The Executive Board discusses the staff reports, deliberates about possible recommendations, communicates its conclusions to the member’s policymakers,<sup>110</sup> and generally approves a public “summing-up” statement by the Fund’s managing director.<sup>111</sup> Although it is technically possible for a

---

101. *Id.* art. 4, § 3(b).

102. *Id.* art. 4, § 1.

103. *Id.* art. 1.

104. See IMF, *IMF Executive Board Adopts New Decision on Bilateral Surveillance Over Members’ Policies*, Public Information Notice ¶¶ 4–6 (2007) (“The scope of bilateral surveillance is determined by members’ obligations under Article IV, Section 1.”); see also Gianviti, *supra* note 82, at 55 (“[T]hose purposes will guide the IMF in the exercise of its power to interpret its own charter.”).

105. VITERBO, *supra* note 3, at 68–69.

106. For good summaries of the process of surveillance, see RICHARD W. EDWARDS, JR., INTERNATIONAL MONETARY COLLABORATION 572 (1985) and Martin S. Edwards & Stephanie Senger, *Listening to Advice: Assessing the External Impact of IMF Article IV Consultations of the United States, 2010–2011*, 16 INT’L STUDS. PERSP. 312 (2015).

107. EDWARDS, *supra* note 106, at 573–74.

108. *Id.* at 574.

109. *Id.* at 574–75.

110. *Id.* at 575.

111. *Id.*

member to breach its obligations, and although the Fund's Articles of Agreement provide for consequential sanctions for such a breach,<sup>112</sup> the Fund has never deemed a state in formal breach of its Article IV obligations to promote exchange rate stability. Rather, its modes of surveillance are avowedly collaborative and iterative.<sup>113</sup> According to the Fund's Executive Board:

Continuous dialogue and persuasion are key pillars of effective surveillance. The Fund, in its surveillance over the policies of individual members, will clearly and candidly assess relevant economic developments, prospects, risks, and policies of the member in question, and advise on these. Such assessments, advice and discussion of alternative policies are intended to assist that member in making policy choices, and to enable other members to discuss these policy choices with that member.<sup>114</sup>

In recent years, the Fund has published most staff reports on Article IV consultations.<sup>115</sup> Publication of the staff reports adds a potent dose of public scrutiny to what is otherwise a discreet, confidential, internal, non-coercive, peer-review-type process.<sup>116</sup>

---

112. Articles of Agreement of the IMF, *supra* note 6, art. 26, § 2; Joseph Gold, *The "Sanctions" of the International Monetary Fund*, 66 AM. J. INT'L L. 737 (1972). On the consequences of withdrawal from the Fund, see Mitu Gulati & George G. Triantis, *Contracts Without Law: Sovereign Versus Corporate Debt*, 75 U. CINN. L. REV. 977, 998 (noting that a sovereign's loss of eligibility with the Fund is often an event of default to other creditors). Such sanctions are extremely rare, however. Czechoslovakia was expelled from the Fund in 1954 for not providing adequate information to the Fund, as required by IMF Articles, art. 8, § 5. See Ross Leckow, *The Obligation of Members to Provide Information to the International Monetary Fund Under Article VIII, Section 5: Recent Developments*, 4 CUR. DEV. INT. MONETARY L. 41 (2005). Argentina was censured in 2013 and threatened with sanctions for the same breach. A number of states have become ineligible to use Fund resources or lost voting rights over the years for failure to meet financial obligations to the Fund under various financial programs, including Peru, Sudan, Liberia, Cambodia, Guyana, Vietnam, and, most recently, Zimbabwe.

113. See IMF, *supra* note 88, ¶ 14.

114. *Id.*

115. See IMF, *Factsheet: IMF Surveillance* (Sept. 26, 2012), <http://www.imf.org/external/np/exr/facts/surv.htm>.

116. See EDWARDS, *supra* note 106, at 558; IMF, *2011 Triennial Surveillance Review—Overview Paper* 19–26 (Aug. 29, 2011), <http://www.imf.org/exter>

## 2. *Multilateral*

The Fund's failure to anticipate and help avoid the recent financial crisis revealed significant shortcomings in its surveillance<sup>117</sup> and the Fund has focused heavily on improving it in the wake of the crisis.<sup>118</sup> Among other things, the recent crisis and subsequent developments illustrated that risks to the monetary system can arise from circumstances that are effectively beyond the scope of the Fund's jurisdiction to conduct bilateral surveillance of its individual members, which is limited to enforcing its members' obligations to promote domestic stability.<sup>119</sup> Systemic vulnerability or instability does not necessarily arise from a national financial crisis or domestic instability. In fact, policies in a generally stable economy, or policies designed to stabilize a national economy, may create spillovers that create instability elsewhere and that are not transmitted through exchange rates.<sup>120</sup> This led to significant uncertainty about the extent of the Fund's authority to influence members' policies that might create vulnerabilities across the global economic financial system that might hamper efforts to resolve crises.<sup>121</sup>

In the wake of the crisis, the Fund's members determined that it should expand its multilateral surveillance to the fullest extent of its formal mandate to "oversee the international monetary system in order to ensure its effective operation."<sup>122</sup> Although, as noted above, the Fund takes the position that its members do not have obligations to adopt or conduct financial policies to promote external stability if they are otherwise promoting their domestic stability, the Fund does aim to influence its members in this direction. According to a recent decision by the Executive Board:

---

nal/np/pp/eng/2011/082911.pdf; Woods & Lombardi, *supra* note 85, at 31–37 (exploring greater peer pressure as an enforcement mechanism).

117. *See, e.g.*, IEO-IMF, IMF PERFORMANCE IN THE RUN-UP TO FINANCIAL AND ECONOMIC CRISIS: IMF SURVEILLANCE IN 2004–07 (2011). *See also infra* Part III.E.

118. IMF, *supra* note 116, at 19–26.

119. Feibelman, *supra* note 81, at 111; IMF, *supra* note 116, at 9–11.

120. *See infra* note 200; Feibelman, *supra* note 81, at 111.

121. Feibelman, *supra* note 81, at 112.

122. Articles of Agreement of the IMF, *supra* note 6, art 4, § 3(a). *See also* Feibelman, *supra* note 81, at 112–17.

In the context of multilateral surveillance, the Fund may not and will not require a member to change its policies in the interests of the effective operation of the international monetary system. It may, however, discuss the impact of members' policies on the effective operation of the international monetary system and may suggest alternative policies that, while promoting the member's own stability, better promote the effective operation of the international monetary system.<sup>123</sup>

Previously, the Fund's multilateral surveillance activities were largely limited to its World Economic Outlook reports and the Global Financial Stability Report.<sup>124</sup> In 2012, the Fund's Board adopted an *Integrated Surveillance Decision*,<sup>125</sup> the first decision by the Fund that expressly addresses its mandate for multilateral surveillance.<sup>126</sup> The new Decision provides that the Fund's Article IV consultations with members will cover both bilateral and multilateral surveillance, and it sets out a "conceptual link" between them.<sup>127</sup>

Pursuant to this newly articulated mandate, bilateral and multilateral surveillance both address threats to global instability. Bilateral surveillance focuses on policies that may cause domestic instability, which in turn may undermine systemic stability.<sup>128</sup> Multilateral surveillance focuses "on issues that may affect the effective operation of the international monetary system"<sup>129</sup> and, especially, spillovers from a member's "exchange rate, monetary, fiscal, and financial sector policies and policies respecting capital flows" that may threaten global stability even if they do not threaten that member's domestic stability.<sup>130</sup>

---

123. See IMF, *supra* note 91, ¶ 9.

124. See, e.g., IMF, *The Fund's Mandate—The Legal Framework* 11 (Feb. 22, 2010) [hereinafter IMF, *The Fund's Mandate*] <http://www.imf.org/external/np/pp/eng/2010/022210.pdf>; IMF, *An Evaluation of the IMF's Multilateral Surveillance* (Sept. 1, 2006), <http://www.imf.org/external/np/ieo/2006/ms/eng/index.htm>; Woods & Lombardi, *supra* note 85, at 25–26.

125. See IMF, *Factsheet: Integrated Surveillance Decision* (July 31, 2012), <http://www.imf.org/external/np/exr/facts/pdf/isd.pdf>.

126. IMF, *The Fund's Mandate*, *supra* note 124, at 10.

127. IMF, *supra* note 88, at 2.

128. *Id.* at 6.

129. *Id.* at 8.

130. *Id.*



### C. *Summary*

In sum, the Fund has formal, treaty-based, authority and responsibility to conduct surveillance of its members' policies that implicate domestic or global monetary stability, including financial policies. While the Fund's surveillance tools are generally "soft," surveillance is a mode of enforcing formal obligations, at least in the case of bilateral surveillance. The Fund's multilateral surveillance is not enforcement of members' formal obligations because the Fund has determined that its members do not have obligations to promote external stability beyond promoting their domestic stability, yet the Fund's responsibility to conduct multilateral surveillance is based on its formal mandate under its Articles of Agreement.

While the Fund's mandate for surveillance of its members' financial policies provides the legal basis for its role in international financial regulation, the scope of that mandate, and the extent of that role, is defined by the Fund's actual practice of "financial surveillance."<sup>131</sup>

## IV. FINANCIAL SURVEILLANCE

Over the last two decades, the Fund has significantly expanded its surveillance of members' financial policies in the course of both its bilateral and multilateral surveillance activities.<sup>132</sup> This Part describes the scope of the Fund's financial surveillance and provides three prominent examples of the practice: the Financial Sector Assessment Program; the Fund's efforts to help its members manage global capital flows; and the Fund's recent engagement with its European members to help resolve their financial crisis and to promote union-level governance and financial regulatory reforms. Finally, it remaps the framework of international financial regulation to account for the Fund's mandate for financial surveillance and its activities in pursuit of that mandate.

### A. *Scope*

The potential scope of the Fund's financial surveillance—its regulatory jurisdiction—is defined by its formal mandate

---

131. See IMF, *supra* note 18.

132. See *supra* Part III.B.

set forth in its Articles of Agreement,<sup>133</sup> i.e., the Fund's authority to conduct surveillance of its members' financial policies that may impact external stability.<sup>134</sup> As the Fund's practice of surveillance makes clear, this limitation can be a very coarse sieve; it is easy to draw plausible connections between most financial policies and systemic stability. Certain categories of domestic financial regulation are almost inevitably within this scope, especially banking laws and regulations. This is due in part to the direct connections between commercial banking systems, central banks, and monetary policy. But it is also due to the deeper connections between depository institutions and the rest of the financial system and, in turn, the real economy.<sup>135</sup>

Policies regarding capital markets, including regulation of securities brokers and dealers, financial products, ratings agencies, and clearinghouses, are also generally macro-relevant.<sup>136</sup> These policies promote the stability of capital markets by determining what information should be available to investors, policing for fraud and manipulation, setting rules for complex products and transactions, and regulating firms that underwrite public and private securities.<sup>137</sup> Like banks, participants in capital markets serve a crucial intermediating function, providing working capital and credit as well as liquidity to

---

133. See Gianviti, *supra* note 82, at 54–57.

134. As described above in Part II.B., the Fund's bilateral surveillance is based on its members' formal obligations to promote global stability by promoting their own domestic stability, while its responsibility for multilateral surveillance is matched by members' obligations to collaborate with the Fund and other members to promote global stability.

135. A crucial component of the payment system, the banking system serves a utility-like function underlying most commercial activity. Banks provide both capital and liquidity to other firms, including other financial firms. They provide working credit to firms in peacetime and, in times of crisis, they are often important conduits for governments' emergency lending functions.

136. See, e.g., *Oversight of Dodd-Frank Implementation: Monitoring Systemic Risk and Promoting Financial Stability: Hearing Before the S. Comm. on Banking, Hous., & Urban Affairs*, 112th Cong. (2011) (statement of Hon. Mary L. Schapiro, Chairwoman, Sec. & Exch. Comm'n), <https://www.sec.gov/news/testimony/2011/ts051211mls.htm>.

137. *What We Do*, SEC. & EXCH. COMM'N, <https://www.sec.gov/about/whatwedo.shtml> (last updated June 10, 2013).

commercial and financial firms.<sup>138</sup> This function has expanded in recent decades as non-bank financial institutions have increasingly engaged in “shadow” bank-like activity.<sup>139</sup>

The extent to which regulation of insurance firms and insurance markets implicates systemic stability is somewhat less clear. These firms and markets perform crucial functions in the real economy by allocating risk of harms and losses. To be sure, insurance firms are also important financial intermediaries,<sup>140</sup> yet they are generally not integrated into payments systems. It is clear from the experience of the recent crisis that some insurance firms can—by virtue of their size, the broader array of their financial activities, and their linkages with other financial firms—become systemically significant.<sup>141</sup> Furthermore, as Daniel and Steven Schwarcz argue persuasively, it is possible that the insurance industry as a whole could implicate systemic stability due to correlated risks and the potential threat to broader financial markets from an industry-wide collapse.<sup>142</sup>

Finally, some non-regulatory regimes and policies affecting financial firms and markets are key tools for maintaining systemic stability. Bankruptcy law is a notable example. In its general application, bankruptcy law is not macro-relevant; it is employed to deal with individual firms or households in financial distress, and usually those firms and individuals do not implicate systemic stability. In some cases, however, bankruptcy law is employed to resolve or restructure systemically significant firms.<sup>143</sup> And in times of generalized financial distress or crisis, widespread application of bankruptcy law can facilitate

---

138. See, e.g., Tobias Adrian & Hyun Song Shin, *Financial Intermediaries, Financial Stability and Monetary Policy* 1–2 (Fed. Reserve Bank of N.Y., Staff Report No. 346, 2008), [https://www.newyorkfed.org/medialibrary/media/research/staff\\_reports/sr346.pdf](https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr346.pdf).

139. See generally Steven L. Schwarcz, *Regulating Shadow Banking*, 31 REV. BANK. & FIN. L. 619 (2010–11).

140. See Daniel Schwarcz & Steven L. Schwarcz, *Regulating Systemic Risk in Insurance*, 81 U. CHI. L. REV. 1569, 1583–84 (2014) (arguing that the insurance industry as a whole can pose systemic risks).

141. For example, the Financial Stability Oversight Council has designated MetLife as a systemically important financial institution pursuant to provisions of the Dodd-Frank Act.

142. See Schwarcz & Schwarcz, *supra* note 140.

143. Consider, for example, the bankruptcies of Lehman in 2008 and those of Chrysler and GM in 2009. See Stephen J. Lubben, *Systemic Risk &*

timely allocation of losses and return significant numbers of firms and/or households to productivity.<sup>144</sup>

The scope of the Fund's mandate for multilateral financial surveillance extends beyond that of its bilateral surveillance to policies affecting global stability through pathways other than domestic instability. These include, especially, policies regarding cross-border capital flows, supervision and resolution of transnational financial firms, and international payments systems.<sup>145</sup>

Although the scope of the Fund's mandate for surveillance of members' financial policies is exceptionally broad, the Fund's actual performance of financial surveillance has, historically, not extended to the full extent of its authority. Until the 1990s, the Fund's surveillance of its members' financial sectors was "rudimentary"<sup>146</sup> and peripheral to its mandate and mission.<sup>147</sup> The Fund's domain was defined at a time when financial systems were still relatively modest in size and significance for the international economy.<sup>148</sup> In fact, some scholars attribute the initial development of the framework of networks and informal financial regulatory institutions described above to the failure of the Fund and other Bretton

---

Chapter 11, 82 TEMPLE L. REV. 433 (2009); Mark J. Roe & David Skeel, *Assessing the Chrysler Bankruptcy*, 108 MICH. L. REV. 727 (2010).

144. See, e.g., Susan Block-Lieb & Terrence Halliday, *The Microeconomics and Macropolitics of Systemic Financial Crisis: Bankruptcy as a Point of Reference* (Fordham Law Legal Studies, Research Paper No. 2538584, 2014), <https://ssrn.com/abstract=2538584>; Sean Hagan, *Debt Restructuring and Economic Recovery*, in SOVEREIGN DEBT MANAGEMENT 359 (Rosa M. Lastra & Lee Buchheit, eds., 2014). The recent crisis also illustrated how laws and policies affecting consumer financial transactions and those improving access to financial services can have systemic significance. They can help moderate the overall level and improve the underlying quality of household debt in an economy; in the aggregate, this can reduce vulnerability of firms within a financial system and, thereby, the system itself.

145. Feibelman, *supra* note 81, at 113.

146. See, e.g., VITERBO, *supra* note 3, at 122–23 (“[I]t was not until the late 1990s that the IMF started to assess its members’ financial sector in a systemic way.”).

147. See Barr, *supra* note 3, at 266 (observing that “financial regulation . . . occupied an ancillary position to the more central stabilization and development objectives of these multinational institutions. Otherwise, financial regulation was relegated to the domestic arena.”).

148. IMF, *supra* note 18, at 6.

Woods institutions to address the emerging international financial system.<sup>149</sup>

The general growth of financial systems across the globe, resulting credit booms, and subsequent financial and economic crises of the 1990s led the Fund and its members to focus on financial policies as an essential component of domestic stability, one that is deeply linked to various measures of external stability.<sup>150</sup> Thereafter, financial policies became an increasingly important aspect of members' formal obligations under the Fund's Articles and a more central focus of the Fund's bilateral surveillance.<sup>151</sup> In the immediate wake of the more recent global crisis, the Fund acknowledged that it had fallen short in its surveillance of domestic and international financial systems.<sup>152</sup> The crisis provided another example of domestic and systemic stability stemming from the financial sector<sup>153</sup> and thereby underscored the importance of core financial regulatory policies.

"Financial stability" has thus emerged "as one of the central themes of surveillance."<sup>154</sup> Yet, as the Fund's staff has observed, while "financial sector issues and policies are at the

---

149. Barr, *supra* note 3, at 266–68; Verdier, *supra* note 40, at 1409–16.

150. IMF, *supra* note 18, at 6; VITERBO, *supra* note 3, at 20 (describing a shift in concern among policymakers during the second half of the twentieth century from international monetary stability to global financial stability).

151. VITERBO, *supra* note 3, at 24.

152. See, e.g., IMF, *supra* note 18, at 7 ("In other cases, the Fund may have identified the key material threats to macrofinancial stability through sound analysis, but did not deliver sufficiently clear, consistent, and candid messages on these risks or their policy implications. This points to the need to increase the quality of the Fund's products and instruments and sharpen their messages." (citations omitted)).

153. IMF, *supra* note 18, at 6 ("The global financial crisis . . . showed that unfettered financial sector expansion in advanced economies could have destructive effects with global repercussions."). See also IMF, *supra* note 91, at 5 ("Financial instability can jeopardize growth and price stability. It can also translate into external instability both directly, through a loss of confidence in a country's currency or other financial assets, and indirectly through its impact on the domestic economy.").

154. IMF, *supra* note 18, at 6; *id.* at 20 (discussing the responsibility of various departments for aspects of the Fund's financial surveillance); IMF, *Financial Sector Work and Bilateral Surveillance—Toward Further Integration* (2009), <http://www.imf.org/external/np/pp/eng/2009/082809A.pdf>; IMF, *Financial Sector Surveillance and the Mandate of the Fund* (2010), <http://www.imf.org/external/np/pp/eng/2010/031910.pdf>.

core of the Fund's surveillance mandate, their effective integration has been a challenge."<sup>155</sup> In recent years, the Fund has sought to strengthen and better integrate its financial surveillance by improving its capacity to assess macrofinancial risk,<sup>156</sup> reevaluating the "instruments and products" of its financial surveillance, and engaging more effectively with its members and other stakeholders involved in financial regulation.<sup>157</sup> This effort to improve and integrate its financial surveillance is reflected in the greater attention to financial policies in the Fund's annual reports on bilateral surveillance of its members,<sup>158</sup> its new financial sector reports and multilateral financial spillover reports, and its efforts to improve its Global Financial Stability Report.<sup>159</sup> As described below, the expanded Financial Sector Assessment Program, the Fund's new approach to global capital flows, and its recent engagement in crisis-torn Europe provide more comprehensive examples of the Fund's evolving approach to financial surveillance and how its activities fit within the broader framework of international financial regulation.

### B. *The Financial Sector Assessment Program*

The expansion of the Financial Sector Assessment Program and the decision to incorporate it as part of Fund surveillance are among the most important developments in the Fund's financial surveillance since the recent crisis. The program was established in 1999 jointly by the Fund and the World Bank as a response to the financial crises of the 1990s. As its name suggests, it was designed to help member states assess "vulnerabilities and developmental needs" of their finan-

---

155. IMF, *supra* note 91, at 3.

156. IMF, *supra* note 18, at 9 ("[T]oday macrofinancial feedback effects have reached a level of complexity . . . requiring new analytical frameworks to be developed that explore the interdependencies of real-financial sectors within and across countries.").

157. *Id.* at 1–2, 4, 17 (table on financial surveillance strategic priorities).

158. *Id.* at 7 ("Article IV reports now contain substantive discussions of financial sector issues and deeper analysis of vulnerabilities, and put greater emphasis on cross-border spillovers.").

159. *Id.* at 7 ("The Global Financial Stability Report (GFSR) has increased its analytical depth, candor, and reach.").

cial sectors.<sup>160</sup> Initially, assessments under the program were conducted upon the request of members;<sup>161</sup> they were provided as technical assistance and were not part of the Fund's bilateral surveillance.<sup>162</sup>

An assessment under the program generally involves evaluation of data provided by the member under review; visits to the country to interview regulators, policymakers, and market participants; and preparation of a confidential document detailing the assessment.<sup>163</sup> Early assessments under the program focused heavily on compliance with standards, codes, and guidelines developed by sector-specific international regulatory organizations.<sup>164</sup> Resources for the program were limited, and there was generally a waiting list of countries seeking assessment.

While the recent crisis underscored the potential benefit of effective financial sector assessments as a tool for promoting global stability, it also revealed problems with the scope and the quality of analysis under the program as it had been conducted.<sup>165</sup> As a result, there was strong interest among policymakers in improving the program's assessments and expanding their function as a component of international financial regulation.<sup>166</sup> Most countries with the largest financial sectors and the greatest capacity to impact global stability had not been participating in the program. Given that the recent

---

160. IMF & THE WORLD BANK, *The Financial Sector Assessment Program After 10 Years* 9 (Aug. 28, 2009), <https://www.imf.org/external/np/pp/eng/2009/082809B.pdf> (“[The Financial Sector Assessment Program] was one of several initiatives to strengthen the international financial architecture following the crises of the 1990s.”).

161. *Id.* at 12.

162. *Id.* at 22 (“The FSAP was never conceived as a surveillance instrument . . .”).

163. *Financial Sector Assessment Program (FSAP)*, IMF, <http://www.imf.org/external/np/fsap/fssa.aspx> (last updated Feb. 3, 2017).

164. See IMF & THE WORLD BANK, *supra* note 160, at 11 (describing the codes and standards), 19–20 (“Detailed assessments of compliance with Standards and Codes have been closely associated with the FSAP.”); BRUMMER, *supra* note 1, at 92–93; VITERBO, *supra* note 3, at 121–25.

165. BRUMMER, *supra* note 1, at 157–66 (criticizing the monitoring function of the Financial Sector Assessment Program for the scope of its assessment, the lack of participation by many countries, and poor data gathering and analysis).

166. IMF & THE WORLD BANK, *supra* note 160, at 7.

crisis had stemmed from regulatory dysfunction and instability in many of these countries, this was especially troubling.

Thus, the membership of the Fund determined that the Fund's larger members should undergo assessments under the program. Members with larger economies quickly committed to do so at the G-20 meeting in Washington in 2008.<sup>167</sup> The Fund's Executive Board subsequently decided that assessments under the program would be mandatory for its members with systemically significant financial systems.<sup>168</sup> Additionally, and significant for present purposes, these assessments would be a component of the Fund's bilateral surveillance of these members.<sup>169</sup> The decision to include mandatory assessments under the Financial Sector Assessment Program as a formal part of bilateral surveillance of some of its members should be understood as an attempt by the Fund to ratchet up its enforcement of members' obligations to pursue policies that promote their own domestic financial stability.<sup>170</sup> As a practical matter, this move broadly expanded the Fund's financial surveillance, as twenty-five member states were determined to have systemically significant financial systems,<sup>171</sup> together representing "almost 90 percent of the global financial system and . . . almost 80 percent of global economic output."<sup>172</sup> At the same time,

---

167. *Statement From G-20 Summit*, N.Y. TIMES (Nov. 15, 2008), [http://www.nytimes.com/2008/11/16/washington/summit-text.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2008/11/16/washington/summit-text.html?pagewanted=all&_r=0).

168. VITERBO, *supra* note 3, at 121–25; IMF, *supra* note 91, at 3 (“[I]n the context of the broader debate on modernizing the Fund’s surveillance mandate and modalities, a majority of directors agreed in principle to consider going a step further: making stability assessments under the FSAP a mandatory part of Article IV surveillance for members with systemically important financial sectors.” (emphasis added)).

169. IMF, *supra* note 91, at 7–8. See also IMF & THE WORLD BANK, *supra* note 160, at 8 (“The Fund’s 2007 Financial Sector Task Force report and 2008 Triennial Surveillance Review provided a framework . . . and called for moving beyond the ‘coverage’ of financial sector issues toward the ‘integration’ of financial sector issues and, in particular, FSAP assessments, into Article IV surveillance.”).

170. IMF, *supra* note 91, at 7–8 (“It is legally possible for the Fund to conduct mandatory financial stability assessments, as proposed below, in the context of bilateral surveillance under Article IV.”).

171. *Id.* at 13 (discussing the framework—developed jointly by the IMF, the BIS, and the FSB—for determining whether a financial sector is systemically significant for this purpose).

172. *Id.* at 13–14.



the Fund committed to conducting more assessments for its other members.<sup>173</sup>

Improving the quality of assessments will inevitably prove to be a complicated and challenging project. After the crisis, staff at the Fund and the World Bank determined that focusing assessments on members' compliance with standards and codes developed by other standard-setting financial regulatory entities—costly and burdensome for a program with limited resources<sup>174</sup>—had distracted from “a more holistic discussion of the financial sector”<sup>175</sup> and financial stability in general.<sup>176</sup> They also recognized that the Financial Stability Board and sector-specific institutions had increased their efforts to promote compliance with the regulatory approaches they designed.<sup>177</sup>

In 2009, the Fund and the World Bank determined that assessments would focus more on factors impacting financial stability, and that the Fund would take the lead in this part of the assessment. The Fund's primary role in assessments under the program is now to assess, among other things, “the source, probability, and potential impact of the main risks to macro-financial stability in the near term; the jurisdiction's financial stability policy framework; and the authorities' capacity to manage and resolve a financial crisis should the risks materialize.”<sup>178</sup> They include vulnerability exercises,<sup>179</sup> for example, which assess a wide range of potential vulnerabilities, including systemically important institutions<sup>180</sup> and external

---

173. IMF, *supra* note 18, at 13.

174. IMF & THE WORLD BANK, *supra* note 160, at 20 (“Standards assessments have become more costly . . .”).

175. *Id.* at 40 (“The proposed risk-focused ROSCs would introduce greater flexibility to tailor standards assessments and help arrest the reduced emphasis that these have received as part of the FSAP.”).

176. *Id.* at 18 (“One of the FSAP's primary objectives is the assessment of the stability of the financial system as a whole.”).

177. *Id.* at 40 (noting “the increasing emphasis on standards assessments by the FSB and others”).

178. IMF, *supra* note 91, at 15; IMF, *supra* note 18, at 7.

179. IMF, *supra* note 18, at 7 (“The Vulnerability Exercise, which started in 2001 for emerging economies, was extended to advanced economies in 2009 and to low-income countries in 2011.”).

180. IMF & THE WORLD BANK, *supra* note 160, at 18 (“FSAPs have often not focused on individual institutions' vulnerabilities, which can pose risks to the entire system. In some of the pre-crisis countries, greater attention to

threats.<sup>181</sup> Although compliance with standards developed and agreements reached by members' regulators in other contexts is still a subject of assessments under the program, it has receded significantly as a focus for assessment.<sup>182</sup> It tends to be more narrowly focused<sup>183</sup> and remains a voluntary component even in mandatory assessments.<sup>184</sup>

### C. *Managing Cross-Border Capital Movements*

The Fund's evolving view of its mandate to help its members manage global capital flows is another important component of its enhanced financial surveillance in both bilateral and multilateral contexts.<sup>185</sup> For the first decades of its existence, the Fund did not engage much with its members regarding their policies directed at cross-border capital movements.<sup>186</sup> In fact, the Fund's jurisdiction was historically understood to be expressly limited in this regard.<sup>187</sup> Although its Articles prohibit members from imposing limits on payments or transfers for current transactions,<sup>188</sup> they provide that members may "exercise such controls as are necessary to regulate international capital movements."<sup>189</sup> This reflects the view of

---

individual institutions might have uncovered some of [sic] vulnerabilities that led to, or facilitated the transmission of the current crisis.").

181. *Id.* at 18 ("The assessments centered mostly on home-grown vulnerabilities, even when external factors were considered in stress-testing scenarios. They rarely assessed vulnerabilities originating in other countries or the possible implications of a global crisis.").

182. "[T]he average number of ROSCs associated with FSAPs has declined over time . . . . [T]he average number of ROSCs has decreased from about five at the height of the first round of FSAPs to around one in FY09 for initial FSAP assessments and less than one for updates." *Id.* at 20 (noting also the effect of resource constraints on the quality of compliance assessments).

183. *Id.* ("Standards-related work continues to be important, but has been increasingly focused in certain areas only—typically those where compliance in the original assessment had been found lacking—and is now often summarized in Technical Notes rather than ROSCs.").

184. IMF, *supra* note 91, at 4–5, 15–16.

185. See generally Adam Feibelman, *The IMF and Regulation of Cross-Border Capital Flows*, 15 CHI. J. INT'L L. 493 (2015); see also KEVIN P. GALLAGHER, *RULING CAPITAL: EMERGING MARKETS AND THE REREGULATION OF CROSS-BORDER FINANCE* (2015).

186. Feibelman, *supra* note 185, at 429–31.

187. *Id.*

188. Articles of Agreement of the IMF, *supra* note 6, art. 8, § 2(a).

189. *Id.* art. 6, § 3.

the Fund's original architects that domestic controls on cross-border capital flows were potentially effective policy tools.<sup>190</sup>

From the late 1980s through the 1990s, however, the Fund pushed its members to liberalize policies affecting capital flows,<sup>191</sup> i.e., to avoid direct or indirect controls, part of a movement among global financial policymakers initiated with the OECD's Code of Liberalisation of Capital Movements in 1961.<sup>192</sup> There was serious discussion during that period about a proposal to amend the Fund's Articles to expressly provide that the Fund had jurisdiction over its members' policies regarding cross-border capital flows and, thus, authority to encourage them toward liberalization.<sup>193</sup>

The financial crises of the 1990s proved, however, that the potential negative impact of capital flows on domestic and external stability had been under-appreciated.<sup>194</sup> Thereafter, the Fund embraced a more nuanced approach to liberalization of capital movements, encouraging a more gradual liberalization of members' policies regarding capital flows.<sup>195</sup> It also occa-

---

190. See VITERBO, *supra* note 3, at 178–82 (noting that capital controls were common after World War II and discussing the views of capital controls among the Bretton Woods participants); Maria Socorro Gochoco-Bautista & Changyong Rhee, *Capital Controls: A Pragmatic Proposal* 6 (Asian Dev. Bank, Working Paper No. 337, 2013), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2236562](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2236562) (“Early on, J. M. Keynes, one of the IMF’s founding fathers, saw a role for capital controls under certain circumstances even as he said that the post-war system should ‘facilitate the restoration of international loans and credits for legitimate purposes.’”).

191. GALLAGHER, *supra* note 185, at 3.

192. See *infra* note 201 and accompanying text.

193. GALLAGHER, *supra* note 185, at 41–46; VITERBO, *supra* note 3, at 186–89; see also IMF, *The Fund’s Role Regarding Cross-Border Capital Flows* 19–20 (Nov. 15, 2010), <http://www.imf.org/external/np/pp/eng/2010/111510.pdf> (“[T]his reform effort [of the 1990s] did not come to fruition, largely due to the reluctance of key members to cede sovereignty in this important area, coupled with the belief held by many that the Asian crisis . . . had its roots in premature capital account liberalization.”).

194. OLIVIER JEANNE ET AL., WHO NEEDS TO OPEN THE CAPITAL ACCOUNT? 47 (2012) (“After the onset of the Asian financial crisis, the IMF’s approach to capital flows took a more nuanced turn.”).

195. See *id.* at 47 (“Effective capital account liberalization was [thereafter] a question of proper sequencing.”); IMF, *Liberalizing Capital Flows and Managing Outflows* 16 (Mar. 13, 2012), <http://www.imf.org/external/np/pp/eng/2012/031312.pdf> (“Staff advice has tended to rely to a large extent on the so-called ‘integrated approach’ to liberalization, which received considerable support at an informal Board seminar in 2001, but was never formally

sionally blessed or encouraged members' use of capital controls to address acute crises.<sup>196</sup> It did not attempt to develop any systematic approach to managing capital flows during this period, however, perhaps due in part to lingering uncertainty about its jurisdiction.

Recent economic research has cast significant doubt on whether capital account liberalization has the beneficial effects conventionally attributed to it,<sup>197</sup> and has generally established the benefits of managing capital flows.<sup>198</sup> The global financial crisis underscored the potential for rapid capital flows to exacerbate or cause financial instability. In particular, it provided new evidence that large and rapid capital inflows, especially of short-term instruments, can overwhelm domestic capacity for regulation and supervision and can create vulnerability to rapid reversals.<sup>199</sup>

The crisis has also drawn policymakers' attention to the multilateral determinants of global capital flows. Domestic policies affecting flows in and out of a country—especially a country with a relatively large and interconnected economy—can affect flows in and out of others. For example, expansionary monetary policy in large economies in recent years has led to large, potentially destabilizing capital inflows to many emerging economies.<sup>200</sup> Thus, especially after the recent crisis, the need for international coordination in managing capital flows is clear.

Despite this need, there is no multilateral framework specifically designed to guide and coordinate states' approaches

---

adopted as the Fund's policy framework."); VITERBO, *supra* note 3, at 190 (noting that the Fund embraced a structured approach to liberalization during this period).

196. VITERBO, *supra* note 3, at 184 ("[T]he IMF has often supported members' economic programmes that included controls on capital inflows . . . and on capital outflows.").

197. GALLAGHER, *supra* note 185, at 26–27; Eswar S. Prasad & Raghuram G. Rajan, *A Pragmatic Approach to Capital Account Liberalization*, 22 J. ECON. PERSP. 149, 149 (2008) ("[C]ross-country regressions suggest little connection from foreign capital inflows to more rapid economic growth for such countries."); IMF, *supra* note 193, at 21 ("[N]either the benefits of liberalization nor the costs and effectiveness of capital controls are well-established in the empirical research.").

198. GALLAGHER, *supra* note 185, at 58–70.

199. Feibelman, *supra* note 185, at 502–03.

200. See *supra* note 120 and accompanying text.

to capital movements. Instead, there is a large web of discrete international trade and investment agreements that generally commit states to liberalize their policies regarding capital flows.<sup>201</sup> Most of these treaties include exceptions, or provide for derogation, to preserve financial stability or to address acute balance-of-payments crises.<sup>202</sup> Such exceptions provide some room for domestic actions to manage flows to avert crisis, but they are complicated, heterogeneous, and potentially incompatible. They are certainly not designed to coordinate global flows generally or to manage them in the absence of crisis.

Against this backdrop, the Fund has begun to play a more assertive role in helping its members manage global flows. Since the beginning of the recent global financial crisis, the Fund has focused increasingly on helping its members coordinate their policies as a central part of its multilateral surveillance.<sup>203</sup> After a period of study and deliberation among the Fund's staff and membership, the Fund articulated an "institutional view" in 2012 to guide its advice and surveillance regarding its members' policies affecting capital flows.<sup>204</sup>

As discussed below,<sup>205</sup> it is noteworthy for present purposes that the Fund made a point in the course of developing this new institutional view, to confirm its legal authority to conduct surveillance of policies affecting capital flows notwithstanding that Article VI expressly allows members to "exercise such controls as are necessary to regulate international capital movements."<sup>206</sup> The Fund determined that it has jurisdiction to conduct bilateral surveillance of its members' policies re-

---

201. See Elizabeth Broomfield, *Reconciling IMF Rules and International Investment Agreements: An Innovative Derogation for Capital Controls* 1 (Vale Columbia Ctr. on Sustainable Int'l Inv., FDI Perspective No. 78, 2012), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2206646](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2206646) ("There is currently no universal framework governing capital controls."); VITERBO, *supra* note 3, at 88 (noting the lack of "inter-treaty coherence" and potentially conflicting obligations in agreements related to capital flows); Feibelman, *supra* note 185, at 524–31.

202. Feibelman, *supra* note 185, at 524–31.

203. *Id.* at 518–19.

204. GALLAGHER, *supra* note 185, at 126–30, 131–54 (describing the origins of the Fund's new approach, both internal and external); Feibelman, *supra* note 185, at 433–39.

205. See *infra* notes 283, 293 and accompanying text.

206. See *supra* note 189.

garding capital flows pursuant to Article IV, *i.e.*, to the extent that those policies implicate members' obligation to promote domestic stability.<sup>207</sup> The Fund has also determined that it has jurisdiction to conduct multilateral surveillance of global flows pursuant to its responsibility to "ensure the stability of the international monetary system."<sup>208</sup>

To some extent, the Fund's new institutional view builds on advice that the Fund has been providing its members over the last two decades, encouraging them to liberalize policies regarding capital flows in tandem with domestic economic and institutional development.<sup>209</sup> In unequivocally advocating that its members actively manage capital flows, however, the Fund's new institutional view represents a clear shift from its previous posture.<sup>210</sup> The Fund's new view proposes that domestic policymakers should, in most cases, manage capital flows through macro-prudential policies, including exchange rate and monetary policies. In cases of acute crisis, however, it may be necessary to adopt direct controls on cross-border capital transfers. Although the Fund had approved or encouraged controls in certain circumstances in the past, it had not generally embraced controls as part of the policy toolkit.<sup>211</sup> According to a recent study, the Fund's new view of capital flow management has already been incorporated in its bilateral surveillance.<sup>212</sup>

The Fund's determination to help coordinate its members' efforts to manage capital flows represents a significant

---

207. IMF, *Liberalizing Capital Flows and Managing Outflows* 6–7 (Mar. 13, 2012), <http://www.imf.org/external/np/pp/eng/2012/031312.pdf>; VITERBO, *supra* note 3, at 183–84; Feibelman, *supra* note 185, at 514–15.

208. IMF, *supra* note 207, at 7 (“[T]he Fund focuses on capital flow issues both as an integral part of bilateral surveillance and in the context of its responsibility to oversee the international monetary system (that is, multilateral surveillance).”); Feibelman, *supra* note 185, at 515.

209. Feibelman, *supra* note 185, at 520.

210. See generally Manuela Moschella, *The Institutional Roots of Incremental Change: The IMF and Capital Controls after the Global Financial Crisis*, 17 BRITISH J. POL. & INT'L REL. 442, 442–43 (2014); Kevin P. Gallagher & Yuan Tian, *Regulating Capital Flows in Emerging Markets: The IMF and the Global Financial Crisis* 2–4 (Global Econ. Governance Initiative, Working Paper No. 5, 2014) (discussing the literature on the crisis and “the shift of discourse at the IMF [about capital controls]”).

211. VITERBO, *supra* note 3, at 184; IMF, *supra* note 207, at 5.

212. Gallagher & Tian, *supra* note 210, at 20–23.

shift in its regulatory role regarding capital flows in particular and its regulatory mandate in general. Surveillance of potential spillovers and other external effects of domestic policies affecting capital flows will be a central component of the Fund's new mandate for multilateral surveillance. Given the significance for global financial stability of managing global capital flows, the Fund's activities in this regard represent one of the most important examples of its unique role in international financial regulation. And, to reiterate, these activities have been expressly predicated upon newly articulated interpretations of the Fund's legal mandates for both multilateral surveillance and surveillance of capital management policies. As discussed below, this suggests that the Fund's formal authority is an important determinant of the scope and nature of its financial surveillance.<sup>213</sup>

#### D. *Engagement with Europe*

The Fund's engagement with its members in the euro zone to advocate for union-wide legal and regulatory reforms is perhaps the most visible example of its recent efforts to play an active role in the design and performance of international financial regulation.<sup>214</sup> In any event, the Fund's recent engagement with European financial policymakers provides a useful case study of how it employs its various tools of influence and enforcement, including bilateral surveillance, multilateral surveillance, conditional lending, and informal ad hoc advice.

As the European financial crisis unfolded, it was widely recognized that many critical aspects of the problems stemmed from, or were exacerbated by, the imperfect institutional design of Europe's monetary union.<sup>215</sup> The union centralized monetary and exchange rate policy, but left fiscal policy largely decentralized. Member states committed to coordinate their independent fiscal policies and to abide by constraints under the Growth and Stability Pact, which pro-

---

213. See *infra* Part V.B.

214. See generally Jean Pisani-Ferry et al., *Triennial Surveillance Review External Study—An Evaluation of IMF Surveillance of the Euro Area* (July 19, 2011), <http://www.imf.org/external/np/pp/eng/2011/071911.pdf>.

215. *Id.* at 33.

vides for limits on deficits and borrowing.<sup>216</sup> But these commitments are subject to limited enforcement mechanisms<sup>217</sup> and the union has experienced difficulty in ensuring the accuracy of financial and economic data provided by members.<sup>218</sup>

Until recently, the monetary union also retained a decentralized financial regulatory apparatus,<sup>219</sup> with regulation and supervision of financial institutions and financial markets, including resolution of financial firms in distress and deposit insurance, conducted by national institutions and actors.<sup>220</sup> The national regulatory schemes varied in many respects and were not subject to any union-wide oversight. This decentralized approach increased the financial and economic vulnerability of the monetary union and its members. It resulted in inconsistent quality of regulation and supervision across the union, providing few, if any, safeguards against recklessness or incompetence at the state level, and it encouraged regulatory arbitrage.<sup>221</sup> As cross-border financial activity expanded within the region, the arrangement required an increasing degree of international coordination among European financial regulators. Then, as conditions within the region worsened and spillovers among domestic economies accelerated, the decentralized framework severely complicated efforts to respond effectively.<sup>222</sup> To some extent, this was a function of practical and logistical coordination problems. But the lack of a centralized regulatory framework also enabled member states to pur-

---

216. Eur. Cent. Bank, *A Fiscal Compact for a Stronger Economic and Monetary Union*, ECB MONTHLY BULL., May 2012, at 79, [http://www.ecb.int/pub/pdf/other/art1\\_mb201205en\\_pp79-94en.pdf](http://www.ecb.int/pub/pdf/other/art1_mb201205en_pp79-94en.pdf).

217. See, e.g., Anthony Annett, *Enforcement and the Stability and Growth Pact: How Fiscal Policy Did and Did Not Change Under Europe's Fiscal Framework* 3 (Int'l Monetary Fund, Working Paper No. 06/116, 2006) ("The Pact has faced frequent criticism and suffered from significant enforcement problems.").

218. *Id.* at 14.

219. See generally IMF, *Euro Area Policies: 2012 Article IV Consultation* (July 2012), <https://www.imf.org/external/pubs/ft/scr/2012/cr12181.pdf>.

220. *Id.* at 13.

221. THE DE LAROSIÈRE GROUP, *THE HIGH-LEVEL GROUP ON FINANCIAL SUPERVISION IN THE E.U.* 27 (2009), [http://ec.europa.eu/internal\\_market/finances/docs/de\\_larosiere\\_report\\_en.pdf](http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf).

222. See IMF, *supra* note 219, at 13.



sue protectionist policies at the expense of others and of the union more generally.<sup>223</sup>

These structural aspects of the euro zone and the halting crisis-response policies of the European Central Bank caused alarm beyond Europe as financial and economic crisis there began to imperil global stability. Although the stability of Europe had global ramifications, the rest of the world had very few tools with which to influence legal developments within the region. The Fund was, and remains, one such tool. Each member of the European Union, including all members of the euro zone, is also a member of the Fund and subject to the Fund's bilateral surveillance of economic and financial policies affecting domestic stability.<sup>224</sup> But the euro zone members delegated their power to conduct monetary and exchange rate policies to the European Central Bank, which had no independent membership in the Fund.<sup>225</sup> There continues to be some uncertainty about whether the European Central Bank and other union-level institutions share the formal obligations of union member states under the Fund's Articles.<sup>226</sup>

Whether or not these institutions are themselves subject to members' obligations under the Fund's Articles, the Fund has taken the position that its euro zone members are accountable for the actions and policies of the union-level institutions.<sup>227</sup> And the Fund has construed "domestic stability" in the context of a monetary union to mean both the stability of the member and at the union level.<sup>228</sup> Since the creation of the European monetary union, Fund staff have met with those institutions annually as part of its bilateral surveillance of its euro zone members.<sup>229</sup> After these meetings, the Fund

---

223. Perhaps the most notable example of this was the experience of depositors in Icelandic banks outside of Iceland.

224. See Eur. Cent. Bank, *IMF Surveillance in Europe* 9 (Occasional Paper Series, No. 158, 2015), <https://www.ecb.europa.eu/pub/pdf/scpops/ecbop158.en.pdf>; Feibelman, *supra* note 81, at 138, 141–42.

225. Feibelman, *supra* note 81, at 124.

226. See Eur. Cent. Bank, *supra* note 224, at 9 ("None of the European institutions or fora are members of the IMF, and their cooperation with the Fund is not mandatory."); Feibelman, *supra* note 81, at 138–39.

227. See IMF, *supra* note 88, at 6.

228. *Id.*

229. This was formally acknowledged in the 2007 Decision, relevant parts of which survived into the Integrated Surveillance Decision of 2012.

prepares and publishes a Euro area policy report covering aspects of bilateral and multilateral surveillance.<sup>230</sup>

Before the crisis, the Fund consistently encouraged its members in the euro zone to increase the strength of union-level coordination over fiscal policies and financial regulation, but arguably without much sense of urgency.<sup>231</sup> As the crisis unfolded, the Fund became more aggressive in pushing European policymakers in this direction, especially with regard to financial policies and regulation within the region.<sup>232</sup> In particular, Fund surveillance focused on the need for a euro zone banking union including a common deposit insurance scheme, a union-level approach to bank resolution, and coordinated banking supervision.<sup>233</sup> European policymakers have subsequently adopted union-level bank supervision and resolution mechanisms and have strengthened the region-wide approach to deposit insurance.<sup>234</sup> The Fund has also made important programmatic improvements in its surveillance of its euro zone members and union-level institutions, some of which were a product of its new integrated approach to bilateral and multilateral surveillance.<sup>235</sup> Fund staff also engaged informally with euro zone policymakers throughout the crisis to provide advice regarding response, containment, and resolution.<sup>236</sup>

The Fund's engagement with euro zone policymakers over financial regulation in the region is a revealing example of the Fund's participation in international financial regulation. Since the onset of the financial crisis, the Fund has actively and vocally sought to influence domestic financial policymakers in Europe to advance domestic and global stability.<sup>237</sup> The European case is also particularly interesting because it

---

230. See generally IMF, *supra* note 219.

231. See Pisani-Ferry et al., *supra* note 214, at 12.

232. See *id.* at 16–18, 21–22.

233. See generally IMF, *supra* note 219.

234. See *Banking Union*, EUROPEAN COMMISSION, [https://ec.europa.eu/info/business-economy-euro/banking-and-finance/banking-union\\_en](https://ec.europa.eu/info/business-economy-euro/banking-and-finance/banking-union_en) (last visited Mar. 20, 2017) (describing the components of the new EU banking union, including its mechanisms for supervision and for resolving failing banks).

235. See Pisani-Ferry et al., *supra* note 214, at 15–16.

236. See *id.* at 21–22.

237. See generally *id.*

involves the creation and maintenance of an international monetary union—it is, internally, a distinctly international regulatory project. Thus, in its engagement with Europe, the Fund is acting to influence the development of a new framework for international regulatory integration and coordination on a regional level. Its engagement with Europe may be understood as a model for its financial surveillance more generally and its ambition to help all of its members forge a more substantial and effective framework for international financial regulation.

### E. *Impact*

The following Part remaps the framework for international financial regulation to take account of the Fund's role. A remapping of formal regulatory authority across the international financial system yields little value, however, if it does not also reflect the sources and nodes of actual power and influence with that system. If the Fund has no actual impact on the design and operation of its members' financial policies, then a remapping of formal authority is an empty exercise. This Part addresses the impact of the Fund's financial surveillance.

This discussion generally sets aside the impact that the Fund has on its members' policies through its conditional lending.<sup>238</sup> The Fund's financial support most often requires the borrowing member to agree to make policy changes to address underlying problems in their balance of payments.<sup>239</sup> In that context, the Fund has enormous leverage to influence a member's policies. This is distinct from the impact it has over the policies of members who are not seeking financial assistance although the policies subject to conditional lending are

---

238. See, e.g., DAM, *supra* note 83, at 123–27; WOODS, *supra* note 12, at 70–71.

239. Articles of Agreement of the IMF, *supra* note 6, art. 1(v) (“To give confidence to members by making the general resources of the Fund temporarily available to them under adequate safeguards, thus providing them with opportunity to correct maladjustments in their balance of payments without resorting to measures destructive of national or international prosperity.”); *id.*, art. 5, § 3(a) (“The Fund shall adopt policies on the use of its general resources . . . that will assist members to solve their balance of payments problems in a manner consistent with the provisions of this Agreement and that will establish adequate safeguards for the temporary use of the general resources of the Fund.”).

usually also the subject of the Fund's Article IV surveillance.<sup>240</sup> It is certainly possible that the Fund's practice of conditional lending contributes to the impact of its surveillance by motivating members who anticipate that they might need financial assistance in the future. This is especially likely in the context of the Fund's ex ante conditionality,<sup>241</sup> where the distinctions between lending conditions and surveillance get blurry. In any event, this Article understates the impact of the Fund on international financial regulation by focusing solely on its surveillance activities and setting aside the impact of its conditional lending.

In Fund-speak, the impact of its surveillance on its members' policies is described as "traction." The impact or traction of the Fund's surveillance is an important measure of its success or failure in enforcing its members' obligations and performing its responsibilities for multilateral surveillance. Unfortunately, the effects and impact of surveillance are understudied, especially compared to those of its lending and conditionality. As one pair of authors recently observed, "While we now understand a great deal about IMF lending, we know precious little about IMF surveillance."<sup>242</sup>

Despite the relative lack of data, there is widespread agreement among scholars and commentators that the trac-

---

240. See, e.g., Edwards & Senger, *supra* note 106, at 312–13; IMF, *2011 Review of Conditionality—Overview Paper* 21–22 (June 19, 2012), <http://www.imf.org/external/np/pp/eng/2012/061912a.pdf> (discussing the relationship between surveillance and lending program design).

241. Since the onset of the crisis, the Fund has created the Fund's Flexible Credit Line facility and other similar precautionary facilities that members can draw upon without conditions. See IMF, *The IMF's Flexible Credit Line (FCL)* (Sept. 27, 2012), <http://www.imf.org/external/np/exr/facts/fcl.htm>. This new facility is designed to allow countries that have demonstrated "strong economic fundamentals and institutional policy frameworks" access to Fund resources without the need to seek approval ex post. See *id.* This arrangement has been aptly described as ex ante conditionality, and it relies heavily on the Fund's ongoing surveillance. To the extent that members want to qualify for these facilities, they may have significant and concrete motivation to be responsive to the Fund's input during its Article IV surveillance consultations.

242. Edwards & Senger, *supra* note 106, at 314 (noting that 60% of the Fund's Executive Board's time and 42% of staff time is spent on surveillance (citing Leo Van Houtven, *Governance of the IMF: Decision Making, International Oversight, Transparency and Accountability* 15 (Int'l Monetary Fund, Pamphlet Series No. 53, 2002))).

tion of Fund surveillance falls well short of its mandate to enforce members' obligations and its responsibility to ensure the stability of the international monetary system.<sup>243</sup> And the Fund has candidly acknowledged that its surveillance has significantly less traction with its members than it and its members expect.<sup>244</sup>

To begin with, the Fund has relatively delicate enforcement tools.<sup>245</sup> As noted above,<sup>246</sup> while sanctions are theoretically available if members fail to satisfy their obligations under the Articles, they are almost never employed, and they have never been employed in the context of Fund surveillance. Rather, the Fund must rely on suasion, peer pressure, and consultation to execute its responsibilities and to enforce members' Article IV obligations.

Beyond this structural challenge, the Fund acknowledges that it could improve its institutional and analytical approaches to surveillance.<sup>247</sup> It conducts a comprehensive surveillance review triennially, and the need for greater traction

---

243. See, e.g., VITERBO, *supra* note 3, at 24 (noting the “lack of teeth” and “the failure to address the IMF’s legitimacy deficit and to reform its governance structure”); *id.* at 125–28 (observing that the Financial Stability Board has more traction than the Fund with “non-cooperative jurisdictions”); Edwards & Senger, *supra* note 106, at 314–15; Bessma Momani, *Assessing the Utility of, and Measuring Learning from, Canada’s IMF Article IV Consultations*, 39 CANADIAN J. OF POL. SCI. 249 (2006); Truman, *supra* note 93; Ngaire Woods & Domenico Lombardi, *The Political Economy of IMF Surveillance*, 12–31 (Ctr. For Int’l Governance Innovation, Working Paper No. 17, 2007), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=964917](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=964917) (evaluating the Fund’s historical practice of surveillance as, potentially, just “window-dressing,” “learning,” and/or the “imposition of standards” by stronger members upon weaker ones); Independent Evaluation Office of the International Monetary Fund, *IMF Performance in the Run-up to the Financial and Economic Crisis: IMF Surveillance in 2004–07* (2011), [http://www.ieo-imf.org/ieo/files/completed\\_evaluations/Crisis-%20Main%20Report%20%28without%20Moises%20Signature%29.pdf](http://www.ieo-imf.org/ieo/files/completed_evaluations/Crisis-%20Main%20Report%20%28without%20Moises%20Signature%29.pdf).

244. See, e.g., IMF, *supra* note 116, at 19–26.

245. See Edwards & Senger, *supra* note 106, at 317 (“[U]nderstanding how surveillance works helps us to develop a better understanding of soft law and the barriers that exist to soft law affecting outcomes. While the Article IV process is framed as an obligation of IMF member countries, failing to implement the recommendations of a mission does not invoke enforcement, since no financial resources underpin the relationship.”).

246. See *supra* note 112 and accompanying text.

247. See, e.g., Edwards & Senger, *supra* note 106, at 315; Woods & Lombardi, *supra* note 85.

has been a prominent and consistent theme in these reviews.<sup>248</sup> Such reviews suggest that this could be achieved through improved qualitative analysis, more effective communication strategies, increasing candor with its members, and greater concern for the Fund's legitimacy and reputation for even-handedness.<sup>249</sup> The most recent review also considered "whether the Fund's mandate is adequate to support a stronger role in global cooperation."<sup>250</sup> As discussed below,<sup>251</sup> this statement is significant because it reflects that the Fund connects its formal mandate to the quality of its function in the global order.

Nonetheless, internal and external criticism of the Fund's surveillance tends to obscure the meaningful impact its surveillance has on its members' policies. To be fair, it is hard to isolate causal factors in domestic financial and economic policymaking, and so it is nearly impossible to positively identify the traction or impact of the Fund's surveillance without deep qualitative empirical study. There is, however, a growing body of scholarship indicating that Fund surveillance has significant impact on its members and the financial system in various ways. A number of researchers have found, for example, that the Fund's surveillance reports can have an effect on the value of debt issued by its emerging market members because it represents one of the best sources of quality information about them.<sup>252</sup> Although much harder to measure, the Fund's surveillance has likely had significant impact on the macro-economic policies of many of its members over the years, especially monetary, exchange rate, and fiscal policies.<sup>253</sup> As a recent survey of officials in its member states found, "a large share of the membership sees the Fund as their key external advisor on macro-policy decisions."<sup>254</sup>

---

248. See, e.g., IMF, *2014 Triennial Surveillance Review—Overview Paper 10* (2014), <http://www.imf.org/external/np/pp/eng/2014/073014.pdf>; IMF, *supra* note 116, at 19–26.

249. IMF, *supra* note 116, at 19–26.

250. IMF, *supra* note 248, at 2.

251. See *infra* notes 293–300 and accompanying text.

252. See, e.g., Edwards & Senger, *supra* note 106, at 314.

253. See, e.g., *id.* at 315 (citing and discussing policy studies that suggest the influence of Fund surveillance "is considerable"); *id.* at 315–16 ("In many countries, the exact policies that the Fund has advocated have been adopted.")

254. IMF, *supra* note 248, at 27.

There is some objective, if anecdotal, evidence of the Fund's impact on particular aspects of its members' financial policies through its surveillance.<sup>255</sup> Perhaps one of the most important examples of this is the Fund's recent engagement with its members in the euro zone, described above, where Fund officials played an important role in pushing European policymakers to reform financial regulations within the European Union.<sup>256</sup> This example of the Fund's impact on its members' policies reflects the difficulty in separating out the effects of surveillance and conditional lending.<sup>257</sup> Throughout this period, the Fund was playing a crucial role in providing financial assistance to some members of the European Union and the euro zone, most notably Greece in 2012. The Fund could not impose union-level conditionality, so the reforms of union-level regulations are not formally attributable to conditions attached to its financial support. It is entirely possible, however, that some informal type of conditionality was at play. At the very least, the Fund's dual role made it an especially important interlocutor for European policymakers and gave it unique access at crucial moments of debate over financial regulatory policy in the region.

Finally, as discussed below in more detail, in addition to its impact through conditional lending and surveillance, the Fund has some significant and underappreciated impact on its members' financial policies by actively participating in other international financial regulatory institutions that promulgate standards, codes, and guidelines.<sup>258</sup> This impact may be indirect, but it is not trivial. In sum, there is ample evidence that

---

255. It appears that the Fund has had some impact on some of its members' capital flow management policies, especially when those members have experienced volatile capital flows. Some of the Fund's influence in this regard has been in the course of conditional lending, but it appears that the Fund has also helped steer some members' capital flow policies in the absence of a financial program. GALLAGHER, *supra* note 185 (exploring the complex political economy of policies regarding regulation of capital flows); *id.* at 99–123 (describing the IMF reaction to particular policies—not really determinative).

256. See Pisani-Ferry et al., *supra* note 214, at 16–18, 21–22, 33; *id.* at 19 (“[T]he Fund played a leading role in emphasizing the relation between monetary and financial integration and it pushed for progress towards more policy integration.”).

257. See *supra* notes 238–41 and accompanying text.

258. See *infra* notes 269–71 and accompanying text.

the Fund has meaningful impact on its members' financial policy through surveillance as well as through its conditional lending and other activities. This Article does not aim to measure the extent of this impact but simply observes that it exceeds a basic threshold of influence that warrants further study and reconsideration of the conventional account of international financial regulation.

## V. REMAPPING AND IMPLICATIONS

Assuming that the Fund's financial surveillance has meaningful impact on its members' financial policies, this Part argues that the Fund's impact on international coordination renders network theories of global governance incomplete and inaccurate. More speculatively, it argues that the Fund's impact is likely, at least in some part, a product of the formal legal basis of its responsibilities and its members' obligations.

### A. *Remapping*

The conventional view of the Fund as a conditional lender and a monitor of regulatory arrangements misapprehends its mandate and therefore misplaces the Fund in the framework of international financial regulation. An accurate mapping of the framework must, at a minimum, situate the Fund's formal mandate for financial surveillance in relation to the roles assigned to other institutional actors in the framework.

The Fund's mandate for financial surveillance, described above,<sup>259</sup> overlaps with a vast swath of the regulatory concerns and activities of other international financial regulatory actors, i.e., basically anything that is macro-relevant, having the potential to affect domestic or external stability. Sector-specific organizations like the Basel Committee and IOSCO are largely focused on improving prudential financial policies to promote safety and soundness of firms and markets. It may be that not all of these prudential policies have the potential to undermine domestic or global stability, but most do. To that extent, the regulatory activities of these organizations overlap with the Fund's mandate for financial surveillance.

---

259. See *supra* Part III.B.



The Fund's regulatory domain overlaps with that of the Financial Stability Board and the G-20—the agenda setters—more considerably. These organizations focus on issues more directly affecting global, systemic, and international stability. The G-20, for example, has emerged as an important forum for crisis prevention and response, for coordinating short-term financial and economic policies in developed and emerging economies, and for improving the architecture of more comprehensive and longer-term coordination.<sup>260</sup> As an ad hoc “state-to-state” group<sup>261</sup> of ministers and heads of state, it is effectively upstream from the Fund, and serves as a forum for reaching preliminary agreements about actions its members commit to take in the Fund and elsewhere.<sup>262</sup>

The Fund's regulatory mandate overlaps even more comprehensively with the Financial Stability Board.<sup>263</sup> Like the Fund, and unlike other sector-specific institutions, the Board's mandate—as its name suggests—is oriented toward systemic stability. The Board's mandate includes assisting and coordinating efforts by domestic regulators and sector-specific organizations to design regulatory and supervisory policies, and monitoring domestic regulators' implementation of those policies.<sup>264</sup> Significantly, the Board's mandate also includes “assess[ing] vulnerabilities affecting the global financial system . . . to identify . . . on a timely and ongoing basis within a macroprudential perspective, the regulatory, supervisory and related actions needed to address these vulnerabilities . . . .”<sup>265</sup>

Thus, managing the allocation of regulatory responsibilities between the Fund and the Board has been an important challenge for the ongoing design of the international financial

---

260. “In this context, and reflecting the concentration of the current crisis in the advanced economies, the G20 has become a key player in financial policy reform.” IMF, *supra* note 18, at 29. See also VITERBO, *supra* note 3, at 22–23; GALLAGHER, *supra* note 185, at 147–49 (discussing the use of the G-20 forum by emerging market countries to impact global governance); *id.* at 155–68 (discussing the role of the G-20 in promoting better management of cross-border capital flows).

261. See Pan, *supra* note 23, at 252–53.

262. See *supra* notes 32–33 and accompanying text.

263. VITERBO, *supra* note 3, at 120–31 (examining the relationship between the Fund and the FSB).

264. See *supra* notes 35–36 and accompanying text.

265. *About the FSB*, FIN. STABILITY Bd., <http://www.fsb.org/about/#mandate> (last visited Mar. 20, 2017).

regulatory architecture.<sup>266</sup> At least in design, the Board is primarily concerned with designing and implementing particular regulatory regimes and policies while the Fund is primarily concerned with the macro-relevant impacts of its members' financial policies. As a practical matter, however, these mandates are inextricably linked.

The efforts of the Fund and these other international financial regulatory institutions are generally complimentary, but there is potential for redundancy or tension. Tensions could arise, for example, where the underlying mandates are different, leading to disagreement about goals of member states' policies. There is significant room, for example, for tension between the Fund and other institutional actors whose mandates lean more toward facilitating growth than toward promoting stability, such as the OECD. In that case, it is possible that the different institutional missions could be adverse in certain circumstances. Tension could also arise if the mandates of different institutions overlap and the institutions disagree about the appropriate or desirable regulatory approach to the mandate.

It appears that the Fund and these other institutions generally aim to navigate these potential tensions cooperatively.<sup>267</sup> But the framework of international financial regulation also

---

266. See, e.g., VITERBO, *supra* note 3, at 130–31 (“[A]s monetary and financial stability are inextricably intertwined, we consider the IMF better suited than the FSB to monitor holistically its members’ macroeconomic and macrofinancial policies, as well as their linkages and implications for global stability.”); BARR, *supra* note 3, at 284–85; Bessma Momani, *The IMF and FSB: Intractable Political Reality and Organizational Mismatch*, in THE FINANCIAL STABILITY BOARD: AN EFFECTIVE FOURTH PILLAR OF GLOBAL ECONOMIC GOVERNANCE?, *supra* note 35; IMF, *supra* note 18, at 24 (“Experts acknowledged that there are overlaps in responsibilities and that the key was to avoid unnecessary duplication . . . . As an example, they noted that the FSB should take the lead in designing regulatory reforms, but the Fund should analyze the macroeconomic impact of regulatory reform and assess implementation progress.”); *id.* at 11 (“Although the lead responsibility for managing the global financial regulatory reform agenda lies with the FSB, the Fund . . . can . . . provide independent advice on, and assessment of, . . . their impact on the international monetary system. The Fund can also identify and monitor unintended regulatory spillovers and arbitrage . . . .”).

267. See, e.g., VITERBO, *supra* note 3, at 120–21 (discussing the FSB/Fund joint letter mapping out their respective roles). The Charter of the FSB, for example, provides that it will collaborate with the Fund in conducting early warning exercises. See FIN. STABILITY BD., Charter art. 2, § 1(h), <http://www>.

includes various structural features that address these overlapping mandates and the potential for tensions between the Fund's activities and those of other international financial regulatory entities. Some of these can be described as ordering mechanisms. For example, many of the agreements creating other international regimes and organizations provide that the obligations they create and the activities they promote will be consistent with states' commitments under the Fund's Articles.<sup>268</sup>

More significantly, as noted above, the Fund enjoys a formal position in most other international financial regulatory entities and has participated actively in the work of these organizations.<sup>269</sup> The Fund is an observer on the Basel Committee,<sup>270</sup> for example, and a member of the FSB.<sup>271</sup> The Fund's role in these other international organizations not only helps promote institutional cooperation, it also enables the Fund's staff to play an under-recognized role in designing the standards, codes, and guidelines promulgated by sector-specific regulatory organizations or horizontal networks. It is noteworthy that such institutional bridges are asymmetrical; these other institutions do not have a similar formal or observer status at the Fund. Since the onset of the recent crisis, the Fund staff and leadership have a greater appreciation of its leverage within other components of the international financial regulatory framework and is now determined to exploit this leverage more than it has previously done.<sup>272</sup>

---

[fsb.org/wp-content/uploads/FSB-Charter-with-revised-Annex-FINAL.pdf](http://fsb.org/wp-content/uploads/FSB-Charter-with-revised-Annex-FINAL.pdf) [hereinafter FSB Charter].

268. See, e.g., VITERBO, *supra* note 3, at 205–08, 222–32, 255–60 (discussing formal deference or links to the Fund in various trade and investment regimes, including WTO, NAFTA, and the ASEAN Free Trade Area). In some circumstances, such provisions are arguably superfluous as member states' obligations under the Fund's Articles will supersede sub-state agreements and many subsequent state-level commitments as well.

269. IMF, *supra* note 18, at 29.

270. *Basel Committee Membership*, BANK FOR INT'L SETTLEMENTS, <http://www.bis.org/bcbs/membership.htm> (last updated Dec. 30, 2016).

271. FSB Charter, *supra* note 267, art. 5, annex A.

272. The Fund has been increasingly active in its efforts at “forging strong relationships and . . . collaborating actively with [its] international partners . . . . In particular, the Fund has intensified its contributions to the discussion of global financial issues through its presence in key committees and groups of the FSB and SSBs.” IMF, *supra* note 18, at 29.

In sum, remapping the Fund within the architecture of international financial regulation makes clear that the view of the Fund as a monitor or a convening authority grossly misapprehends its mandate and role. In the course of enforcing formal, treaty-based obligations and performing treaty-based responsibilities, the Fund plays a direct regulatory role in the international financial system, both *ex ante* (at the time of policy design) and *ex post* (in assessing the macro-performance of its members' policies and enforcing their obligations). At the very least, the Fund has been assigned an agenda-setting and systemically-oriented role in the regulatory framework. Compared to the Financial Stability Board, however, it is responsible for surveillance of a broader range of financial system vulnerabilities, especially those related to other macro-economic policies and transnational spillovers. In that respect, the Fund occupies a position similar to the G-20, which has a mandate that encompasses any financial or economic policy implicating systemic stability. Where the G-20 is essentially a state-level steering body, however, the Fund is a regulatory institution charged with narrower enforcement and supervisory responsibilities.

Although she misdescribes the Fund's role in her work, Slaughter's concept of vertical networks provides a useful template for considering the Fund's actual role. Her chief examples of supranational enforcement institutions within vertical governance networks are the International Criminal Court and the WTO's dispute resolution panels.<sup>273</sup> These are, in Slaughter's terms, genuinely supranational organizations to which their members have ceded a meaningful degree of sovereignty. Structurally, the Fund serves a similar function as these other supranational institutions—enforcing state-level obligations and commitments made by participating states. Thus, financial regulation is not a model of global governance in which networks of regulators have completely replaced diplomats or ministers; rather, it is a more familiar, if complicated, example of collaborative effort between domestic regulators, state-level obligations, and international institutions representing a range of legal formality.

---

273. See *supra* note 49 and accompanying text.

## B. *Implications*

Because Slaughter and other writers dismiss the possibility that the Fund is a supranational enforcement institution within a vertical governance network, they do not grapple with the potential significance of the Fund's regulatory role. Recognizing the Fund's formal role and its impact on international financial regulation and its members' domestic financial policies requires more than merely remapping the institutional framework of international financial regulation. It requires a revised account of how international financial regulation works and an assessment of whether traditional modes of law help determine how it works.

This in turn begs the question of whether the Fund's impact on financial regulation may be, at least in part, a function of the legal basis of its authority. Because most scholarship on the topic misapprehends the Fund's role, the literature has no cause to consider whether formal legal obligations and responsibilities under international monetary law do meaningful work in this corner of global governance. In fact, the Fund's role in financial regulation has the potential to shed valuable light on the study of law as a determinant of international cooperation and coordination.

There is a rich literature examining whether, when, and how international legal obligations and responsibilities affect states' policies and actions. Especially in the wake of the World Wars of the last century, various theorists have attributed international coordination and cooperation primarily to political, economic, and other practical interests rather than formal legal arrangements.<sup>274</sup> In response to these challenges, a growing body of work explores how formal arrangements may promote international coordination,<sup>275</sup> perhaps by serving signaling or expressive functions,<sup>276</sup> or by promoting changes in norms or state-level socialization.<sup>277</sup> As discussed above, the ex-

---

274. See, e.g., JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005).

275. See, e.g., LOUIS HENKIN, *HOW NATIONS BEHAVE* (1979); ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* (2008).

276. See, e.g., Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 *YALE L.J.* 1935 (2002); GUZMAN, *supra* note 275, at 38.

277. See, e.g., RYAN GOODMAN & DEREK JINKS, *SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW* (2013).

ample of international financial regulation has been marshaled to support claims that traditional, formal legal arrangements are not necessary to achieve international cooperation or coordination. This may yet be true, but the claim is significantly more complicated if one accounts for the role of the Fund and the possibility that its formal legal basis supports that role.

It may be that the Fund's impact or influence is not, in fact, a function of its formal legal status. The Fund might derive all of its influence from non-legal factors like the political dynamics among its members, its leverage as a potential lender, or its own effective persuasion and consultation. As noted above, the Fund has its greatest impact on members' policies in the context of conditional lending when a member needs financial support to fix an acute balance-of-payments problem. That impact is perhaps exclusively a function of its leverage over a country in crisis and the quality of its substantive advice.

Domestic policymakers also may perceive that the Fund's surveillance reflects the views of more powerful states and may therefore be inclined to give the Fund's advice weight to curry favor, or to avoid conflict, with those more powerful states.<sup>278</sup> They may also respond to the Fund's surveillance advice to send signals to market participants, other states or official actors, or to domestic constituencies.

It is more likely, however, that the formal legal basis of the Fund's regulatory role contributes to the impact it has on members' policies, including their financial policies, by influencing the Fund's officials and staff in their performance of regulatory responsibilities and by influencing member states in their design and conduct of financial policies. As an initial matter, the underlying formal legal framework of Fund surveillance appears to have both constraining and enabling influence on the Fund's performance of its regulatory role.

Throughout its existence, Fund members and staff have been observably committed to and constrained by the jurisdic-

---

278. There is a significant body of scholarship on the effect of such factors on Fund lending programs. See, e.g., MICHAEL BREEN, *THE POLITICS OF FUND LENDING* (2013); Axel Dreher et al., *Does Membership on the U.N. Security Council Influence Fund Decisions? Evidence from Panel Data* (CESifo, Working Paper No. 1808, 2006).

tional grants and the governance structure set forth by the Articles: “the law of the Fund.”<sup>279</sup> As a former head of the Fund’s Legal Department and General Counsel has written, “[T]he Fund has always recognized the importance of abiding by its charter and regulations. . . . [It] must decide for itself and in good faith whether it is acting in accordance with its law. If the law is found to be inadequate, it should not be ignored but amended . . . .”<sup>280</sup> Thus, for example, actions and decisions by the Fund are routinely subject to review by the Fund’s legal department to ensure that they fall within the organization’s authority.<sup>281</sup> This internal concern with legality and authority is reflected in the care taken to articulate the formal scope of the Fund’s mandate to conduct multilateral surveillance<sup>282</sup> and to advise members on managing capital flows,<sup>283</sup> both discussed above.

Perhaps more important, the underlying formal legal basis of Fund surveillance may have an enabling effect on Fund officials’ performance of the institution’s regulatory role. If so, this would be a somewhat unique circumstance in the global order. As an international institution formally charged with performing a robust regulatory function, the Fund’s efficacy is at least partly a function of its institutional energy and self-confidence, both of which could be affected by the legal framework. If the Fund’s staff and officials derive at least some motivation or some enhanced sense of legitimacy from the fact that they are acting pursuant to a formal treaty-based grant of responsibility, this would prove to be an important consequence of the legal order.

Beyond the effect of legal formality on the Fund itself, states’ formal obligations under the Fund’s Articles may have

---

279. See, e.g., Gianviti, *supra* note 82, at 36–37.

280. *Id.* at 37.

281. *Id.* at 35 (“The IMF has developed a practice that incorporates the provision of legal advice in the decision-making process. It consists in having the prior approval of the legal advisor [that] the proposed decision may legally be taken by the Executive Board.”); *Staff of International Civil Servants*, INT’L MONETARY FUND, <https://www.imf.org/external/about/staff.htm> (last visited Mar. 20, 2017). See generally, Richard W. Edwards, Jr., *The Role of the General Counsel of an International Financial Institution*, 17 KAN. J. L. & PUB. POL. 254 (2008).

282. See *supra* notes 122-30 and accompanying text.

283. See *supra* notes 204-12 and accompanying text.

an impact on their behavior and engagement with the Fund. It is worth emphasizing in this regard that the founding members of the Fund ceded a great degree of their monetary sovereignty to commit to a regime of fixed exchange rates.<sup>284</sup> This initial design of the Fund relied heavily on formal legal obligations and the Fund's regulatory role of enforcing the fixed exchange rates of its members' currencies was expected to be robust.<sup>285</sup>

The collapse of the fixed exchange rate regime resulted in the adoption of the current set of member obligations and the Fund's responsibilities under an amended Article IV, described above.<sup>286</sup> In debates over the amendments to Article IV in the wake of the collapse of the Bretton Woods fixed exchange rate regime, many members of the Fund were concerned that the flexibility regarding exchange rate policies allowed under the new Article IV would lead to an erratic unconstrained system of exchange rates.<sup>287</sup> Led by the French, these members succeeded in adding to Article IV the Fund's responsibility for "firm surveillance" to ensure that members were constrained in the performance of the policies they announced.<sup>288</sup> Thus, members' obligations under Article IV as amended, including their obligations regarding their financial policies, may only require best efforts,<sup>289</sup> but they are formal obligations nonetheless, which the Fund has a formal mandate to enforce. As James Boughton, a prominent Fund historian, puts it, "The emphasis [of Article IV] is on freedom of choice, not on freedom of behavior."<sup>290</sup>

In assessing the ongoing force of these obligations on members' behavior, then, it is significant that the Fund's mem-

---

284. See *supra* notes 82-84 and accompanying text.

285. See *supra* notes 97-98 and accompanying text.

286. See *supra* notes 85-87 and accompanying text.

287. See, e.g., BOUGHTON, *supra* note 98, at 747-55.

288. *Id.*; DAM, *supra* note 83, at 259 (explaining that the Fund's surveillance responsibilities were introduced "[t]o compensate for the substantively laissez-faire Article IV").

289. See IMF, *Article IV of the Fund's Articles of Agreement: An Overview of the Legal Framework* 14-17 (June 28, 2006), <http://www.imf.org/external/np/pp/eng/2006/062806.pdf> (distinguishing between members' hard and soft obligations under Article IV, Section 1); see also Truman, *supra* note 93, at 2 (characterizing the Fund's regulatory role as principles-based and, thus, an example of soft law).

290. BOUGHTON, *supra* note 98, at 755.



bers believed that it was important to renegotiate the underlying formal arrangement after the collapse, and that the existence and substance of a new set of obligations and responsibilities mattered. Members' ongoing concern about the nature and scope of these obligations reinforces this significance. At the time of the drafting of the amended Article IV, for example, members of the Fund were keenly concerned that the new obligations not be construed to give the Fund authority "to interfere with economic policies of a member country."<sup>291</sup> As Boughton explains, the amended Article IV and a contemporary supporting Executive Board decision on surveillance "were crafted so as not to impose obligations on member countries to conduct domestic macroeconomic policies in a particular way, other than the general obligation to cooperate with the Fund in the conduct of surveillance."<sup>292</sup>

The deliberative process leading to the Fund's new institutional view on capital flows and recent decisions on surveillance by the Fund's Executive Board indicate that the Fund and its members continue to believe that the content of obligations and responsibilities matter.<sup>293</sup> As discussed above, the 2007 Decision that replaced the 1977 decision re-articulated the substance and the scope of members' obligations and confirmed that those obligations survive when a member joins a currency union.<sup>294</sup> As an initial matter, by clarifying that members' obligations extend to all policies affecting domestic stability,<sup>295</sup> the 2007 decision reflected an expanded scope of the constraining force of Article IV and of the Fund's authority to interfere in members' domestic policies.

At the same time, the 2007 decision was careful to clarify that the Articles do not obligate members to change policies that may have a negative impact on external stability if those policies do not threaten domestic stability.<sup>296</sup> And it became clear in the deliberations leading to the 2012 Integrated Surveillance Decision, which dramatically changed the Fund's mandate for multilateral surveillance, that many of the Fund's

---

291. DAM, *supra* note 83, at 169.

292. BOUGHTON, *supra* note 98, at 73.

293. *See supra* notes 206-08 (regarding capital flows), 88-96, 122-30 (regarding surveillance) and accompanying text.

294. *See* IMF, *supra* note 88, at ¶ 8.

295. *See supra* notes 87-91 and accompanying text.

296. *See supra* notes 87-92 and accompanying text.

members had ongoing concerns about the scope of their formal obligations to promote external or global stability under Article IV.<sup>297</sup> The 2012 Decision expressly determined—wisely or not—that multilateral surveillance did not create any additional formal obligations for members regarding their domestic policies that do not implicate domestic stability.<sup>298</sup> Instead, the expanded practice of multilateral surveillance is based on the Fund’s responsibility to advise its members regarding such policies that might have an impact on external stability through other pathways.<sup>299</sup> Finally, the fact that Fund staff expressly raised the question of whether the Fund’s “mandate is strong enough to support a stronger role in global cooperation,”<sup>300</sup> implicitly reflects an internal view that the formal mandate matters and that it meaningfully impacts the Fund’s role.

While members obviously care about the formal articulation of their obligations, however, this does not prove that the existence of these obligations actually guide or otherwise affect members’ behavior in adopting and pursuing their financial policies. In any event, other practical, political, or sociological factors almost certainly predominate in the policymaking calculus. The limited available data, especially the significant attention that members and the Fund give to their formal obligations and responsibilities, make it fair to speculate that these responsibilities and obligations help guide the Fund’s work and contribute to the impact it has on international financial regulation. If so, this represents an important example of the efficacy of traditional, formal legal arrangements in the global order.

## VI. CONCLUSION

Conventional accounts of international financial regulation misapprehend the Fund’s mandated role and the impact it has on its members’ policies. That impact is likely due to some extent on the underlying legal bases of the Fund’s status, its formal mandate, and its members’ obligations under its Articles of Agreement. All of the acknowledged shortcomings of

---

297. *See supra* notes 122-30 and accompanying text.

298. *See supra* notes 96, 125 and accompanying text.

299. *See supra* notes 129-30 and accompanying text.

300. *See supra* note 250 and accompanying text.

Fund surveillance notwithstanding, surveillance should be understood as a formal mode of regulatory enforcement and supervision.<sup>301</sup> There are reasons to believe that the Fund's formal mandate affects the performance of these regulatory responsibilities and that the formal obligations of its members may also affect their engagement with the fund in the course of its surveillance, either of which would enhance the Fund's ability to play an impactful role in financial regulation. If so, this raises the question of whether adjustments to its underlying legal framework might strengthen and improve the Fund's impact on international financial regulation. Such adjustments might include amending the Fund's Articles to grant it more authority or to expand members' obligations.<sup>302</sup>

If the formal basis of the Fund's mandate and its members' obligations help determine the impact of Fund surveillance, this also suggests that scholars have overlooked some valuable lessons about how international law works that can be drawn from the Fund's role in international financial regulation. Prevailing accounts simply do not address the possibility that there may be a hard law, formal regulatory component to international coordination and cooperation over financial regulation. If, as one writer puts it, international financial regulation is "likely to be a foremost achievement of international cooperation in the twenty-first century,"<sup>303</sup> the possibility that underlying formal legal structures have supported this regulatory architecture should give us pause. With further study, we may find that the Fund's role provides a compelling example of formal international obligations and institutions doing real work in the project of global governance.

---

301. It is true that the Fund had limited enforcement powers if members breached their obligations, but this is a familiar problem for most international legal regimes, whether formal or informal. The Fund did—and still does—have some sanctioning tools available, including involuntary removal from membership in the Fund. While the tools are available, however, they are almost never employed; if they have any effect it is *ex ante* and deterrent.

302. See, e.g., Palais-Royal Initiative, *Reform of the International Monetary System: A Cooperative Approach for the Twenty First Century* (2011), [http://global-currencies.org/smi/gb/telechar/news/Rapport\\_Camdessus-integral.pdf](http://global-currencies.org/smi/gb/telechar/news/Rapport_Camdessus-integral.pdf); VITERBO, *supra* note 3, at 69 (“[T]he 2007–2010 crisis reopened the debate on the need for a further, more profound, reform especially for what concerns the IMF surveillance over members’ financial system and the IMF role in the global adjustment process.”); *id.* at 130.

303. Zaring, *Finding Legal Principle*, *supra* note 1, at 686.

