The G20's Performance in Global Financial Regulation

Ross Buckley

university of new south wales

Follow this and additional works at: http://law.bepress.com/unswwps-flrps13

Part of the Banking and Finance Commons, and the International Trade Commons

Recommended Citation
http://law.bepress.com/unswwps-flrps13/85

This Article is brought to you for free and open access by the University of New South Wales Faculty of Law Research Series at bepress Legal Repository. It has been accepted for inclusion in University of New South Wales Faculty of Law Research Series 2013 by an authorized administrator of bepress Legal Repository.
THE G20’S PERFORMANCE IN GLOBAL FINANCIAL REGULATION

ROSS P BUCKLEY*

This article assesses the performance of the G20 since the Global Financial Crisis by analysing the regulatory measures it has called for and their current stage of implementation. It then proceeds to consider the changes in the global financial system in the past 40 years and seeks to assess how adequate the G20’s measures have been as a response to these fundamental systemic changes. The article concludes that the G20 has met the first challenge far better than it has the second, and goes on to propose four measures that would be appropriately responsive to the massive systemic changes of the past 40 years.

One of the most important decisions this century was that taken by the G7 when it decided, in 2008, that it had neither the right nations at the table, nor the moral authority, to craft a credible response to the Global Financial Crisis (‘GFC’).¹ The first meeting of the G20 leaders took place in Washington D.C. in November 2008 but it wasn’t until the Pittsburgh Summit, in September

---

2009, that it was formally agreed that the G20 would henceforth be ‘the premier forum for international economic cooperation.’

Before 2008 the G20 was a meeting of finance ministers and central bank governors that had itself been established in 1999 as a response to the Asian financial crisis of 1997–1998. The decision to pass directional control of the global economy to the G20 saw the G20 upgraded into a leaders’ meeting. While the membership of the G20 is not precisely what one would craft, if starting with a fresh slate, it is nonetheless many times more representative than the G7 and has at the table the essential participants such as Brazil, China, India, Indonesia, South Africa and Turkey. The G20 then promptly created a major problem for itself by doing a rather splendid job of responding to the crisis. Perhaps, most essentially, this more representative organisation was able to persuade the world that someone, at least, was somewhat in charge of proceedings and this sense of security went a long way toward preventing what could have been a disastrous collapse in confidence globally. The general applause that the G20 won for its actions in the initial two years in response to the crisis promptly created expectations that have proven, somewhat predictably, virtually impossible to fulfil.

This paper seeks to assess how well the G20 has performed over the five years since the crisis. The next section seeks to sketch out an assessment of the G20’s performance in improving the global financial regulatory machinery thus far. Section 2 examines the fundamental changes in the global financial system in the past 40 years, and Section 3 explores the reforms the G20 might have introduced had it been seeking to respond fully to these fundamental changes. In Section 4 the paper concludes.

To leap ahead, and make a long story short, assessing the G20’s performance inside a conventional framework for thinking about such matters, I would give it an A- for its ideas, and a C- for implementation so far, resulting in an overall grade of a B. To be fair to the G20, the principal implementation agencies for its ideas are national governments, and this explains much of the glacial slowness of implementation of many sound initiatives.

---

The awarding of such a high grade for the ideas is very much a contextual exercise undertaken with a nuanced appreciation of just how difficult major financial regulatory initiatives are to implement at any time and how the history of international regulation has been dependent almost entirely upon severe crises to provide the trigger and impetus for action. For instance, the US needed the Great Depression of the early 1930s to give itself a new regime of securities regulation, and the world needed the Latin American and African debt crisis of 1982 to terrify leaders and banking regulators in North America and Europe into agreeing to the first iteration of the Basle Accord.

Measured by conventional levels of achievement in national and international regulation, the G20 has thus done quite well. However, measured against how the financial system has changed in the past 40 years, the G20’s performance is more problematic. You may well ask why am I measuring the G20’s reforms as a response to the fundamental, systemic changes in the international financial system of the past 40 years when the G20 was merely responding to the GFC, and not thinking beyond that crisis. The answer is that if we are to avoid future global financial crises, in my view, we need to start to respond to how the international financial system has changed so fundamentally in the past 40 years, and the G20 is the best placed organisation to take up that challenge. If the G20 limits itself to responding merely to the latest crisis, the latest major global crisis will never be the last severe one.

The world of banking has changed profoundly in the past 40 years, but because the changes have been incremental, few people appreciate their scope and scale. If reforms undertaken thinking inside the square prove sufficient to give us stable and efficient banking systems, then the G20 has performed well and deserves at least that B grade. However, the massive changes in what banks do, and who works within them, in the past 40 years are two factors that lie at the heart of the GFC. The world of banking has changed fundamentally. Banking is a different industry than it was, and radically new and different approaches to its regulation are required. If I am right on this, then we need fundamentally different reforms, which the G20 has not delivered and so in this context the G20’s efforts earn it a D.

If I am right, the reforms of late will prove insufficient and we will have further massive global financial crises. I hope I am wrong.
I THE G20 RESPONSE AS A CONVENTIONAL RESPONSE TO A CONVENTIONAL CRISIS

The first meeting of the G20 leaders took place in Washington DC in November 2008. The purpose of the meeting was to create an action plan to stabilise the global economy and to prevent future crises. To this effect, the leaders agreed upon three key objectives: restoring global economic growth, strengthening the international financial system and reforming international financial institutions.3

The G20 leaders met five times between 2008 and 2010, and have since met on an annual basis. During this period, the G20 has initiated a wide range of financial reforms, all of which are at different stages of implementation. Monitoring the national realisation of the reforms is the Financial Stability Board (‘FSB’), which was established as the successor to the Financial Stability Forum in April 2009.

The sheer number of regulatory measures, the interconnectedness of many of the reforms, and the fact they are ultimately implemented at a national level makes assessment of individual measures difficult. Many of the reforms are yet to be fully implemented, or even fully developed (for example, the Global Legal Entity Identifier System). Nevertheless, a number of key reforms have been, or should soon be, successfully adopted into the legislation of a number of jurisdictions.

A Revised Capital Adequacy Rules: Building Resilient Financial Institutions

The severe stress experienced by the banking system during the GFC was due to the failure of many banks to manage themselves prudently.4 As a result, one of the key aims of the G20 leaders has been to improve banks’ resilience to financial and economic shocks through enhanced capital and liquidity requirements. The implementation of the Basle II and III requirements has been one of the most significant international policy reforms since the crisis.5

---

3 G20, What is the G20 <http://www.g20.org/docs/about/about_G20.html>.
5 ibid 1.
The aim of the Basle III regulatory framework is to improve the quality of capital, increase the level of capital, encourage the build-up of capital buffers to mitigate pro-cyclicality, supplement the risk-based capital requirements with a leverage ratio and introduce a set of global liquidity standards.\textsuperscript{6} Assessing the impact of the framework is difficult as many of the components of Basle III are not to be implemented until 2015. However, Basle III’s capital adequacy reforms are more advanced. At the time of writing, eleven countries have fully implemented rules consistent with the Basle III framework, three countries have issued rules that have not yet been implemented, and a further thirteen countries are at various stages of finalising their rules.\textsuperscript{7}

The increased capital called for by Basle III, and the buffers designed to mitigate pro-cyclicality, are to my mind most useful reforms. The 8% capital level of Basle I has been in place for a considerable time and gained credibility as a result. Some people refer to it as if 8 is a capital ratio with some intrinsic validity. But while it is a lucky number in parts of China, 8 was merely the highest capital ratio that banks in the 1980s could reach. Japanese banks, in particular, operated on capital ratios of 4 and 5% when Basle I was being negotiated, and to insist on their reaching anything higher than 8% would have seen them not participating in Basle I.\textsuperscript{8}

Many economists have predicted that the implementation of Basle III is likely to increase the cost of bank funding and intermediation.\textsuperscript{9} In January 2013 the Basle Committee on Banking Supervision bowed to pressure to modify the composition of its liquidity coverage ratio

\textsuperscript{6} Ibid 3.
\textsuperscript{7} Basle Committee on Banking Supervision, ‘Report to G20 Finance Ministers and Central Bank Governors on monitoring implementation of Basle III regulatory reform,’ (Bank for International Settlements, April 2013) \texttt{<http://www.bis.org/publ/bcbs249.pdf>}.\textsuperscript{3}
Members of the trade finance industry are also pushing for further changes, as the current reforms are likely to increase the price of providing trade finance. I support measures to facilitate trade finance, as the finance of trade is central to a flourishing global economy and the GFC resulted in severe trade finance shortfalls, particularly in East Asia when the traditional suppliers of trade finance to the region, European banks, largely withdrew from the business. More broadly, though, I support the generally higher capital levels required by Basle III. If these higher capital levels increase funding costs that, in my view, is an acceptable price to pay for a more stable system. The lessons of the past 50 years of international financial history are that we have been excellent at achieving ever greater levels of short-term efficiency and poor at avoiding crises. The world enjoys lower costs of capital due to financial innovations and efficient markets and this is important, but the massive costs of crises are consistently downplayed, particularly as these costs fall primarily upon the poor in developed and developing nations alike.

Our system needs to be reweighted far more in favour of stability and if higher funding costs are a cost of this change, so be it.

**B Ending 'Too-Big-To-Fail'**

The GFC emphasised the need to regulate systemically important financial institutions (‘SIFIs’). Governments have generally been unwilling to allow large banks to fail, as their failure tends to be extremely destabilising and have multiple, severe flow-on effects on other institutions. This

---


13 Davis, above n 9, 33-34.
approach increases moral hazard risks in the financial system as, with an expectation of official support, SIFIs are more likely to engage in high-risk activities. Recognising this, the G20 reforms aim to ensure that taxpayers do not bear the costs of resolution in the event that an institution does fail.

At the Cannes Summit in 2011 the G20 endorsed a comprehensive policy framework proposed by the FSB. The framework focused on three key aims: to improve the standard of resolution regimes, to increase the intensity and effectiveness of SIFI supervision, and to broaden the scope of reforms to include domestic systemically important banks (‘D-SIBs’) and non-bank global SIFIs.

Implementation of the global systemically important financial institution (‘G-SIFI’) framework has thus far been slow and still has a long way to go. By mid to late 2013, resolution strategies and plans are scheduled to be in place for all G-SIFIs designated in November 2011. Progress is being made identifying global systemically important insurers and in developing appropriate policy measures for them. The FSB has revealed that an identification methodology for non-bank G-SIFIs will be issued for consultation in the second half of 2013 — so the process is only beginning for globally systemically important non-bank institutions.

One challenge to the reforms has been identifying which institutions are SIFIs — in the context of both their relationship with other financial institutions and within the financial system generally. Further, some SIFIs sit outside the prudentially regulated sector, such as hedge funds. This raises the dilemma of who is responsible for their regulation and how such

16 Ibid 8.
18 Ibid 4.
19 Ibid 4.
20 Davis, above n 9, 8.
21 Ibid.
regulation should be approached.\textsuperscript{22} Resolving the challenges posed by G-SIFIs is difficult, and is perhaps the field in which the G20’s reform efforts have made the least progress to date.

C Regulating the Shadow Banking System

The global shadow banking system grew rapidly in the years preceding the GFC, rising from USD 26 trillion in 2002 to USD 62 trillion in 2007.\textsuperscript{23} It now plays an important role in supporting the real economy and providing credit to small and medium enterprises that otherwise may not be able to access it. This is particularly the case in our region, East Asia. Nevertheless, shadow banking also poses risks to the stability of the entire financial system. During the financial crisis, the limited regulation of shadow banking allowed the sector to become highly leveraged.\textsuperscript{24} These liquidity risks attached to the sector were quickly transferred to the global banking system.\textsuperscript{25} This contagion prompted the G20 to review the regulation of shadow banking.

At the Seoul Summit in November 2010 the G20 Leaders recognised that the Basle III standards for banks were inadequate for shadow banking.\textsuperscript{26} Consequently, the FSB was tasked with developing recommendations to strengthen the oversight and regulation of the shadow banking system.\textsuperscript{27} These recommendations emphasised a two-pronged approach — broad monitoring to assess global trends and risks within the sector, and increased regulation focused on five key policies:

i. mitigating the spill-over effect between the regular banking system and the shadow banking system;
ii. reducing the susceptibility of money market funds (‘MMFs’) to ‘runs’;
iii. assessing and mitigating systemic risks posed by other shadow banking entities;
iv. assessing and aligning the incentives associated with securitisation to prevent a repeat of the creation of excessive leverage in the financial system; and

\textsuperscript{22} Ibid.
\textsuperscript{23} Anand Sinha, ‘Regulation of Shadow Banking – Issues and Challenges,’ (Speech delivered the Indian Merchants’ Chamber, Mumbai, 7 January 2013) 5 <http://www.bis.org/review/r130204g.pdf>.
\textsuperscript{24} Ibid 3
\textsuperscript{25} Ibid.
\textsuperscript{26} G20, Seoul Summit Document (12 November 2010) 10 <http://www.g20.org/load/780988195>.
\textsuperscript{27} Ibid.
v. to dampen risks and pro-cyclical incentives associated with secured financing contracts such as repos, and securities lending that may exacerbate funding strains in times of ‘runs’.  

These recommendations were endorsed at the Cannes Summit in November 2011. Further FSB proposals were submitted for review at the G20 Finance Ministers and Central Bank Governors meeting in November 2012. Final recommendations are due to be published by the FSB in September 2013. Again, some five years after the crisis we are only at the stage of resolving how to address these problems, ie, the implementation of reforms is yet to begin.

D Over-the-counter (‘OTC’) Derivatives Reforms

OTC derivatives were a major contributor to the global financial crisis. The scale of business activity in global OTC derivatives markets now far exceeds global banking and economic activity. The interconnectedness of OTC derivatives markets increases their volatility, as distress in one institution or location is easily transmitted to others.

At the Pittsburgh Summit in 2009 the G20 leaders agreed to a number of reforms concerning OTC derivatives. In the words of the Leaders’ Declaration:

All standardized OTC derivative contracts should be traded on exchanges or electronic trading platforms, where appropriate, and cleared through central counterparties by end-2012 at the latest. OTC derivative contracts should be reported to trade repositories. Non-centrally cleared contracts should be subject to higher capital requirements. We ask the FSB and its relevant members to assess

---


29 FSB, ‘Overview of Implementation fo G20 Recommendations,’ above n 4, 13.

30 FSB, ‘Strengthening Oversight,’ above n 28, 1.

31 Ibid ii.


regularly implementation and whether it is sufficient to improve transparency in the
derivatives markets, mitigate systemic risk, and protect against market abuse.\textsuperscript{34}

In October 2010 the FSB published a report, \textit{Implementing OTC Derivatives Markets Reforms},
which set out 21 recommendations addressing practical issues related to implementing the G20’s
commitments. Since then, significant progress has been made by jurisdictions with the largest
markets in OTC derivatives — the European Union, Japan and the United States — imposing
regulatory frameworks.\textsuperscript{35} Practical implementation of reforms to market infrastructures in these
jurisdictions is well underway.\textsuperscript{36} However, in most cases, national regulators are still at a very
preliminary stage of developing OTC reform policies.\textsuperscript{37}

One challenge recognised by regulators is that not all OTC derivatives products suit central
clearing, such as complex or illiquid products.\textsuperscript{38} Further, in some cases central clearing may not
result in a material reduction in systemic risk.\textsuperscript{39}

\textbf{E Strengthening and Converging Accounting Standards}

There are a number of accounting issues that have contributed to problems in the financial
sector.\textsuperscript{40} One issue has been the role of mark-to-market accounting and the measurement of fair
value, which some critics have argued increased the impact of the global financial crisis.\textsuperscript{41}
Another issue has been the ability of accounting methods to deal with complex financial
transactions.\textsuperscript{42} Prior to its collapse, Lehmann Brothers used alternative accounting techniques for
many repurchase transactions as a way of reducing the firm’s apparent leverage and creating a
misleading balance sheet.\textsuperscript{43} A third issue has been the use of different approaches to the

\textsuperscript{34} G20, \textit{Pittsburgh Summit: Leaders’ Statement}, above n 2, 9.
\textsuperscript{35} FSB, ‘Overview of Implementation fo G20 Recommendations,’ above n 4, 2.
\textsuperscript{36} Ibid 18.
\textsuperscript{37} Council of Financial Regulators, above n 33, 10.
\textsuperscript{38} Ibid.
\textsuperscript{39} Ibid.
\textsuperscript{40} Davis, above n 9, 16.
\textsuperscript{41} Knowledge@Australian School of Business, ‘Accounting Practices: Did Fair-Value Cause the Crisis?’ (Working
paper, Australian School of Business, 24 March 2011)
\texttt{<http://knowledge.asb.unsw.edu.au/article.cfm?articleid=1366>}
\textsuperscript{42} Davis, above n 9, 19.
\textsuperscript{43} Ibid.
offsetting of derivative contracts and other financial assets and liabilities, which can result in significant differences when measuring the balance sheets of large financial institutions.\textsuperscript{44} Lastly, the approach to impairment of financial assets has been another issue — whether provisioning should be done on an ‘incurred loss’ basis or an ‘expected loss’ basis has been a contentious subject.\textsuperscript{45}

Strengthening global accounting standards is of fundamental importance. At the summits in Pittsburgh (2009), Toronto (2010), Seoul (2010) and Cannes (2011) the G20 leaders restated their aim to achieve a single, universal set of high quality accounting standards.\textsuperscript{46} In pursuit of this objective, the leaders emphasised the need for the completed convergence of international and US accounting standards.\textsuperscript{47} At the Cannes Summit the G20 also reaffirmed their desire to improve standards for the valuation of financial instruments, an objective set at the London Summit in 2009.\textsuperscript{48}

To date, most FSB member jurisdictions have either adopted the International Financial Reporting Standards (‘IFRS’) developed by the International Accounting Standards Board (‘IASB’) or are in the process of converging with or adopting IFRS.\textsuperscript{49} Progress has been made towards converging the standards of the IASB and the US Financial Accounting Standards Board (‘FASB’), including a joint expected loss impairment approach.\textsuperscript{50} However, disagreement remains between the two boards on some key issues, such as how banks should disclose their

\textsuperscript{44} Ibid; and FSB, ‘Overview of Implementation of G20 Recommendations,’ above n 4, 21.
\textsuperscript{45} Davis, above n 9, 19.
\textsuperscript{46} G20, \textit{Cannes Summit Final Declaration – Building Our Common Future Renewed Collective Action for the Benefit of All} (4 November 2011) 7 (‘\textit{Cannes Declaration}’) \url{http://www.g20.org/load/780986775}.
\textsuperscript{48} G20, \textit{Cannes Declaration}, above n 46, 7.
\textsuperscript{49} FSB, ‘Overview of Implementation of G20 Recommendations,’ above n 4, 20.
\textsuperscript{50} Ibid, 21.
derivatives holdings. The G20 Finance Ministers and Central Bank Governors have requested that both boards issue a set of final converged standards by mid-2013.

F Building a Common Legal Entity Identifier (‘LEI’)

The GFC highlighted the need for a uniform global system for legal entity identification. While many other industries have introduced consistent global frameworks for entity identification, the finance sector has lagged behind. A Global LEI system will reduce the risks of a future major financial crisis because it will allow industry participants to more accurately assess their exposures to different counterparties, and allow regulators to more accurately monitor the systemic stability of the system. At the Cannes Summit in 2011, the G20 Leaders gave the FSB a mandate to deliver recommendations on an LEI system by June 2012.

The recommendations put forward by the FSB were for a global LEI system with three tiers: a Regulatory Oversight Committee (‘ROC’), a Central Operating Unit (‘COU’) and federated Local Operating Units (‘LOUs’). These recommendations were endorsed by the G20 in June 2012 and the FSB was directed to coordinate the implementation of the global LEI System. The ROC has now been established and has assumed responsibility for governing the Global LEI System. Nonetheless there is still a long way to go and much time and effort required to harmonise the presently fragmented system and establish a fully functional global system.

54 James Armstrong and Gregory Bresiger, ‘Saving the World; Global IDs for counterparties might be the way to prevent the next market meltdown’ (Fall 2011) Clearing Quarterly and Directory 10.
55 G20, Cannes Declaration, above n 46, [31].
56 FSB, ‘Overview of Implementation of G20 Recommendations,’ above n 4, 23.
58 Ibid.
Reducing Reliance on Credit Ratings and Improving Oversight of Credit Rating Agencies

The impact of credit rating agencies (‘CRAs’) on today’s financial markets is huge, with rating actions directly affecting the actions of investors, borrowers, issuers and governments. The use of credit ratings in regulatory regimes (such as Basle II), and the increase in complexity of financial products, has led to a mechanical reliance on ratings by firms and an unfortunate reduction in firms’ own capacity for credit risk assessment and due diligence. Such behaviour is concerning given that the business model of CRAs involves a powerful conflict of interest — entities pay for themselves to be rated, and issuers of securities pay for the securities to be rated. CRAs know that if they give an entity or security a poor rating, entity or issuer is highly unlikely to use them next time. Overreliance on ratings can increase procyclicality and contribute to cliff effects when ratings are suddenly downgraded. This was highlighted during the GFC when CRAs failed to fully appreciate the inherent risks in complicated financial instruments and consequently issued incorrect ratings that were far too high.

The G20 reforms seek to reduce reliance on credit ratings and improve the oversight of credit rating agencies. At the Seoul Summit the G20 Leaders endorsed the FSB’s Principles for Reducing Reliance on Credit Rating Agencies (CRA) Ratings. To date, international standard setters have examined references to CRA ratings in their standards and have taken some steps to discourage undue reliance on such ratings. While some jurisdictions have passed legislation or regulatory measures to reduce reliance on CRA ratings, implementation has been problematic. A real impediment to progress has been the difficulty of developing alternative risk assessment capabilities and processes.

---

62 Davis, above n 9, 17–18.
64 European Commission, above n 60.
65 G20, Seoul Summit Document, above n 26, 8, [37].
67 Ibid.
The EU regulations on CRAs have been in force since December 2010, and were part of its response to the G20 summit in 2008. The EU regulation focuses on conditions for registration of CRAs, ‘conduct of business’ requirements, and supervision. The ‘conduct of business’ requirements relate to measures to avoid conflicts of interest, to ensure the quality of ratings, to achieve consistency in ratings methodologies, and to mandate transparency in CRAs.

The EU CRA Regulation granted the European Securities and Markets Authority (‘ESMA’) exclusive supervisory jurisdiction over CRAs registered in the EU. The ESMA produced regulatory technical standards for CRAs in May 2012. These standards set out the information required for registration as a CRA by the ESMA, the information to be disclosed in the central repository (‘CEREP’) to enable investors to compare CRAs, how the ESMA will assess rating methodologies, and information needed to conform with compliance requirements.

The most recent amendments to the EU CRA Regulation, enacted in January 2013, go further to reduce overreliance on ratings, in line with G20 commitments. These amendments are also aimed at improving the quality of ratings of EU sovereign debt by restricting unsolicited ratings to three per year to avoid market disruption, as well as requiring the publishing of all ratings.

---


69 Ibid.


centrally on a European Rating Platform.\textsuperscript{75} The new rules seek to ensure that a CRA is held liable for its actions if either intentionally or by gross negligence the CRA breaches the regulation and causes damage to an investor. Transparency is also increased by mandating that CRAs disclose if shareholders who hold 5% or more of the capital or voting rights in the CRA also hold 5% or more of the capital or voting rights in the rated entity.\textsuperscript{76} The new regulations further prevent CRAs from issuing a rating if a shareholder holding 10% or more of the capital or voting rights of the CRA also owns 10% or more of the capital or voting rights of the rated entity. If the rating has already been issued, the CRA is required to disclose that the shareholder possesses 10% or more in each entity.\textsuperscript{77} The new amendments introduce a mandatory rotation rule under which issuers of structured finance products with underlying re-securitised assets who pay a CRA for their ratings must switch to a different agency every four years. Issuers are also required to engage two different CRAs to rate structured finance instruments.\textsuperscript{79}

The EU reforms are far more extensive than the minimum required by the G20, and it is difficult to see how the proposed G20 CRA reforms will be adequate. The FSB principles focus heavily on reducing the role of CRAs, without there presently being a real alternative to CRA ratings,\textsuperscript{80} so the FSB’s current approach is unlikely to succeed. Reducing reliance on CRAs would not be so necessary if CRAs were more accountable for their actions and the quality of ratings were improved.

The proposed G20 reforms to CRAs in my view do not go far enough. The core problem with CRAs is that the issuer pays for the rating. This introduces a powerful conflict of interest that distorts the entire process. If one believes in markets and their efficiency, one has to work to remove conflicts that undermine those markets. The so-called Franken amendment in the US, named after Al Franken, one of the two Senators promoting it, would do so. Under this

\textsuperscript{75} Ibid.
\textsuperscript{77} Ibid art 3(aa).
\textsuperscript{78} Barnier, above n 74.
\textsuperscript{79} Ibid.
\textsuperscript{80} Davis, above n 9, 18.
amendment, the SEC would establish an independent panel that would assign the ratings of structured products (not of companies or sovereigns) to the CRA that the panel believed was best equipped to provide the rating. The incentive to provide a favourable rating to continue to get this issuer’s business would thereby be removed. At the time of writing, the SEC is undertaking a further study into how conflicts of interest can be avoided, short of instituting the Franken Amendment. If the G20 were serious about reforming CRAs, it would have mandated a global requirement along these lines and would have extended it to all ratings, ie, not just structured products, but the ratings of bonds, companies, sovereigns and other entities would all be allocated to a CRA by an independent commission. The Franken Amendment also has the advantage that Senator Franken spent most of his career writing comedy for Saturday Night Live, or performing as a comic, and in medieval times, it was often only the court jester who could risk telling the truth to the King. We have allowed financial firms to become too large, profitable and powerful and there is a delightful historical resonance in a jester telling them the truth.

H Enhancing Compensation Practices

Excessive and poorly structured remuneration in financial institutions has received significant public and political attention since the GFC. Prior to 2008, remuneration policies in many institutions rewarded excessive risk taking which contributed to the GFC. As a result, one of the objectives of the G20 leaders has been to change compensation practices to support financial stability. At the Pittsburgh Summit in 2009 the leaders endorsed implementation standards recommended by the FSB, aimed at aligning compensation with long-term value creation, not excessive risk-taking. The reforms included:

---

84 Ibid 14.
85 Ibid.
86 G20, Pittsburgh Summit: Leaders’ Statement, above n 2, [13].
87 Ibid.
1. avoiding multi-year guaranteed bonuses;
2. requiring a significant portion of variable compensation to be deferred, tied to performance and subject to appropriate claw back;
3. ensuring that compensation for senior executives and other employees having a material impact on the firm’s risk exposure align with performance and risk;
4. making firms’ compensation policies and structures transparent;
5. limiting variable compensation as a percentage of total net revenues when it is inconsistent with the maintenance of a sound capital base; and
6. ensuring that compensation committees overseeing compensation policies are able to act independently.

To date, almost all FSB member jurisdictions have completed implementation of the FSB’s recommendations in their national regulation or supervisory guidance. However, some jurisdictions have chosen not to implement certain standards, either because they are deemed inapplicable or because of domestic restraints such as labour laws. This gives rise to concerns of an uneven playing field for firms that are fully constrained by legislation in line with the FSB’s recommendations, such as the US Dodd-Frank Act.

The G20’s reforms to banker compensation were advocated in the G20 most strongly by the Europeans, and it is in the EU that the reforms are most advanced, in terms of scope, scale and stage of implementation.

The European regulators announced new regulations in December 2010 that require banks to defer 40–60% of bonuses for three to five years, pay at least 50% of bonuses in shares (rather than cash) and publish pay details for ‘senior management and risk-takers’.

The European Union agreed in early 2013 to limit bankers’ bonuses to a year’s salary, with the proviso that the bonus can be doubled subject to approval by at least 66% of shareholders.

89 Ibid.
90 Ibid.
holding at least 50% of the shares.\textsuperscript{92} To encourage bankers to take a long-term view, a minimum of 25% of any bonus exceeding one year’s salary must be deferred for at least five years. Bonuses may include long-term deferred instruments that can be appropriately discounted. The actual discount rates are yet to be set, but the long-term instruments have to be fully ‘claw-back-able’ and ‘bail-in-able’ should an individual’s performance be later not deemed worthy of the bonus or if the assets acquired or created prove less valuable than expected.\textsuperscript{93} Given the culture of banks, refusing to pay part or all of a deferred bonus because the assets the banker created or acquired prove to be of less value than was anticipated, would be a major cultural change. But it is a change, if the regulators are sufficiently vigilant and insistent to bring it about, it could do much to change risk-taking behaviour.

The UK opposed this agreement but was defeated by a majority vote. EU countries need to implement the rules nationally by 1 January 2014, the targeted effective date for the cap.

These rules are designed to curb the culture of excessive bonus payments that encouraged risk-taking for short-term gains that contributed to the GFC. The deal forms part of the Capital Requirements Directive (‘CRD IV’), which is the EU’s implementation of the Basle III rules, to ensure that banks have enough future capital to withstand financial shocks. The bonus cap was not a requirement of the Basle III rules, but was demanded by the EU parliament in return for agreement to the rest of the CRD IV legislation.\textsuperscript{94}

These are far reaching changes. Bonuses often represent 80% or more of total remuneration for many bankers. If shareholders approve bonuses of up to two years’ salary this will water down the effect of these changes, but if they hold the line, this is a major change. Banks will no longer be able to pay employees relatively small fixed salaries and then divide up the profits pool at year-end. Bankers will derive more of their income in fixed salary form, and less in bonus, which should encourage less risk taking.


\textsuperscript{93} BBC News, ‘EU Banker Bonus Cap Plan,’ above n 91.

The 2010 restrictions requiring at least one-half of bonuses be paid in shares and requiring
deferral of the payment of a major portion of bonuses for three to five years may prove to be of
as much, or even more, significance as the 2013 cap on bonuses. What is clear, is that with the
two sets of bonus reforms in place and operating together, in five years’ time we may well see
different banker behaviour in the EU than we have become accustomed to in the recent past.

I Conclusion on the G20’s Reforms as a Conventional Response to a Conventional Crisis

The breadth and scope of the regulatory changes initiated by the G20 makes it difficult to assess
their likely consequences. As many of the reforms have lengthy implementation timeframes, the
opportunity still exists for private lobbying for further changes that may be socially warranted or
that, far more likely, represent special interest pleading. While there have been some clear
achievements by the G20, there is much more that is still in progress. The take up of the Basle
reforms remains slow. The G20’s call for the IASB and FASB to complete convergence of
accounting standards is yet to be responded to fully. Some initiatives that have been endorsed by
the G20 would almost certainly have gone ahead anyway.

As Rottier and Véron suggest, the success of the G20 financial reforms is highly dependent on
which body is entrusted to implement the initiatives. While the reforms are internationally
driven, they are locally implemented — leaving their ultimate success in the hands of national
governments.

At the Seoul Summit in 2010 the G20 leaders identified a number of areas requiring further
reform, and these still require attention: macro-prudential frameworks (including dealing with
volatile capital flows); regulatory issues for emerging market and developing economies;
commodity derivative markets; market integrity and efficiency; and consumer finance protection
so, even by the G20’s own calculus, there remains much to be done.

95 Davis, above n 9, 39.
96 Nicolas Véron, ‘Financial Reform after the Crisis: An Early Assessment,’ (Working Paper 12–2, Peterson Institute
97 Ibid.
98 G20, Seoul Summit Document, above n 26; G20, Cannes Declaration, above n 46, [30]–[34]; G20, Los Cabos
Leaders’ Declaration (19 June 2012) [61], [50], [52], [45] <http://www.g20.utoronto.ca/2012/2012-0619-
loscabos.html>.
II THE PROFOUND CHANGES IN GLOBAL FINANCE SINCE 1970

The full scope of changes in the global financial system since 1970 could fill a multi-volume treatise. This paper will focus on four principal ones. These are (i) the legalisation of financial gambling, (ii) the globalisation of the international financial system, (iii) the rise in algorithmic and high frequency trading, and (iv) the fundamental changes in banks and bankers.

A The Legalisation of Financial Gambling

The Gaming Act 1845 (8 & 9 Vict.c.109) in the UK made gaming houses illegal and gaming or wagering agreements unenforceable. It was enacted on the recommendation of a House of Commons’ Select Committee Report on Gaming in 1844. Australia followed suit with gaming and wagering legislation in each state and territory. In the US, The General Obligations Law of the State of New York provided under section 5-401 that ‘all wagers, bets or stakes, made to depend upon any…unknown or contingent event whatever shall be unlawful.’ Further, section 5-411 provided that ‘all contracts for or on account of any money or property, wagered, bet or staked, as provided in Section 5-401, shall be void.’

For over a century, courts in all these countries took the view that derivatives contracts (as they came later to be known) entered into by at least one party for hedging purposes were valid under these enactments, but derivatives entered merely to place a bet on the price of something were invalid and unenforceable. Accordingly, a contract by which a farmer locks in a price for their wheat crop when it is harvested, or by which an airline guarantees a future price for jet fuel, are both valid, but a contract by which a speculator places a bet on future wheat or fuel prices is not.

Over time, legislatures began to exempt derivatives contracts from the application of these laws. In the words of Philip Wood, ‘many states have introduced exceptions to gaming laws in order to facilitate markets … and to remove the threat of nullity. The rationale is either there is a

99 Gaming and Betting Act 1912 (NSW), Games Wagers and Betting-houses Ordinance and Gaming and Betting Ordinance 1945 (ACT), Gaming Act 1972 (QLD), Lottery and Gaming Act 1936 (SA), Gaming Act 1983 (TAS), Lotteries, Gaming and Betting Act 1966 (VIC), and Gaming and Betting (Contracts and Securities) Act 1985 (WA).


101 See See v Cohen (1923) 33 CLR 174 and note the opposite result by the time of Morgan Grenfell and Co Ltd v Welwyn Hatfield DC [1995] 1 All ER 1, 2.
satisfactory alternative system of protection or the contracts are entered into between sophisticated institutions who do not need the protection of gaming legislation.  

In the UK, Section 63 of the Financial Services Act 1986 (UK) (FSA) exempted ‘investments’, broadly defined, from the application of the Gaming Act 1845, an exemption which was maintained by section 412 of the Financial Services and Markets Act 2000, and section 334 of The Gaming Act 2005. In Australia, New South Wales first enacted a carve out to facilitate the establishment of the Sydney Futures Exchange in 1979 and this was followed by a general upholding of the validity of exchange-traded futures contracts by the Commonwealth in 1989. In 2001, section 1101I of the Corporations Act 2001 excluded all financial products, broadly defined, including derivative products, from gaming and wagering laws.

New York courts carved out a ‘commercial purpose’ exception to the State gambling laws. But the remaining, and restraining, uncertainty in the US was removed by The Commodity Futures Modernization Act of 2000 (‘CFMA’), which excluded the application of any state or local laws in respect of gaming, with the aim of giving legal certainty to derivatives trading.

The Financial Crisis Inquiry Commission (‘FCIC’) of the United States concluded in its Final Report that OTC derivatives contributed significantly to the crisis, and that the enactment of the CFMA legislation in 2000 ‘to ban the regulation by both the federal and state governments of over-the-counter (OTC) derivatives was a key turning point in the march toward the financial crisis.’ A wide variety of parties had used derivatives, but ‘without any oversight, OTC derivatives rapidly spiraled out of control and out of sight.’ In the words of Lynn Stout, the enactment of the CFMA was a ‘sudden and wholesale removal of centuries-old legal restraints

---

103 Futures Market Act 1979 (NSW) s 7.
104 Corporations Act 1989 (Cth) s 1141.
106 Ibid.
on speculative trading in over-the-counter (OTC) derivatives, that played a large role in the 2008 crisis.

Gambling was strictly regulated for centuries because it was perceived to be a social ill. The removal of derivatives from the purview of gaming laws was a major step that went largely unnoticed at the time, but was to contribute to the GFC, and to the reshaping of international financial markets.

_B The Globalisation of the International Financial System_

In 1970, capital controls blocked most movement of capital between nations, and savings in each country funded investment in that country, supplemented in some countries by relatively small inflows of funds from abroad. Progressively over the next two decades, as the fixed exchange rate Bretton Woods system was dismantled, so were the capital controls, to the point today that capital moves freely in and out of most countries (with the principal exceptions of China and Taiwan).

This regulatory liberalisation has been accompanied by the rise of computers and telecommunications so that, today, capital moves by way of keystrokes on a computer keyboard, in response to information that has come in over the same system. An investor in Chicago can be as up to date on developments in Brazil as one in Sao Paulo.

These trends have resulted in global financial markets being amongst the most globalised markets we have. Perhaps only the markets for commodities such as oil, soybeans, cotton and the like are as globalised as the markets for money. This is a profound change. Without globalised markets, the US sub-prime crisis would have remained a US crisis — it was globalised markets that allowed pension funds in Norway and local government authorities in Australia to lose hundreds of millions of dollars investing in repackaged US home loans.

---


108 For a full history of the CFMA, its origins and recent attempts to restore regulatory limits on speculative derivatives via the Dodd-Frank Act see Lynn Stout, above n 107.

The truly globalised market we have today for money also exposes the inadequacies of the Bretton Woods system of international financial institutions established by Keynes and White in 1945. Keynes and White’s system was designed to promote international trade and keep finance national. If they had designed a globalised financial system, they would almost certainly have created a global financial regulator, a global lender of last resort, and a global sovereign bankruptcy scheme, for no national financial system is able to operate without these institutions.110

The system of financial regulation that has developed ad hoc in recent decades involving the Basle Committee, the Bank for International Settlements, the FSB, and many other institutions, is a response to the absence of a global central bank and global financial regulator. The system that has developed is primarily one of ‘soft law’ as the rules are made at the international level and implemented nationally.111

C The Rise in Algorithmic and High Frequency Trading

Algorithmic112 or computer-driven trading accounts for about 70 percent of US equity trading and 30–40 percent of European and Japanese equity trading.113 Algorithms drive much of the high frequency trading so common in markets today. Schulmeister’s research has established that the ever faster trading of recent years tends to make exchange rates and stock and commodity prices less accurate, ie, less close to that which would be dictated by economic fundamentals. This is because short-term price runs, fuelled by very rapid trading and strengthened by the impact of algorithmic trading programs, accumulate to baseless long-term trends and distortions

in prices. The resulting over-shooting of prices favours speculators over longer-term investors and thereby feeds into the ever-higher levels of trading we are seeing.\textsuperscript{114}

\textbf{D The Change in Banks and Bankers}

If a lawyer from 1970 was brought forward in time and put in a modern day courtroom, most things would be familiar: the solemnity, the architecture of the court room, the mode of dress (at least in the Supreme Court of New South Wales), the procedure, the objections being made by counsel. Since 1970 the manner of lawyers, the way they carry themselves, the way they are trained, the way they think and look backwards to find authority for what they propose doing, has all changed very little. Indeed, a lawyer transported forward in time from 16\textsuperscript{th} century England would likewise see much in a courtroom today that they might recognise.

Yet if a banker from 1970 was brought forward in time to 2013 and placed in a modern investment bank, or in the investment banking arm of a commercial bank, much would seem profoundly different.

The first and major difference would be in the people. The manner of bankers, the way they carry themselves, the way they are trained, the way they see the world, all this has changed profoundly. Bankers in 1970 had basic arithmetic. You needed some math to run a bank, but it was mostly primary school math, not the calculus and trigonometry of high school. Today most younger bankers are highly trained in maths and quantitative skills. Their degrees are in highly quantitative and mathematical finance and economics, or in maths or physics.

Bankers in 1970 were as prudent, cautious and dull as lawyers, perhaps more so. If we consider a sophisticated market like London, the traditional degree to have taken to go into a bank was Classics (the study of Greek and Latin language and history). This remained the case until well into the 1980s. Having studied classics or been an officer in a good regiment were considered the best trainings possible for banking\textsuperscript{115} for banking was perceived to be about prudence and


\textsuperscript{115} These thoughts are not new. Susan Strange in 1986 described how ‘[b]ankers used to be thought of as staid and sober men, grave-faced and dressed in conservative black pinstripe suits, jealous of their reputation for caution
judgment, and the study of history or military officer training were seen to promote careful deliberation and judgment.

Today an investment bank or the investment banking arm of a commercial bank is typically filled with ultra-numerate people with little knowledge of history or the humanities. In their world-view markets and corporations exist to produce profits.

An earlier view was that corporations existed to provide important products to their customers and provide jobs for their workers; and profits were essential to enable the fulfilment of these more important functions. Most bankers before 1970 had similar views. Today most bankers are focused on profit to the bank. The majority of their remuneration is by way of an annual bonus and they see the world through a quantitative/analytical lens, not a humanities one.

Furthermore, what a bank does has changed profoundly. Banks in 1970 essentially intermediated money. They received deposits and made loans. Banks today, at least the investment banks and investment banking arms of major commercial banks, derive little of their income from financial intermediation and far more from speculating on markets, underwriting stock and bond issuances, giving sophisticated advice on mergers and acquisitions, selling financial products to customers, etc.

A banker travelling forward in time even 40 years would not recognise most of what a bank today does, as being banking business. Indeed, as we have seen, much of the business of a contemporary bank would have been illegal in 1973. A banker travelling forward in time would look with horror upon speculative financial derivatives contracts as transactions that could bring a bank undone.

______________________________
and for the careful guardianship of their customers’ money,’ but warned that the international financial system had already become a ‘gambling hall’ and would soon resemble ‘nothing as much as a vast casino’: Susan Strange, *Casino Capitalism* (Cromwell Press, 1997) 1–2. She was prescient in the extreme.
III OTHER REFORMS THE G20 COULD HAVE PURSUED AS A RESPONSE TO THE PROFOUND CHANGES IN THE SYSTEM

To my mind, there are four other reforms the G20 could have mandated, had it really wished to address the fundamental changes in the global financial system considered above. These reforms would address the need for a rule prohibiting proprietary trading by commercial banks, bank levies, a financial transactions tax, and sovereign bankruptcy.

I am suggesting four reforms, and have identified four fundamental changes to the financial system in the past 40 years; however, this is not to suggest that each reform responds to one fundamental change. Neither this paper, nor the international financial system, is that intellectually elegant. We now have a truly globalised financial system, in which financial gambling is legal and in which trades are often initiated by computer programs and the resultant positions are held for merely seconds or minutes. The bankers who work in this system are motivated differently than their counterparts were 40 years ago, and the core business of many banks is quite different also from what it was 40 years ago. So if we are to properly respond to such fundamental changes, we need to limit the gambling undertaken by banks that accept deposits from the public, we need to make banking less profitable, we need to dissuade a proportion of the hyper short-term trades, and, finally, we need to provide a system to respond in a timely and fair fashion to sovereign insolvencies.

A A Global Volcker Rule

Section 619 of The Dodd-Frank Wall Street Reform and Consumer Protection Act116 prohibits depository institutions and their affiliates from engaging in proprietary trading, or acquiring or retaining an interest in a hedge fund or a private equity fund or sponsoring a hedge fund or a private equity fund.117 These provisions (commonly referred to as the Volcker Rule, after former Chairman of the Federal Reserve, Paul Volcker) apply to proprietary trading and fund activities by US banks

---

116 (Pub L 111-203, HR 4173)
117 s 619.
anywhere. ‘Proprietary trading’ is broadly defined in the Act as engaging as a principal for the trading account of a bank.118

In other words, the Volcker Rule generally prohibits the buying and selling of securities as principal for the bank’s trading account. However, some trading activity is specifically permitted, including:

- Trading in government securities;
- Trading in connection with underwriting or market making;
- Risk-mitigating hedging;
- Trading on behalf of customers;
- Investments in small business investment companies;
- Trading by a regulated insurance business for the general account of the insurance company;
- The organising and offering of a private equity or hedge fund.119

The Volcker Rule in the US has been needlessly watered down and made extraordinarily complex due to the legislature responding to the extensive lobbying of the financial services industry.120 Globally the G20 could have required a simple rule that states ‘banks that accept deposits from the public cannot engage in proprietary trading’. This simple concept would go some way to stabilising the global financial system. Of course, this would require the US to agree to implement a simple, clear-cut rule domestically in furtherance of the G20 directive, which is unlikely given the way that special interest groups in the financial services industry have worked so hard to water hollow out the US rule.121

118 s 619.
119 s 619.
B Bank Levies

The IMF has recommended that governments impose a levy on the assets of their financial institutions. In its words, ‘Expecting taxpayers to support the [financial] sector during bad times while allowing owners, managers and/or creditors of financial institutions to enjoy the gains of good times misallocates resources and undermines long-term growth.’

France, Germany, and the U.K. imposed levies in early 2011 for four reasons: (i) to recoup some of the costs of bailing out their financial sectors in the wake of the GFC; (ii) to accumulate funds so that future bailouts are funded by banks rather than taxpayers; (iii) to shrink the size of financial sectors that have grown too large in part due to being under-taxed; and (iv) to discourage risky behaviour in banks.

There is a strong argument that financial sectors in some countries are too large and profitable and consume a disproportionate amount of the financial and human capital in those countries. Joseph Stiglitz believes ‘in many countries, the financial system had grown too large; it had ceased to be a means to an end and had become an end in itself.’ Lord Turner said, ‘the whole financial system has grown bigger than is socially optimal … [f]rom the point of view of Britain as a whole we have over-relied on the City and we need other dynamic sectors.’ Paul Krugman believes that ‘an oversized financial industry is hurting the broader economy’ and even 30 years ago, James Tobin wrote that

We are throwing more and more of our resources, including the cream of our youth, into financial activities remote from the production of goods and services, into activities that generate high private rewards disproportionate to their social productivity.

Bank levies are an attempt to redress these issues, a financial transactions tax is another means of achieving the same end.

---

124 Lord Adair Turner, ‘How to tame global finance’ Prospect (online) August 27 2009 <http://www.prospectmagazine.co.uk/magazine/how-to-tame-global-finance/#.UbKsNmQpYbY>.
C Financial Transaction Tax

A FTT is a tiny impost of perhaps between 0.01% and 0.1% on all wholesale capital market secondary transactions. It was first proposed by John Maynard Keynes,127 and resurrected in the context of foreign currency transactions by the Nobel Laureate, James Tobin.128 Their thinking is that the essential function of capital markets is to intermediate capital effectively. In their view, a FTT would dissuade purely speculative, short-term transactions while doing little to nothing to dissuade longer term investments. Markets would thus be encouraged to trade more on economic fundamentals and less on what speculators believe the price for an asset will be in the next few minutes or hours. On this reasoning, a FTT is needed today more than ever, given that some 70% of trading on US financial markets is algorithmically driven and the assets acquired are typically held for very short periods of time, often measurable in minutes, if not seconds.

In 2011 the European Commission (‘EC’) voted to implement a FTT in the EU by early 2018.129 In January 2013, the EU voted to allow 11 countries to implement a FTT much sooner, possibly in early 2014 depending upon the pace of implementation. These countries are Austria, Belgium, Estonia, France, Germany, Greece, Italy, Portugal, Slovakia, Slovenia and Spain.130 This tax in Europe will apply to shares and bonds, and derivatives on shares and bonds. The proposed rates are 0.1 percent on shares and bonds, and 0.01 percent on the derivatives of shares and bonds.131

The tax base applying to derivatives is the nominal value of the underlying assets. The proposed tax will be levied according to the fiscal residence of the seller of an asset.

A FTT today is eminently feasible. When James Tobin suggested his tax on foreign currency transactions 40 years ago, its implementation was highly problematic because most trading was conducted on proprietary systems. However, in the interim, trading has migrated to centralised exchanges and clearing houses that undertake the function exceptionally efficiently. Moving trades away from these exchanges and clearing houses would cost far more than the amount of the tax, so today the collection of the tax would be relatively simple. Indeed, when the IMF considered the administrative feasibility of levying a FTT in 2011 it concluded it ‘is no more difficult and, in some respects easier, to administer than other taxes.’

A FTT will also encourage simpler transactions and thereby enhance the effectiveness of securities regulations. The complexity of many CDOs in the lead-up to the GFC defeated disclosure as an organising market principle. The cascading effect of a FTT — applying to multiple transfers which together comprise one transaction — offends some economists’ sense of propriety, but has the benefit of incentivising simplicity in transactional design which should in turn increase the efficacy of securities regulation.

If the G20 really wants to address the move in our financial markets towards ever higher frequencies of trading, and wants to encourage accuracy in pricing, and thus promote the most important form of market efficiency, allocative efficiency, a FTT is the way to go.

The debate on an FTT in Asia has been far less extensive and vigorous than in Europe, in part perhaps because civil society is less well developed in the region, and the civil society that is

---

132 Ibid art 4(3).
active and vocal understandably tends to focus on issues that are more domestic and central to a rights agenda. Nonetheless, in the past few years the idea has gained some traction.

In early 2013 the South Korean government discussed imposing a Spahn tax, a modified Tobin tax, on foreign currency transactions to limit speculative inflows of foreign capital. Named after Professor Paul Bernd Spahn, such a tax is at very low rates in normal times but rises to high rates at times of extreme fluctuations in the value of the currency. At the time of writing, it seemed that there was some sort of general consensus in Korea that (i) such a tax should perhaps be implemented if speculation in the won intensified, and (ii) the threat alone of such a tax was itself having a salutary effect in dampening speculation in, and appreciation of, the won.

In China, Xia Bin, a member of the Monetary Policy Committee of the People’s Bank of China, has written that ‘China should continue to strengthen its regulations on capital inflows to fend off the risks produced by hot money.’ He suggested ‘the government impose a "Tobin tax", a levy on all spot conversions of one currency to another, to penalize short-term financial "round-trip" excursions into other currencies.’


139 Xiaotian, above n 138.
In Japan in 2010, Foreign Minister Katsuya Okada said politicians internationally should consider a tax on international finance in order to help support developing nations and Deputy Finance Minister Naoki Minezaki said Japan should consider implementing a FTT to dampen speculative capital flows and market volatility.

So the idea of a FTT, in its various guises, is now part of the debate in the region, although it will take decisive leadership in more than one nation to see its implementation.

D A System to Deal with Sovereign Bankruptcy

Adam Smith identified the clear need for a sovereign bankruptcy regime over 200 years ago, in these terms:

> When it becomes necessary for a state to declare itself bankrupt, in the same manner as when it becomes necessary for an individual to do so, a fair, open, and avowed bankruptcy is always the measure which is both least dishonourable to the debtor, and least hurtful to the creditor.

Horst Kohler, when Managing Director of the International Monetary Fund in 2002, spoke to the same need when he said, ‘[T]he present arrangements for resolving sovereign debt crises are not sufficiently transparent or predictable, and … they impose unnecessary costs on debtors, creditors, and the system as a whole.’

Faced with a nation in crisis, the IMF simply has too few policy options at its disposal. The Fund can continue lending or stop lending to the debtor. If the nation’s problems include an unsustainable debt burden, more debt will only make matters worse. Yet if the Fund stops

---


32
lending, the debtor will usually be forced to default, and lose access to capital, and capital markets more generally may be destabilised.¹⁴⁴

Traditionally these crises were the preserve of developing countries, but of late, of course, we have seen Iceland, Ireland, Greece, and Cyprus, suffer similar crises. Yet today there is still no machinery or rules in place to facilitate or regulate sovereign bankruptcy. The IMF proposed a Sovereign Debt Restructuring Mechanism in 2002. This idea didn’t win widespread support at the time, but the Fund is revisiting it at the time of writing.¹⁴⁵

In writing about sovereign bankruptcy, Adam Smith meant something quite different from corporate or personal bankruptcy. A sovereign nation cannot go out of business, and its assets cannot be liquidated and distributed among creditors. Sovereign bankruptcy would involve a stay of execution by creditors while the procedure was in process, and would result in the determination of an amount of debt relief that would, after it had been effected, leave the debtor able to continue to service its remaining debts and afford to its people their basic human rights.

The term sovereign bankruptcy is therefore used, in the literature, as a short-hand for a formal procedure conducted according to rules that would result in a degree of mandated debt relief. Sovereign bankruptcy would thus lead to much the same type of result as the long, protracted rescheduling negotiations which are currently the norm, viz. the debt would be cancelled in part and the balance rescheduled. The differences are that the level of cancellation might be higher, as the debtors have little power in the current negotiations, and the outcome would be determined by an independent forum, not by the parties, and according to prescribed rules. In short the process should be fairer, swifter and more certain than that which prevails today.

The principal purposes of a personal bankruptcy system are generally seen to be to divide the assets of an insolvent debtor fairly and rateably between its creditors and allow an insolvent debtor the opportunity to make a fresh start free. The four objectives of corporate insolvency law are generally seen as restoring the company to profitable trading if possible, maximising returns


to creditors, providing a fair and equitable system for the ranking of claims and identifying the
causes of company failures and imposing sanctions for culpable management.146

What is missing from the general insolvency literature is the notion that an effective insolvency
regime will improve dramatically the allocation of credit within an economy, and thus make the
economy more stable. This effect I have termed the ‘systemic’ aspect of a bankruptcy regime —
for without a bankruptcy regime, any economy will, as a system, be unstable.147

The fairness aspects of bankruptcy are important. Internationally their absence has cost millions
of lives in developing countries. However, the systemic advantages of a bankruptcy system are
arguably more important at the international level. This is because the more immediate risk of
loss for creditors with a sovereign bankruptcy regime in place would tend to moderate capital
flows to developing countries. The real prospect of massive loan losses always sharpens banker’s
minds. These systemic advantages would help ensure that the capital flows are more appropriate
to the needs and capacities to repay of debtors. Financial crises would thus be less frequent and
less severe because crises are so often the result of excessive inflows in preceding years.148

Furthermore, in the event of a crisis, the workout would proceed more rapidly and efficiently and
thus the workout costs to creditors and debtors would be reduced.

We take this systemic effect of bankruptcy for granted in domestic systems. If a bank makes a
poor credit decision domestically and lends to a borrower who subsequently becomes insolvent,
absent security, most of the money will be lost. Without the prospect of sovereign bankruptcy,
lenders have not borne the full implication of poor lending decisions internationally and thus
excessive extensions of credit have been the result. As default is so destabilising, nations tend to
service their debts through higher taxes and lower social services that translate into malnutrition,
inadequate housing and health care, etc. The debts of effectively bankrupt nations are repaid at
the expense of the most basic human rights of their own citizens. Latin American nations still
service debt incurred in the 1970s. That debt has been restructured, reduced, and transformed

Law Journal 38.
148 Excessive capital inflows played a major role in the Debt Crisis of 1982, the Mexican crisis of 1995, the East Asian Crisis
of 1997 and Russia’s meltdown in 1998: see RP Buckley, ‘A Tale of Two Crises: The Search for the Enduring Lessons of
into Brady bonds, which are still some 15 years away from being fully repaid. Debt is a lifetime sentence for poor countries. We still have something very like debtors’ prisons for highly indebted nations, as Greece and Spain are now beginning to learn.

The comprehensive approach would be to establish a standing sovereign bankruptcy court by treaty. A more achievable approach, in the near term, would be to establish an ad hoc tribunal for each case. In either case, the body would need to apply an agreed set of rules and procedure. An ad hoc arbitral tribunal could be established quickly if implemented by agreement between the creditors and a nation in difficulty.¹⁴⁹

The two principal models generally considered as the basis for any sovereign bankruptcy regime are Chapters 9 and 11 of the US Bankruptcy Code.

Chapter 11 is better known than Chapter 9 and perhaps for this reason, commentators often consider Chapter 11 when looking for a precedent for a sovereign bankruptcy regime. However, the issues that arise in the bankruptcy of a nation are closer to those of a local government than a corporation. For these reasons, Chapter 9 is the best place to start, as it governs the bankruptcy of local government and municipal authorities. While Chapter 9 is not well known, there have, nonetheless, been about 640 proceedings brought under Chapter 9 in its history, and studies have suggested the proceedings have worked very well.¹⁵⁰

The major proposal by civil society to address the problem of sovereign bankruptcy is the idea of a Fair and Transparent Arbitration Process, basically a Chapter 9 style proceeding facilitated by an arbitral tribunal rather than a court. The difference is largely inconsequential. What matters is the fairness and efficacy of the rules and the independence of the tribunal, not the tribunal’s form as a court or arbitral tribunal, and nor the form of proceedings as a court case or an arbitration.¹⁵¹


In current sovereign debt negotiations, the IMF tends to severely limit the budgetary expenditures of debtor nations, despite considerable evidence that overly restrictive fiscal settings are not conducive to economic growth in developing countries.

In short, what works for municipal governments in the US should work far better than our current arrangements for the poorer nations of the world. This should not be surprising, as adjudication under a predetermined set of rules by an independent forum should produce a fairer and more certain and predictable outcome than the utterly unregulated negotiations that resolve these issues today. Developed and developing nations, and the international financial system, would all be best served by a carefully crafted set of bankruptcy rules, modelled on Chapter 9 of the US Bankruptcy Law, and applied and enforced by independent tribunals.

IV CONCLUSION

In the immediate aftermath of the GFC, the UN asked Joseph Stiglitz to head a Commission into the international financial system. Its report was informed by a ‘new’ type of thinking. The first of Stiglitz’s Principles for a New Financial Architecture is:

Financial markets are not an end in themselves, but a means: they are supposed to perform certain vital functions which enable the real economy to be more productive:

(a) mobilising savings,
(b) allocating capital, and
(c) managing risk, transferring it from those less able to bear it to those more able.

It is hard to have a well-performing modern economy without a good financial system.

The GFC was a direct result of treating the creation of financial products as an end in itself – as a valuable driver of economic growth independent of the products’ effects. The reforms initiated by the G20 to date are worthwhile, necessary and helpful. Most have a long way to go to be fully

implemented, and after five years that is disappointing, but the principal reason is that implementation is by national governments. Some of the so-called G20 reforms, such as Basle III, were in train anyway, most were not, and all will assist the global financial system. One test is whether they are useful, helpful reforms. Another more significant test is whether the reforms address the fundamental changes in the system. G20 mandated reforms perform much better on the first test than the second. One reason for this is that none of the reforms initiated by the G20 have challenged the way of thinking that sees financial markets as an end in themselves and not merely a means to support the real economy.

The G20’s reforms are unlikely to be sufficient to avert another global financial crisis. Levies on banks, far reaching reforms of bankers’ compensation, the removal of the conflict of interest that compromises all credit ratings today, and a financial transactions tax, taken together, would do far more than all the G20’s reforms, proposed and mooted, to avert another crisis, and a formal regime for the resolution of sovereign insolvencies would make such events less damaging than they are today. Taken together these reforms would see banking as less profitable, less crisis-prone and far more stable than it is today, and the individual incentives of bankers far better aligned to those of the real economies in which the banks operate.