CHAPTER 9
The Accountability of International Networks of Financial Regulation and Supervision Authorities

§9.01 INTRODUCTION

In recent decades, the accountability and the legitimacy of Transnational Regulatory Networks (TRNs) have generated increasing concerns among scholars and policymakers worldwide. Such interest is highly related to the emergence of a “new world order”1 characterized by the presence of global governance institutions2 – such as TRNs – that perform highly influential and pervasive standard-setting activities.3

A first concern regards the legitimacy, at the national level, of norms – e.g., standards – created by TRNs. The procedures followed by the latter – and by the national representatives that participate in those TRNs – are not necessarily bound by traditional democratic processes applicable to rulemakers in national settings.4 As a result, there is the risk that the norms sourcing from the activities of TRNs do not reflect the democratic input from national political forums and stakeholders but, rather, encompass the technocratic approaches of the members of the networks.5

---

problem with potential legitimacy consequences is related to the possibility of conflicts between the objectives that the members of the TRNs must pursue in their own jurisdictions and the targets that those very same members aim to achieve in global settings.⁶

A second legitimacy concern makes reference to the potential asymmetries in the power of different jurisdictions in the TRNs, and, notably, to the pre-eminence of some countries – that represent certain geopolitical areas or degrees of development – over others. This may result, in turn, in the jurisdictions vested with greater weight in TRNs imposing their views to the rest of the members.⁷

Third, some questions of legitimacy regard the relations between TRNs and civil society. It has been pointed out that TRNs are often opaque in their functioning⁸ and that their transparency weaknesses make difficult for stakeholders to understand their processes.⁹ In addition, the rules and procedures of TRNs may limit stakeholder engagement, notably from those stakeholders outside the financial industry,¹⁰ with the consequence that the views of the latter may be excluded from the policy-making processes carried out by the former.¹¹

Scholars have proposed the use of accountability mechanisms as instruments to address the legitimacy shortcomings referred above.¹² These proposals include, inter
alia, the enhancement or the creation of domestic instruments of accountability applicable to national actors for their actions in TRNs,\(^{13}\) the broadening of the jurisdictions that participate in the work of international standard-setting bodies,\(^ {14}\) or the development of policy-making processes where stakeholders play a more relevant role.\(^ {15}\)

As shown in Chapter 8, International Networks of Financial Regulation and Supervision Authorities (INFRSAs) are highly pervasive forums and their regulatory outputs have a substantial effect on jurisdictions and stakeholders worldwide. Therefore, the legitimacy and accountability questions that are generally made in respect of TRNs are of great relevance to the analysis of INFRSAs.\(^ {16}\)

This chapter addresses the question of what is the role of domestic and global rules in the creation of accountability relationships that have an impact on the legitimacy of INFRSAs and of their regulatory outputs? To this end, the chapter proceeds as follows. It starts with an analysis of the legitimacy challenges related to the participation of (FRSAs) in the work of INFRSAs. This part of the chapter also examines some ad hoc mechanisms of accountability that can be devised at the national level to call-to-account and hold-to-account FRSAs for their actions in INFRSAs. The chapter continues with an assessment of the aspects of the INFRSAs’ governance with repercussions on the accountability of INFRSAs towards the jurisdictions and stakeholders affected by their work. This part of the book focuses its analysis on the internal rules – charters, bylaws, resolutions – of the Basel Committee on Banking Supervision (BCBS), the International Organization of Securities Commissions (IOSCO) and the International Association of Insurance Supervisors (IAIS) in the areas of membership, internal organization, transparency and inclusiveness of the policy-making procedures. Some post-financial crisis developments in the governance of INFRSAs aimed at enhancing their transparency and the inclusiveness of their rulemaking processes are also addressed here; the chapter argues that these reforms are part of a crisis-driven process of organizational change that seeks to improve the perceptions about the legitimacy of INFRSAs.

---


§9.02 THE ROLE OF FRSAs IN INFRSAs: LEGITIMACY CONCERNS
FROM A NATIONAL PERSPECTIVE

The participation of FRSAs in INFRSAs is often envisaged and encouraged by the laws that establish and regulate FRSAs. A good example of such embodiment is provided by the regulations setting the European Supervision Authorities in the financial field (ESAs Regulations), according to which the ESAs: “... may develop contacts and enter into administrative arrangements with supervisory authorities, international organizations and the administrations of third countries.”\(^\text{17}\) The ESAs Regulations go beyond the mere recognition of the international dimension of the ESAs’ tasks and of the latter’s powers to engage in the activities of INFRSAs; in some instances, they even bound the ESAs to take into consideration the criteria set by INFRSAs. For example, when it comes to identification and measurement of systemic risk, the ESAs: “… shall take fully into account the relevant international approaches...including those established by the Financial Stability Board, the International Monetary Fund and the Bank for International Settlements.”\(^\text{18}\)

The engagement of national FRSAs in the activities of INFRSAs has a twofold rationale. First, in a world characterized by highly internationalized financial markets, there needs to be some degree of coordination and cooperation between the entities in charge of the regulation and supervision of the financial markets and institutions.\(^\text{19}\) INFRSAs are forums that enable FRSAs from various jurisdictions to gather, discuss, exchange information, coordinate actions and reach agreements on best practices and standards. Second, owing to the fact that the regulatory outputs of INFRSAs are highly influential, national FRSAs have an interest in participating in the activities and the work of INFRSAs so as to provide their views and input to their policy-making processes.

Despite the relevance of the FRSAs’ involvement in the activities of INFRSAs, that engagement raises some questions about the legitimacy of the tasks that FRSAs perform in international settings as well as about the actors they should be accountable to in such context.

A first element that brings about concerns about the legitimacy – at the national level – of the activities performed by FRSAs in the context of INFRSAs is related to the interests that the former aim to maximize when they operate in the latter. There might be potential conflicts between the mandates of FRSAs set by national legislation and the commitments to which FRSAs (must) abide when they operate in the framework of INFRSAs. On the one hand, the statutory duties of FRSAs have, in general, a national nature. For example, in the United Kingdom (UK), according to the FSMA 2000, the Prudential Regulation Authority (PRA) fulfills its main objective by: “(a) seeking to ensure that the business of PRA-authorised persons is carried on in a way which avoids any adverse effect on the stability of the UK financial system, and (b) seeking to

\(^{17}\) Article 33.1 ESAs Regulations.
\(^{18}\) Article 23.2 ESAs Regulations.
\(^{19}\) "Peoples and their governments around the world need global institutions to solve collective problems that can only be addressed on a global scale” - Slaughter, A New World Order, p. 8.
minimise the adverse effect that the failure of a PRA-authorised person could be expected to have on the stability of the UK financial system". 20 On the other hand, the requisites of membership of INFRSAs may require that, in the context of the activities carried out by the latter, FRSAs perform their tasks so as to maximize the interest of the concerned INFRSAs. For example, according to the Charter of the BCBS, its members have some responsibilities that include: the achievement of “... the mandate of the BCBS”21 and the promotion of “… the interests of global financial stability and not solely national interests, while participating in BCBS work and decision-making”. 22 Hence, with regard to the BCBS, a conflict could appear when, in order to maximize the interest of global financial stability, as required by the BCBS Charter, an FRSA would adopt positions or actions that are detrimental to the achievement of the targets of financial regulation and supervision set by national legislation. Clashes between the duties of FRSAs in the INFRSAs of which they are members on the one hand and in their own jurisdictions on the other may also make reference to the scope of their commitments in the framework of INFRSAs. For example, according to the Charter of the BCBS, its members commit to: “implement and apply BCBS standards in their domestic jurisdictions within the pre-defined timeframe established by the Committee”. 23 This clause dismisses the fact that the implementation and application of the BCBS’s standards in a given jurisdiction may require legislative or regulatory actions that may fall outside the competence of the relevant FRSA with membership in the BCBS. 24 Whereas this contradiction does not have major practical consequences – i.e., in cases of conflict between the BCBS Charter and the national laws and regulations applicable to the implementation of global standards, the latter will prevail –, it shows potential tensions between global and national levels of regulation. It also suggests an underlying self-perception of certain INFRSAs – such as the BCBS – as forums with the ability to impose commitments on their members.

A second element that poses some questions of legitimacy is related to the adoption or the application, by FRSAs, of standards, principles, practices or agreements devised by INFRSAs, notably, when these are not subject to a process of formal implementation or debate in the jurisdictions of the concerned FRSAs. On the one hand, the norms produced by INFRSAs may be implemented, nationally, through legislation or regulations. In those instances, they are subject to a process of transposition that must follow the statutory law – constitutional, administrative or otherwise – of the relevant jurisdiction. Such procedures may include, inter alia, parliamentary debates, hearings, and public consultations. These, in turn, vest the norms subject to national implementation with certain degrees of legitimacy, at least, from the point of view of the national actors and forums involved in the process of implementation. The

21. Section 5(a) BCBS Charter.
22. Section 5(g) BCBS Charter.
23. Section 5(e) BCBS Charter.
24. To a certain extent, the aforementioned clause is also in conflict with another provision of the BCBS Charter that acknowledges the relevance of national implementation rules and whereby: “The Committee expects standards to be incorporated into local legal frameworks through each jurisdiction’s rule-making process within the pre-defined timeframe established by the Committee” – section 12 BCBS Charter.
Basel Capital Accords constitute examples of rules devised by INFRSAs that have been formally incorporated in the legal frameworks of several jurisdictions.\textsuperscript{25} On the other hand, commitments made by FRSAs at the level of INFRSAs may not necessarily be subject to a process of discussion and debate among political actors and stakeholders in the jurisdictions of the concerned FRSAs. For instance, the Memoranda of Understanding devised by INFRSAs and signed by FRSAs that are members of the former may fall outside processes of national scrutiny.\textsuperscript{26} A Memorandum of Understanding (MoU) is a non-binding cooperation agreement whereby the signatories abide to collaborate in a given matter and to follow certain rules and procedures in the provision of such cooperation. An area that is largely regulated by MoUs is that of inter-jurisdictional cooperation for the supervision of financial firms. For example, the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (IOSCO MoU), establishes norms aimed at, \textit{inter alia}, ensuring the mutual assistance and exchange of information between FRSAs of different jurisdictions in the framework of investigations.\textsuperscript{27} Indeed, on the basis of the IOSCO MoU, an FRSA from one jurisdiction may transmit information about a financial firm under its supervision to an FRSA from a different jurisdiction.\textsuperscript{28} The provision of that information may, in turn, potentially lead to the imposition of a fine to the firm investigated – e.g., if the information evidences lack of compliance of the firm concerned with the laws or regulations in the jurisdiction of the FRSA that requests the information. This example shows that, whereas some of the INFRSAs’ non-binding outputs – such as the MoUs – do not impose obligations on FRSAs, their application may, nevertheless, have a relevant individualized impact on actors and institutions of a given jurisdiction. This, in turn, raises questions as regards whether, what, when and to which extent the INFRSAs’ outputs should be subject to political and stakeholder scrutiny at the national level before being adopted by FRSAs.

In spite of the relevance of the legitimacy concerns related to the participation of FRSAs in global financial settings, laws and regulations at the national level are often


\textsuperscript{26} Brummer, \textit{Soft Law and the Global Financial System}, pp. 192, 204.


\textsuperscript{28} See e.g., section 7 IOSCO MOU.
silent on these issues. A rare example of an attempt to adopt legislation addressing some of the legitimacy questions referred above was the Bill HR 2043 (108th),\textsuperscript{29} introduced in the US House of Representatives in the year 2003, and reintroduced in the year 2005 as HR 1226 (109th).\textsuperscript{30} The HR 2043 was aimed at the creation of ad hoc mechanisms of accountability of the US FRSAs that participated in the work of the BCBS, towards the executive and legislative powers.

In the first place, with regard to the accountability towards the executive, the HR 2043 proposed the creation of an inter-agency committee: the “United States Financial Policy Committee”. This Committee would comprise the heads of the FRSAs that participated in the work of the BCBS – the Chairman of the Board of Governors of the Fed, the Comptroller of the Currency and the Chairperson of the Federal Deposit Insurance Corporation (FDIC) –, plus the Secretary of the Treasury, who would be the Chairman of the Committee.\textsuperscript{31} The main function of the Committee would consist of the coordination of the positions of the above-mentioned FRSAs in respect of issues to be discussed in the BCBS that, if materialized in concrete policy-outcomes, could have an effect on financial institutions in the US.\textsuperscript{32} For this purpose, before the meetings of the BCBS, the United States Financial Policy Committee (FPC) would meet and agree on a common position.\textsuperscript{33} Within the Committee, the Secretary of the Treasury would have a more pre-eminent role than the heads of the FRSAs, especially in cases of persistent disagreements among the latter. For instance, if the Board of Governors of the Fed, the Office of the Computer of the Currency (OCC) and the FDIC would not be able to reach a common stand, then, the Secretary of the Treasury would be empowered to decide and impose the joint position that the aforementioned FRSAs would present and defend in the meetings and negotiations of the BCBS.\textsuperscript{34} In other words, in instances of disagreement, there would be a shift of decisional power from the FRSAs to the executive, and the latter would have the authority to define the mandate and the concrete interests that FRSAs should pursue in their work at the BCBS. The introduction of this rather strong mechanism of accountability in the proposal must be interpreted in the context of a series of divergences among the Board of Governors of the Fed, the OCC and the FDIC about the manner in which Basel II should be implemented in the US.\textsuperscript{35} These disagreements threatened the smooth

\begin{footnotesize}
\begin{enumerate}
\item Section 2(a) HR 2043.
\item Section 2(b) HR 2043.
\item Section 2(c) HR 2043.
\item Section 2(d) HR 2043.
\item See e.g., The New Basel Accord: Sound Regulation or Crushing Complexity?: Hearing before the Subcommittee on Domestic and International Monetary Policy, Trade and Technology of the US House of Representatives Committee on Financial Services, One Hundred Eighth Congress (27.02.2003). See also, Basel II Implementation in the Midst of Turbulence (Brussels: Centre for European Policy Studies, 2008), p. 100. These three FRSAs were statutorily vested with the power to participate in the work of the BCBS – see e.g., 12 USC §3911(a).
\end{enumerate}
\end{footnotesize}
implementation of Basel II in the US\textsuperscript{36} and may have motivated, to a great extent, the introduction of the HR 2043.

Second, the Bill also advocated for the creation of a mechanism that would subject the implementation of the recommendations of the BCBS to \textit{ex-ante} scrutiny by the US Congress. Notably, according to the Bill:

\begin{quote}
No Federal banking agency…may agree to any proposed recommendation of the Basel Committee on Banking Supervision before the agency submits a report on the proposed recommendation to the Congress…The head of any Federal banking agency that submits a report to the Congress under subparagraph (A) shall consult with the Congress concerning the proposal.\textsuperscript{37}
\end{quote}

This mechanism of congressional oversight addressed the legitimacy concerns that may arise when FRSAs adopt policy-outputs developed by INFRSAs without subjecting them, \textit{ex-ante}, to forms of democratic oversight.\textsuperscript{38} Indeed, under the proposed instrument, the Congress would exercise a pre-implementation scrutiny of all the recommendations made by the BCBS.

Some of the FRSAs that would have been affected by the proposed Act reacted strongly against its content, arguing that its enactment would lead to a shift of rulemaking power from expert FRSAs to the US Government,\textsuperscript{39} and to “… an unfortunate precedent of congressional involvement in technical supervisory and regulatory issues”.\textsuperscript{40} The threat of legislative intervention and of a subsequent loss of independence of the FRSAs in their work at the BCBS – as represented by the HR 2043 and the HR 1226 – may have indeed influenced the achievement, in the year 2007, of a common agreement about Basel II by the FRSAs with competences in the banking sector in the US.\textsuperscript{41}

Despite the narrow scope of the Bill – limited to the FRSAs from the US that are engaged in the work of the BCBS –, its introduction evidenced the legitimacy concerns that the participation of FRSAs in INFRSAs may raise among political actors. It also

\begin{flushleft}
\begin{footnotesize}
\textsuperscript{36} On the disagreements between FRSAs in the US with respect to Basel II see Barr and Miller, ‘Global Administrative Law: The View from Basel’, pp. 32-33; the authors claim that those divergences may have contributed to the transparency of the process of domestic implementation of Basel II in the US.

\textsuperscript{37} Section 2(e)(2) HR 2043.

\textsuperscript{38} It is also worth noting that, as explained above in Chapter 3, in the US, FRSAs are vested with substantial regulatory powers. Hence, norms such as the Basel Capital Accords, that, in other jurisdictions must be implemented through legislation, may, in the US, be adopted directly by FRSAs.

\textsuperscript{39} See e.g., Donald Powell - Chairman of the Federal Deposit Insurance Corporation, Statement on The New Basel Accord: In Search of a Unified U.S. Position before the Subcommittee on Financial Institutions and Consumer Credit of the US House of Representatives Committee on Financial Services, One Hundred Eighth Congress (19.06.2003).

\textsuperscript{40} Roger W. Ferguson, Jr. - Vice Chairman of the Board of Governors of the Fed, Testimony on Basel II and H.R. 2043 before the Subcommittee on Financial Institutions and Consumer Credit of the US House of Representatives Committee on Financial Services (19.06.2003).

\end{footnotesize}
\end{flushleft}
offered some examples – albeit controversial – of potential mechanisms of account-
ability that can be used to tackle legitimacy weaknesses that source from the interna-
tional dimension of the FRSAs’ activities.

§9.03 THE ACCOUNTABILITY OF INFRSAs TOWARDS FRSAs AND TOWARDS STAKEHOLDERS

At the global level, INFRSAs operate in an environment characterized by the presence of different account-principals. On the one hand, there is an accountability relationship between INFRSAs and their own members – FRSAs and/or stakeholders. The members of INFRSAs are central elements in their functioning. They conform the INFRSAs’ governing organs and adopt the main decisions of the networks. For instance, the members elaborate and approve the rules that govern the internal functioning of INFRSAs. They also contribute to the development of standards, principles, agreements and other rulemaking outputs produced by INFRSAs, and decide whether to support their implementation at the national level. The members may also contribute to the funding of their INFRSAs through the payment of annual membership fees. On the other hand, there is a more subtle accountability relationship between INFRSAs and other actors without membership in them. For example, non-members may have certain rights of participation in the work of INFRSAs – e.g., through the provision of opinions in public consultations or their engagement in working groups instituted within the INFRSAs. The quality of the accountability arrangements towards non-members, as devised by INFRSAs, may influence, to a great extent, the acceptance by those non-members, of the regulatory outputs produced by INFRSAs. This, in turn, may have an impact on the degree of implementation of those regulatory outputs across jurisdictions. In this regard, non-member jurisdictions and non-member stakeholders that feel excluded from the activities of INFRSAs may decide not to support and not to embrace – in their own jurisdictions – the norms produced by INFRSAs; in doing so, non-members may have an effect on the overall success of INFRSAs as standard-setters at the global level.

The internal rules and practices adopted by INFRSAs in the areas of membership, internal organization, transparency and inclusiveness of rulemaking processes are critical to understand the accountability of INFRSAs towards FRSAs and stakeholders, internally and externally. The next sections offer an analysis of these rules and practices with an emphasis on recent reforms operated in the governance of INFRSAs with a potential impact on their accountability and legitimacy.42

[A] The Membership in INFRSAs

Membership constitutes a key factor in the analysis of the legitimacy of INFRSAs. Membership determines, in large part, what institutions and what persons are able to

42. An early analysis of the internal rules of the BCBS and the IOSCO with respect to these issues is provided by Zaring, Informal Procedure, Hard and Soft, in International Administration.
participate in the policy-making activities of INFRSAs – e.g., the development of standards, guidelines or multilateral agreements – and hence, has an impact on the degree of input-legitimacy of their outputs. In addition, the members of INFRSAs are in charge of approving and amending the INFRSAs’ internal rules; as a result, they may influence the adoption of measures that address the legitimacy of their own INFRSAs – e.g., by making them more transparent or more open to public participation. The characteristics of the INFRSAs’ membership may also contribute to overcome the potential consequences of legitimacy gaps from which the FRSAs that are part of INFRSAs may suffer. For example, some FRSAs from national jurisdictions may embrace weak forms of stakeholder participation. This carries the risk that the input that those very same FRSAs provide to the INFRSAs’ policy-making procedures does not properly take in consideration the concerns of civil society in their own jurisdictions. The rules regarding membership and participation in INFRSAs may help to surmount those gaps. For instance, in respect of the example above, by giving direct access to stakeholders to the activities of INFRSAs, the concerned stakeholders may be able to express concerns that would not be voiced by the FRSAs from their countries.

This section focuses on two different, but very related qualitative dimensions of the INFRSAs’ membership, that are relevant to the analysis of the legitimacy of INFRSAs and of their policy-making outputs. First, INFRSAs may establish certain criteria for determining who can effectively become a member. For example, a general requisite might be to have the status of an FRSA or of a stakeholder with an interest in financial regulation. The rules applicable to INFRSAs may also limit membership or participation in decision-making procedures to FRSAs from certain jurisdictions. Some works have, indeed, expressed critical opinions as regards the membership features of certain INFRSAs, being a common concern, that small states are often excluded from the INFRSAs’ membership and decision-making procedures. Second, different members within the same INFRSAs may have attributed different rights according to their status; for example, this would be the case in which an INFRSAs admits both FRSAs and financial industry representatives as members, but grants voting rights to the former and not to the latter. Also, asymmetries in rights may be related to the jurisdictions of origin of the members.

[1] The Membership in the BCBS

The BCBS, was, in its origins, an organization established by and limited to the governors of the central banks of the Group of Ten (G-10) countries and Switzerland. As a result, it only represented highly developed economies. The BCBS maintained its rather closed membership structure until the year 2009, when it decided to open its membership to other jurisdictions.

membership to several new countries. In the first half of that year, representatives from Australia, Brazil, China, India, Korea, Mexico and Russia were invited to join. In the second half of the same year, Argentina, Hong Kong SAR, Indonesia, Saudi Arabia, Singapore, South Africa and Turkey were also invited and they joined the BCBS. Thus, in less than one year, the BCBS’s membership duplicated its size. As at mid-2013, the BCBS’s members comprise central banks and FRAs from Argentina, Australia, Belgium, Brazil, Canada, China, France, Germany, Hong Kong SAR, India, Indonesia, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, Russia, Saudi Arabia, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, the UK and the US. This broadening of the BCBS’s membership was influenced by the Declaration of the Group of Twenty (G-20) Summit on Financial Markets and the World Economy of November 15, 2008. In this regard, the Declaration recommended that the main international standard-setting bodies in the financial sector reviewed their membership and became more inclusive.

Despite this expansion that makes the BCBS more representative than before, its membership remains, however, limited, with only 27 members. Notably, in comparison to its counterparts in insurance and securities – the IOSCO and the IAIS –, which include a high number of jurisdictions, the membership of the BCBS shows a much more restricted character. These quantitative divergences are linked to the different stands of each of these INFRAs to the issue of the FRAs that can become members. These diverse approaches have resulted in very different rules and procedures of accession. In the IAIS and the IOSCO, the Bylaws establish a series of objective requisites for being a member as well as an application procedure that any FRA may follow if it wishes to become a member. In contrast, access to the BCBS’s membership is by invitation only. In the BCBS there is not an application procedure and the criteria that the BCBS follows when deciding whether to invite and to admit an FRA is highly general. For instance, the only reference that the BCBS Charter makes to that criteria is the following: “In accepting new members, due regard will be given to the importance of their national banking sectors to international financial stability”.

Interestingly, by linking the likeness of an invitation to membership in the BCBS to the global relevance of the banking sector of a jurisdiction, the BCBS Charter evidences a somehow elitist approach to the admission of members to the organization. This, in turn, decreases the chances of modest economies and financial systems to be part of the BCBS.

49. This will be explained below.
50. Section 4 BCBS Charter.
51. Section 4 BCBS Charter.
52. Barr and Miller – ‘Global Administrative Law: The View from Basel’, p. 20 – portray the Basel process as a form of "regulatory imperialism".
Within the BCBS, members are not divided in different categories; there is only one type of membership, comprising central banks or other FRSAs that perform banking supervision tasks.\(^{53}\) In addition to members, the BCBS also has observers.\(^{54}\) The status of observer may be granted to organizations different from those that can be members. The person in charge of inviting an organization to become an observer is the Chairman of the BCBS – after consultation with the BCBS Committee.\(^{55}\) Observers do not have voting rights\(^ {56}\) but can participate in the BCBS’s meetings.\(^ {57}\) As at mid-2013 the observers of the BCBS were: the European Banking Authority (EBA), the European Central Bank (ECB), the European Commission, the Financial Stability Institute (FSI) and the International Monetary Fund (IMF).\(^ {58}\)

<table>
<thead>
<tr>
<th>Types of Membership</th>
<th>Composition</th>
<th>Rights</th>
</tr>
</thead>
<tbody>
<tr>
<td>Members</td>
<td>Central Banks / Other FRSAs</td>
<td>Vote</td>
</tr>
<tr>
<td>Observers</td>
<td>Other organizations</td>
<td>Voice</td>
</tr>
</tbody>
</table>

[2] **The Membership in the IOSCO**

In the 1980s, when the IOSCO was instituted and started its activity, it only had 11 members, and the character of the organization was markedly Trans-American. This was the result of the IOSCO’s origins in the Inter-American Association of Securities Commissions that was, as the name indicates, an American association.\(^ {59}\) It was not until the year 1983, with the formal creation of the IOSCO, that membership in the organization was opened to countries outside the American continent. With this organizational change, other countries applied for membership and were admitted to the IOSCO, being the first to do so, France, Indonesia, Korea and the UK, in the year 1984.\(^ {60}\) Over the course of the years, the IOSCO’s membership has increased rapidly and, as at 2012, its members represented actors and forums from 115 jurisdictions.\(^ {61}\)

53. Section 4 BCBS Charter.
54. See Table 9.1 below.
55. Section 4 BCBS Charter.
56. Section 8.4 BCBS Charter.
57. Section 8.3 BCBS Charter.
58. BCBS, *Fact sheet - Basel Committee on Banking Supervision*.
60. The initial evolution of the IOSCO’s membership is explained at http://www.iosco.org/about/index.cfm?section=background.
The IOSCOs’ membership, while more open than that of the BCBS, does not reflect the whole spectrum of stakeholders and interests affected by securities regulation. As will be shown in this section, the IOSCO’s members represent, principally, FRASAs in the field of securities supervision and the securities industry. The IOSCO’s membership, however, dismisses, to a great extent, other actors of the financial markets with an interest in securities regulation and supervision – such as investors, consumers of financial services or the general public.

There are three types of members in the IOSCO: ordinary, associate and affiliate members. 62

Ordinary membership is reserved to public FRASAs in the securities field, 63 or, in absence of the latter, to self-regulatory organizations – e.g., stock exchanges – in the relevant jurisdiction. 64 Ordinary members hold the main powers within the organization. In the first place, they have voting rights – on a one-member one-vote basis. 65 In addition, they participate in the Presidents Committee 66 and they have access to the IOSCO Board. 67 As at May 2013, there were 117 ordinary members in the IOSCO. 68 The IOSCO’s ordinary members from Spain, the UK and the US are the Comisión Nacional del Mercado de Valores (CNMV), the Financial Conduct Authority (FCA) and the Securities and Exchange Commission (SEC) respectively.

Associate members comprise public FRASAs and other bodies – excluding self-regulatory organizations – that are not ordinary members and that have competences with respect to securities supervision. 69 Associate members may, for instance, represent jurisdictions where more than one FRSA has responsibilities in securities regulation and supervision, such as the US. In the latter, the SEC is an ordinary member of the IOSCO and the Commodity Futures Trading Commission (CFTC) an associate member. Associate members may also include FRASAs with responsibilities in the territorial subunits of a country. 70 For example, in the federal state of Canada, the Ontario Securities Commission (Ontario) and the Autorité des Marchés Financiers (Quebec) are ordinary members; the Alberta Securities Commission and the British Columbia Securities Commission have, instead, associate membership. Other examples of associate members are FRASAs of a transnational nature, such as the European Securities and Markets Authority (ESMA). Associate members have no voting rights 71 but they

62. Section 3 IOSCO Bylaws. The composition of and rights attached to each category of members in the IOSCO are summarized in Table 9.2 below.
63. Normally, the main FRASAs in the securities field in a given jurisdiction – see e.g., IOSCO, Fact Sheet (2013), p. 3.
64. Sections 6 and 7.1 IOSCO Bylaws.
65. Section 20.2 IOSCO Bylaws.
66. Section 27 IOSCO Bylaws.
67. Section 26(c) IOSCO Bylaws.
68. The IOSCO’s ordinary membership is available at http://www.iosco.org/lists/display_members.cfm?memID=1&orderBy=jurSortName.
69. Section 8.1-3 IOSCO Bylaws.
70. Section 8.1 IOSCO Bylaws.
may attend and speak at the meetings of the Presidents Committee. Affiliate members are self-regulatory organizations (SROs) or international bodies “... with an appropriate interest in securities regulation ...”. Since May 2012, they are entitled to attend the meetings of the Presidents Committee, however, they cannot vote. Affiliate members are not represented in the IOSCO Board. In spite of the fact that the rights of affiliate members within the IOSCO are rather limited, they nevertheless, have a say in the IOSCO’s affairs through their participation in the IOSCO Self-Regulatory Organizations Consultative Committee, that provides input to the IOSCO’s policy-making process. The observation of the self-regulatory organizations that are affiliate members shows that a majority of them represent the financial industry. Examples of affiliate members are Bolsas y Mercados Españoles (BME) – from Spain –, the Chartered Financial Analyst Institute (CFA), The LSE Group, LCH.Clearnet Group Limited – from the UK –, the Chicago Mercantile Exchange Group (CME), the Financial Industry Regulatory Authority (FINRA) and the National Futures Association (NFA) – from the US. This composition, that is financial industry-dominated, casts some doubts as regards whether the affiliate members include all the organizations with an “appropriate” interest in securities regulation – as stipulated in the IOSCO Bylaws –, notably, because consumers of financial services and small investors are substantially neglected. One of the potential consequences of the pre-eminence of the financial industry among the affiliate members is that the input of the IOSCO Self-Regulatory Organizations Consultative Committee is more likely to represent the interests of the financial services corporations than the interests and demands of stakeholders outside the financial industry. Under the current Bylaws of the IOSCO, the access of non-industry stakeholders to affiliate membership remains highly difficult. National consumer associations and investor advocacy groups do not fit well into the category of international bodies or self-regulatory organizations – as required by the IOSCO Bylaws to access that category of membership. In addition, another factor that creates barriers of access to stakeholders outside the financial industry are the high annual fees charged by the IOSCO. Before the year 2012 these amounted to Euro 15,000. From the year 2012 onwards, the fees are linked to the Gross Domestic Product and to the national per capital income of the countries of origin of the members. These fees range from Euro 12,500 to 30,000. This certainly favors the participation of well-funded industry groups rather than of other organizations with a more modest budget.

72. Section 30 IOSCO Bylaws.
73. See e.g., IOSCO, Membership Categories and Criteria.
74. Section 9.1 IOSCO Bylaws.
75. See e.g., IOSCO, Membership Categories and Criteria.
76. On the IOSCO Self-Regulatory Organizations Consultative Committee see http://www.iosco.org/committees/srocc/.
77. IOSCO, Fact Sheet, p. 4. This committee is composed of bodies that are, at the same time, affiliate members and self-regulatory organizations.
78. The list of the IOSCO’s affiliate members is available at http://www.iosco.org/lists/display_members.cfm?alpha=u&orderBy=jurSortName&memid=3.
Table 9.2  IOSCO Membership

<table>
<thead>
<tr>
<th>Types of Membership</th>
<th>Composition</th>
<th>Rights</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ordinary</td>
<td>FRSAs / SROs</td>
<td>Vote</td>
</tr>
<tr>
<td>Associate</td>
<td>Other FRSAs / Bodies (non SROs), with competences in securities regulation</td>
<td>Voice</td>
</tr>
<tr>
<td>Affiliate</td>
<td>International bodies / SROs, with interest in securities regulation</td>
<td>Voice</td>
</tr>
</tbody>
</table>

[3]  The Membership in the IAIS

Despite the fact of being a relatively novel organization – compared to the BCBS and the IOSCO –, the IAIS has, since 1994, expanded its membership very swiftly, comprising, in the year 2012, more than 300 members, the highest number among the INFRSAs that are analyzed in this book.

The IAIS’s membership follows a hybrid system between the BCBS and the IOSCO, but with fewer barriers of entry than any of the latter. Similarly to the BCBS and the IOSCO, the main category of members in the IAIS comprises FRSAs. The category of IAIS’s “members”, sensu stricto, is constituted by four sub-categories.

The first sub-group are FRSAs in the insurance sector operating in a jurisdiction, but excluding those that, apart from regulating or supervising insurance firms, also underwrite, sell or provide insurance; this condition essentially excludes entities carrying out a commercial activity in the insurance sector. This constitutes a relevant difference with the IOSCO that, as has been shown, allows self-regulatory organizations conducting commercial activities, such as stock exchanges, to be “ordinary members” of the organization. This first sub-category of the IAIS’s members is vested with voting rights.

The DGSFP – Spain – and the PRA – the UK – appertain to this category of membership.

The second and the third sub-categories of members are composed of US entities of state and federal character respectively: the NAIC and the Federal Insurance Office (FIO). The NAIC is the US association that represents state FRSAs in the field of insurance from 50 states, the District of Columbia and the five US territories. The NAIC is not vested with voting rights itself but it can nominate up to 15 members of the

---

81. With members, this section makes reference, not only to members in a strict sense, but also to observers admitted to the IAIS. In August 2012 the IAIS had about 190 members and circa 135 observers – IAIS, Annual Report 2011-2012 (2012), p. 2.
82. The membership of the IAIS is summarized in Table 9.3 below.
83. Article 6(2)(a) IAIS Bylaws.
84. Article 6(3) IAIS Bylaws.
85. Article 6(2)(b) IAIS Bylaws.
86. The NAIC was referred in more detail above in section §2.03[C][2] of Chapter 2.
organization that may cast votes in the IAIS.87 The, FIO is an office of the US Treasury created by the Dodd-Frank Act in the year 2010. Among its functions, it represents the US Federal Government in insurance matters at the international level.88 This regime, tailored to the federal character of the US, gives the latter a slight greater representation in the IAIS than other jurisdictions where FRSAs have a single vote.

The fourth sub-category of members includes international organizations comprising government or statutory bodies.89 These do not, however, have any voting rights.90 Examples of these members are the European Commission, the European Insurance and Occupational Pensions Authority (EIOPA), the IMF, the Organisation for Economic Co-operation and Development (OECD) or the World Bank. Some among the latter are also affiliate members in the IOSCO.

In addition to “members”, the IAIS also permits the affiliation of the so-called “observers”.91 This category corresponds to:

(a) an international, regional or national organisation, a component element of which has an interest in insurance and insurance supervision, regardless of whether the organisation is directly responsible for insurance law or its administration;92 (b) any other person, entity, or organisation, private or public, with an interest in the business or supervision of insurance, and includes any company, association, educator, educational institution, or natural person.93

Observers are deprived of voting rights in the organization.94 They, nevertheless, may attend the general meetings of the IAIS.95 The category of the IAIS’s observers resembles some of the IOSCO’s affiliate members. However, the scope of the latter is much more restricted. Notably, when it comes to the direct participation of civil society stakeholders – or of entities representing their interests –, in the IOSCO this is rather limited to self-regulatory organizations composed of members from the securities industry.96 The IAIS formally encompasses a much broader membership that, essentially, includes any persons with interest in insurance. The IAIS has however been unsuccessful in attracting, as observers, representatives from non-commercial entities or interests. For such reason the IAIS launched, in the year 2013, a consumer participation program aimed at increasing the engagement of consumer representatives as observers.97 According to this initiative the IAIS will admit, in the year 2013, up to five consumer representatives with a waiver of the annual fee.98 Albeit timidly,

87. Article 6(4) IAIS Bylaws.
88. The FIO was discussed in section §2.03[C][2] of Chapter 2.
89. Article 6(2)(d) IAIS Bylaws.
90. Article 6(5) IAIS Bylaws.
91. Article 7 IAIS Bylaws.
92. For example, the World Federation of Insurance Intermediaries.
93. For instance, this includes insurance firms such as MAPFRE Re. S.A., Aviva or Lloyd’s.
94. Article 7(3) IAIS Bylaws.
95. Article 11 IAIS Bylaws.
96. For example, the Mutual Fund Dealers Association in Canada.
97. IAIS, Application for Observer Status as a Consumer Representative at the IAIS for the Calendar Years 2013-14 (2013).
98. IAIS, Application for Observer Status as a Consumer Representative at the IAIS for the Calendar Years 2013-14, p. 1. The initiative will be subject to reevaluation in some aspects – e.g., extension and number of waivers.
this initiative addresses one of the barriers – economic – that non-financial industry stakeholders face for effectively participating in the activities of INFRSAs.

Table 9.3 IAIS Membership

<table>
<thead>
<tr>
<th>Types of Membership</th>
<th>Composition</th>
<th>Rights</th>
</tr>
</thead>
<tbody>
<tr>
<td>Members</td>
<td>FRSAs/NAIC/FOI/</td>
<td>Vote</td>
</tr>
<tr>
<td></td>
<td>International organizations</td>
<td>Voice</td>
</tr>
<tr>
<td>Observers</td>
<td>Any person with interest in</td>
<td>Voice</td>
</tr>
<tr>
<td></td>
<td>insurance</td>
<td></td>
</tr>
</tbody>
</table>

The BCBC, the IAIS and the IOSCO have very different membership structures both from a quantitative and a qualitative point of view. On the quantitative side, the BCBS, with only 27 members highly contrasts with the IAIS and the IOSCO, whose members represent a large number of jurisdictions. From a qualitative perspective, the membership of the BCBS is limited to central banks and other FRSAs. A few major international organizations also participate as observers. As a result, the BCBS’s membership excludes many jurisdictions and stakeholders from the organization. The BCBS’s members only represent a select group of actors, jurisdictions and economic systems. The IAIS and the IOSCO are more open to participation by entities different from FRSAs. As a result, the IOSCO and the IAIS have a more numerous and heterogeneous membership structure. In spite of this, the participation of civil society organizations in both INFRSAs is rather limited to representatives from the financial industry, with the consequence that other societal actors affected by securities or insurance regulation do not have a direct voice. There is, however, an important difference that makes the IAIS’s membership more representative – at least from a formal point of view – than that of the IOSCO; the IAIS permits access to the organization to persons different from the financial industry – such as educators, academic institutions and individuals. Even if, currently, no such persons participate in the IAIS, the fact that the Bylaws of the organization allow that possibility denotes a more open approach of the IAIS than its counterparts in banking and securities.

[B] The Internal Organization of INFRSAs

The mere analysis of membership would not suffice to understand the role of the members of INFRSAs in the regulatory procedures of the latter. In this regard, different categories of members may have attributed diverse types of rights within an INFRSAs; asymmetrical allocations of powers among members may lead to settings in which some of them have substantial weight in the work of INFRSAs whereas others play a much more residual role. This, in turn, may have an impact on the input and the output-legitimacy of the rules produced by INFRSAs.

The next subsections analyze the rules relevant to the internal organization of the BCBS, the IOSCO and the IAIS, with a focus on the assessment of the way in which
those rules determine the position of different actors and forums in the rulemaking processes of INFRSAs.

[1] The Internal Organization of the BCBS

The BCBS is a relatively informal organization. Unlike the IAIS or the IOSCO, which are registered as associations under Swiss and Spanish law, respectively, the BCBS does not have a formal legal status. In spite of this informal character, the Charter of the BCBS approved in January 2013 develops, in a fairly precise manner, a series of rules regarding the organization and working procedures of the BCBS.

The functioning of the BCBS is organized around five bodies: the Group of Governors and Heads of Supervision (GHOS), the Committee, the Chairman, the Secretariat as well as groups, working groups and task forces.

The GHOS is an oversight body. It provides general guidance to the BCBS on its work and endorses the latter’s most important decisions – i.e., the approval of the Charter of the BCBS and its amendments, and the appointment of the BCBS Chairman. The GHOS is composed – as its name indicates – of the heads of the FRAs that are part of the BCBS.

The Committee is the main decisional body of the BCBS. For instance, it is in charge of the development of the BCBS’s standards, guidelines and sound practices. It normally meets four times a year. These meetings are open to senior officials of the BCBS’s members and observers. Within the Committee, the decisions are adopted by consensus. At the top of the Committee is the BCBS Chairman, who is in charge of directing its work. The Chairman also represents the BCBS externally.

The work of the Committee relies, to a great extent, on the activities carried out by Groups, Working Groups and Task Forces. The BCBS Groups gather senior staff from the members of the BCBS. There are four such groups: the Standards Implementation Group, the Policy Development Group, the Accounting Task Force and the Basel Consultative Group. Through their specialized work in concrete areas, they contribute to the development of the BCBS’s policy-making outputs – e.g., standards or guidelines.
Working Groups are instrumental to the technical work of the Groups and they are composed of experts from the BCBS’s members. Task Forces are created for specific purposes and, hence, have a limited duration; similarly to the Working Groups, they are generally made of experts from the members of the BCBS.

From a logistical point of view, the BCBS is supported by a Secretariat, headed by a Secretary General and staffed by 17 members – most of them are seconded staff from the FRSAs that are members of the BCBS. Owing to the fact that the Secretariat of the BCBS is located at the BIS – and that the former is a Committee of the latter – it is therefore pertinent to address the governance structure of the organization that hosts the BCBS.

Two organs govern the BIS: the General Meeting and the Board. Generally, the persons with the right to participate and to vote in the General Meeting are the representatives from the central banks that subscribed shares of the BIS. Voting rights are proportional to the number of shares subscribed by each central bank. The General Meeting decides about issues such as the annual report or the accounts of the BIS.

The Board is in charge of adopting most decisions regarding the BIS, such as the nature of the financial operations to be conducted by the latter. The composition of the Board, as devised by the BIS Statutes, results in certain asymmetries in the powers that different jurisdictions have within the BIS. In this sense, according to the BIS Statutes, the Board is composed of three types of members. First, a core group comprises the governors of the central banks of Belgium, France, Germany, the UK, Italy and the USA – these are called ex-officio Directors. A second category of members of the Board includes six persons appointed one each by the ex-officio Directors, among representatives of finance, industry or commerce and from the same nationality as the ex-officio Directors that appoint them. Third, a group of no more than nine persons is elected by the Board, among the governors of central banks of BIS’s members that do not have ex-officio Directors. The main consequence of this composition and of the appointment system applicable to the

---

114. Section 9.2 BCBS Charter.
115. Section 9.3. BCBS Charter.
116. Section 11.2 BCBS Charter. The Secretary General’s term is of three years, renewable. She or he is selected by the Chairman after receiving a recommendation from a panel composed of members of the BCBS and/or the GHOS.
117. Section 11 BCBS Charter.
118. Section 11.4 BCBS Charter. The BIS also participates in the process of selection of the BCBS Secretary General – section 11.2 BCBS Charter.
119. Chapters IV and V BIS Statutes.
120. Articles 14, 15 and 44 BIS Statutes.
121. Articles 14, 15 and 44 BIS Statutes.
122. Article 46 BIS Statutes.
123. Article 21 BIS Statutes.
124. Article 27.1 BIS Statutes.
125. Article 27.2 BIS Statutes.
126. Article 27.3 BIS Statutes.
Board is that the control of the latter is in the hands of the governors of the central banks of six countries that rank among the most important banking powers worldwide.

From a legal point of view, the BIS is an international organization that has the status of a corporation limited by shares,\textsuperscript{127} it carries out commercial operations that may generate profits\textsuperscript{128} and that resemble those performed by private banks.\textsuperscript{129} The nature of the BIS poses certain dilemmas. On the one hand, it is a commercial entity that conducts financial operations aimed at raising revenue;\textsuperscript{130} on the other hand, one of the objectives of the BIS is to promote cooperation between central banks\textsuperscript{131} and to provide, through its committees – e.g., the BCBS – standards intended for the regulation of relevant aspects of banking. Thus, in the BIS, commercial and regulatory functions are blurred. In addition, whereas from a pure organizational point of view, the BIS and the BCBS are not the same entity, there is, nevertheless, a strong connection between both. Indeed, the 27 members of the BCBS are all among the 60 members-shareholders of the BIS. This, in turn, carries the risk that when the members of the BCBS perform their activities they pursue the maximization of their interests as members of the BIS.

\textbf{[2] The Internal Organization of the IOSCO}

The IOSCO is organized around six governing organs: the Presidents Committee, the IOSCO Board, the Emerging Markets Committee, the General Secretariat, the Regional Committees, and the Consultative Committees.\textsuperscript{132} They all contribute, in different ways, to the IOSCO’s policy-making activities.

At the top of the organization stands the Presidents Committee, the highest decision-making body in the IOSCO. For instance, the Presidents Committee deals with issues such as the admission of new members or the approval of the resolutions submitted by the IOSCO Board.\textsuperscript{133} It meets once a year, during the IOSCO Annual Conference.\textsuperscript{134} The Presidents Committee adopts its decisions by a majority of members present\textsuperscript{135} or by a reinforced two-thirds majority of members present in specific cases – e.g., amendments of the IOSCO Bylaws.\textsuperscript{136} The Presidents Committee is composed of the IOSCO’s ordinary members, who are entitled to vote in its meetings.\textsuperscript{137} Associate and affiliate members may attend the Presidents Committee

\begin{itemize}
  \item \textsuperscript{127} Article 1 BIS Statutes.
  \item \textsuperscript{128} Articles 13, 19 and 21 BIS Statutes.
  \item \textsuperscript{130} E.g., buy and sell gold or negotiable securities other than shares - article 21 BIS Statutes.
  \item \textsuperscript{131} Article 3 BIS Statutes.
  \item \textsuperscript{132} Section 15 IOSCO Bylaws.
  \item \textsuperscript{133} Section 26 IOSCO Bylaws.
  \item \textsuperscript{134} IOSCO, Annual Report 2011, p. 51.
  \item \textsuperscript{135} Section 36.4 IOSCO Bylaws.
  \item \textsuperscript{136} Section 36.3 IOSCO Bylaws.
  \item \textsuperscript{137} Section 27 IOSCO Bylaws.
\end{itemize}
meetings, but they do not have voting rights. In addition, the Chairman of the Presidents Committee may also invite observers and special guests, if such an invitation is supported by a majority of the members of the Presidents Committee.

The IOSCO Board was created in the year 2012, and is subject to renewal every two years. Its functions include the carrying out of core policy-making and governance tasks within the organization. For instance, the IOSCO Board is in charge of the development of standards regarding the securities markets, the preparation of the annual programme of activities, and the recommendation of admission of new members. It also appoints the Secretary General, establishes Consultative Committees and recommends the recognition of Regional Committees to the Presidents Committee. Its powers are, therefore, overarching. Inside the Board, the work is conducted by seven committees specialized in different areas of securities regulation. The Board is composed of a number of ordinary members determined by the Presidents Committee.

The IOSCO Board substitutes and takes over the functions previously performed by the Executive Committee – the former executive body of the IOSCO –, the Technical Committee – a working committee of the Executive Committee –, and the Emerging Markets Committee Advisory Board. In the former structure, the Technical Committee performed the most important standard-setting tasks within the IOSCO. In spite of its relevance within the organization, the Technical Committee was composed of only 18 FRSA members, which essentially represented the largest, most developed and most internationalized securities markets. In addition,
the composition of the Technical Committee was controlled by its own members. 

This resulted in a substantial concentration of policy-making power in a few selected countries and in an exclusion of the rest. It is not clear whether the creation of the IOSCO Board will lead to a broadening of the jurisdictions represented in the IOSCO’s standard-setting activities. In its composition as at May 2013, the IOSCO Board included all the members of the former Technical Committee, representatives from the IOSCO Regional Committees, and the Chair and the Vice-Chair of the Emerging Markets Committee. Owing to the fact that the IOSCO Board adopts its decisions by simple majority of the members present in its meetings, the members of the former Technical Committee still control the decision-making within the IOSCO Board. The representativeness of the IOSCO Board in the future will depend on the decisions regarding its structure. The IOSCO has indicated that the criteria regarding the membership in the IOSCO Board will be subject to review before September 2014. The Presidents Committee is the organ with the power to decide about the composition of the IOSCO Board; hence, the structure of the IOSCO Board in the future will be related to the stand of the majority of the IOSCO’s ordinary members on this issue. The changes that will be operated in the composition of the IOSCO Board will also depend on whether the members of the former Technical Committee are able to influence – or not – the Presidents Committee, so as to ensure that they keep a privileged position in the IOSCO’s decision-making processes.

The General Secretariat of the IOSCO, headed by a Secretary General, administers the organization by assisting the Board and the Committees in their functions, representing the IOSCO in meetings with other organizations and preparing the annual report, among other functions. The IOSCO also incorporates an Emerging Markets Committee that gathers 80% of the IOSCO’s membership. This Committee constitutes a forum of meeting, discussion and work of the IOSCO’s members from emerging financial systems. The IOSCO praises the Emerging Markets Committee and characterizes it as an element of inclusiveness in the organization. A different reading could, however, be made of this Committee. Notably, from an institutional perspective, the Emerging Markets
Committee may be interpreted as a mechanism of exclusion of less sophisticated financial markets from the IOSCO’s core decision-making. In this regard, the representation of the Emerging Markets Committee in the IOSCO Board is very weak – mostly, through the Chair and the Vice-Chair of the Emerging Markets Committee. As a result, the members of the latter have a very limited engagement in the key standard-setting activities of the IOSCO. The members of the Emerging Markets Committee have been exercising an increasing pressure over the IOSCO in order to ensure that their role in the governing architecture of the organization is strengthened. The discussions that took place in the meeting of the IOSCO Board on March 21 and 22, 2013 suggest a support of the latter to an enhanced position of the emerging markets in the IOSCO. This might, in the future, lead to a greater representation of the members of the Emerging Markets Committee in the IOSCO Board.

As at mid-2013, the IOSCO had four Regional Committees: Africa / Middle-East, Asia-Pacific, European and Interamerican. These are composed of ordinary members of the IOSCO that represent certain regions of the world. The Regional Committees discuss issues of relevance to their own zones and provide input to the IOSCO Board on matters under the competence of the latter. In addition, the Regional Committees are represented in the IOSCO Board and, hence, constitute an important element in the governance of the IOSCO.

From an accountability perspective it is important to make reference to the IOSCO Self-Regulatory Organizations Consultative Committee, that reunites affiliate members that have the condition of SROs. This Committee gives input to the IOSCO with regard to the latter’s policy-making procedures. It, hence, constitutes an institutionalized mechanism of participation of stakeholders in the activities of the IOSCO. However, as indicated above in section §9.03[A][2], most of its members represent commercial organizations, a fact that limits the heterogeneity of the input transmitted by this Committee to the IOSCO.

[3] The Internal Organization of the IAIS

The governance of the IAIS revolves around three organs: the General Meeting of Members, the Executive Committee and its Committees and Subcommittees, and the Secretariat.
At the top of the IAIS there is a General Meeting, composed of the insurance supervisors with membership in the IAIS,\footnote{173. Articles 10(a) and 12 IAIS Bylaws.} who meet, at least, once per year.\footnote{174. Article 13(1) IAIS Bylaws.} It holds, \textit{inter alia}, important decisional powers related to the organization of the association – e.g., the amendment of its Bylaws, the approval or rejection of applications to membership, the approval of the annual budget of the IAIS.\footnote{175. Both members and observers may attend the General Meetings,\footnote{176. Article 11 IAIS Bylaws.} but only members can vote.\footnote{177. The General Meeting also elects, among its members, the members of the Executive Committee.\footnote{178. The Executive Committee is entrusted with the adoption – normally, by simple majority of its voting members casting a vote – of the decisions necessary to achieve the targets of the IAIS in conformity with the directions received from the General Meeting.\footnote{179. Article 14(8) IAIS Bylaws.} For instance, the Executive Committee is in charge of approving the IAIS’ main regulatory measures, such as standards, principles and guidance\footnote{181. Article 15(6)(f) IAIS Bylaws. In some instances, the competence to adopt standards, principles and guidance corresponds to the General Meeting – for example, when, at least 10% of the members with the right to vote at the General Meeting request so.\footnote{182. Article 14(1)(a) IAIS Bylaws.}} – by a two-thirds majority of all the voting members of the Executive Committee\footnote{182. Article 14(1)(a) IAIS Bylaws.} and preparing the work of the General Meeting – e.g., by drafting the amendments of the Bylaws, making recommendations to the General Meeting with regard to applications to membership, and elaborating the annual budget of the association.\footnote{183. The IAIS Bylaws incorporate some provisions that try to ensure the diversity of the Executive Committee and avoid the concentration of power in some of the IAIS’s members. For example, one requisite is that:} – e.g., the approval of the annual budget of the IAIS.\footnote{175. Article 12 IAIS Bylaws.} Both members and observers may attend the General Meetings,\footnote{176. Article 11 IAIS Bylaws.} but only members can vote.\footnote{177. Article 7(3) IAIS Bylaws.} The General Meeting also elects, among its members, the members of the Executive Committee.\footnote{178. Articles 12(2)(d) and 14(1)-(2) IAIS Bylaws.}

The Executive Committee is entrusted with the adoption – normally, by simple majority of its voting members casting a vote – of the decisions necessary to achieve the targets of the IAIS in conformity with the directions received from the General Meeting.\footnote{180. Article 14(8) IAIS Bylaws.} For instance, the Executive Committee is in charge of approving the IAIS’ main regulatory measures, such as standards, principles and guidance\footnote{181. Article 15(6)(f) IAIS Bylaws. In some instances, the competence to adopt standards, principles and guidance corresponds to the General Meeting – for example, when, at least 10% of the members with the right to vote at the General Meeting request so.\footnote{182. Article 14(1)(a) IAIS Bylaws.}} – by a two-thirds majority of all the voting members of the Executive Committee\footnote{182. Article 14(1)(a) IAIS Bylaws.} and preparing the work of the General Meeting – e.g., by drafting the amendments of the Bylaws, making recommendations to the General Meeting with regard to applications to membership, and elaborating the annual budget of the association.\footnote{183. The IAIS Bylaws incorporate some provisions that try to ensure the diversity of the Executive Committee and avoid the concentration of power in some of the IAIS’s members. For example, one requisite is that:} For such purpose, the Executive Committee establishes and relies on the work of Committees and Subcommittees specialized in different areas.\footnote{184. Articles 10(b) and 15(3) IAIS Bylaws. Some examples are the Technical Committee – in charge of developing standards, principles and guidance –, the Implementation Committee – that provides assistance in the implementation of the IAIS’s standards, principles and guidance –, or the Budget Committee – which prepares the annual budget of the IAIS.\footnote{185. Article 14(1)(a) IAIS Bylaws.}}

The Executive Committee comprises both voting and non-voting members. The voting members are a number of IAIS’s members between nine and 24, who are elected by the General Meeting\footnote{185. Article 14(1)(a) IAIS Bylaws.} for a period of two years, renewable.\footnote{186. Article 14(3) IAIS Bylaws.} The non-voting members have an ex-officio character and comprise the Chairs of the Technical, Implementation, and Budget Committees.\footnote{187. Unless they already are voting members – article 14(1)(b) IAIS Bylaws.} The IAIS Bylaws incorporate some provisions that try to ensure the diversity of the Executive Committee and avoid the concentration of power in some of the IAIS’s members. For example, one requisite is that:
The Executive Committee shall be limited to no more than one person per Member, and in principle per Jurisdiction. The Executive Committee shall be composed of an appropriate representation of the different geographic areas and different types of insurance markets, particularly in respect of the market sizes and development.  

For instance, in the year 2012, the Executive Committee included 25 members from 23 jurisdictions: Austria, Australia, Bahrain, Canada, Cayman Islands, Chile, China, the EU, Germany, Gibraltar, India, Ireland, Japan, Korea, Lebanon, Luxembourg, Mexico, Peru, Singapore, Slovakia, South Africa, Switzerland, US (FIO), US (Florida), US (NAIC). This composition contrasts with the membership of the IOSCO Board or the BCBS Committee, which are less heterogeneous and less representative of different degrees of development of the financial markets.  

Like the BCBS and the IOSCO, the IAIS relies on the work of Committees. Indeed, the Executive Committee is in charge of establishing five specialized committees that carry out most of the work within the organization. These are the Technical, Implementation, Budget, Audit and Financial Stability Committees. The Technical Committee is, from a regulatory perspective, of particular importance; it is entrusted with, among other functions, with the development of standards, principles and guidelines in the field of insurance supervision. The Executive Committee and the other Committees may also set up Subcommittees and Working Parties that support them in the exercise of their functions. For example, the Technical Committee is assisted by Subcommittees specialized in issues such as accounting, auditing, governance, compliance or market conduct. The IAIS Bylaws also establish some safeguards aimed at avoiding concentration of power in a few jurisdictions within the Committees, Subcommittees and Working Groups’ structures, by requiring that the latter’s Chairs and Vice-Chairs reflect, collectively, “... a balance of geographical areas and supervisory approaches”.  

The Secretariat of the organization, which is located in Basel, is responsible of, inter alia, the management of the material, financial and human resources of the IAIS. The head of the Secretariat is the Secretary General, who is appointed by the Executive Committee.  

The Transparency and the Inclusiveness of INFRSAs  

Both the membership and the internal organization of INFRSAs analyzed above make reference, above all, to accountability relationships between INFRSAs and their ...
members – or persons who participate, in a more or less institutionalized manner, in the activities of INFRSAs. In order to have a broader picture of the accountability of INFRSAs it is also important to look at channels of communication between them and third parties that are not their members – and, more generally, society.

As explained above in Chapter 3, there are strong links between transparency and accountability, and the former is often instrumental to the achievement of the latter. In the context of INFRSAs, transparency can also be seen as an element that may contribute to the participation of non-member jurisdictions and non-member stakeholders in the activities of INFRSAs. For instance, the disclosure and the publication by INFRSAs of information about their internal functioning, work, and policy-making activities may improve the knowledge that third parties have about INFRSAs and about their relevance as global standard-setters. It may also provide those third parties with useful information on how to engage in the work and the activities of INFRSAs through means different from membership. Therefore, disclosure and transparency may increase the ability and the incentives of third parties to take part in the activities carried out by INFRSAs.

In addition, another element of the INFRSAs’ functioning that has a potential impact on their accountability, regards the inclusiveness of third parties in their rulemaking procedures. For example, by launching public consultations, INFRSAs may give voice in their processes to FRSAs and stakeholders that are not members and which would not, otherwise, have access to the INFRSAs’ activities.

[1] Transparency and Inclusiveness in the BCBS

The main regulatory texts addressing the BIS’s organization and functioning are the Hague Convention, the Constituent Charter, and the and BIS Statutes. All of them are integrally published on the BIS’s website and accessible to the general public. Therefore, there is an open access to the legal documents that institute the BIS and that set up its governance and working procedures. When it comes to the BIS’s decision-making instances – e.g., the meetings of the Board or of the General Meeting

198. See also, Scholte, ‘Civil Society and Democratically Accountable Global Governance’, p. 217.
204. Most texts regarding the functioning of the BIS are available at http://www.bis.org/about/legal.htm.
Some information about them is, however, provided by the BIS’s annual reports that are published and made available to the public on the BIS’s website. Press releases constitute another instrument through which the BIS gives publicity to its developments or decisions. At the end of the 1990s, the BIS adopted a more flexible approach to the access to its internal documents. Notably, in the year 1997, the BIS decided to open the documents of the BIS archives that were older than 30 years to the public.

In contrast to its hosting organization, the BCBS has traditionally followed a less transparent approach in its relations with outsiders. In this regard, the BCBS did not make public its internal rules until very recent times. As a result, until then, outsiders faced serious difficulties to understand the rules and the procedures that governed the functioning of the BCBS. A change in this respect took place in January 2013, when the BCBS decided to publish its Charter. This document explains, with certain detail, several core aspects of the internal organization of the BCBS and of its decision-making processes.

The BCBS’s deliberations are private and there are no public recordings or minutes of the meetings of its organs. In this respect, the main instrument to get information about the work of the BCBS as well as about its meetings are the press releases that the BCBS periodically publishes on its website.

The internal rules of the BCBS encompass certain degrees of transparency of the latter in its communications with the public, by requiring, inter alia, that decisions of public interest made by the BCBS Committee are communicated through the website of the BCBS.

---

205. Articles 39.5 and 44 BIS Statutes.
206. The BIS’s annual reports are available at https://www.bis.org/publ/arpdf/ar2012e.htm.
209. S. Emmenegger - ‘The Basle Committee on Banking Supervision - a secretive club of giants?’, in R. Grote et al. (Eds), The Regulation of International Financial Markets - Perspectives for Reform (Cambridge: Cambridge University Press, 2006), p. 226 – provides a very interesting view of the BCBS’s traditionally discreet and secretive character: “The Basle Committee is a rather informal type of organisation. It is, quite simply, an agreement between the G10 central bankers. Consequently, it lacks the status of an international organisation. Also, it has no public bylaws. In fact, its existence was first marked, on 12 February 1975, by a press release issued through the BIS. It took five more years before the founding agreement was released to the public. The latter illustrates another characteristic of the Basle Committee: considering its indisputable influence on the world of finance, it is a rather discrete type of organization”.
211. See e.g., BCBS, Measures for global systemically important banks agreed by the Group of Governors and Heads of Supervision, Press Release (25.06.2011), available at http://www.bis.org/press/p110625.htm - with information concerning the outcomes of a meeting of the Group of Governors and Heads of Supervision.
212. Section 8.5 BCBS Charter.
In the carrying out of its tasks, the BCBS consults with FRSAs that are not members of the organization. Consultations with non-member jurisdictions are, indeed, embraced by the BCBS Charter. Such consultations take place in the framework of ad hoc formal structures that are part of the BCBS, such as the Basel Consultative Group, the International Conferences of Banking Supervisors or the Financial Stability Institute (FSI). These are forums devised for enabling the exchange of views and discussion between the members of the BCBS and other banking supervisors. The BCBS also involves non-member FRSAs in its policy-making processes by inviting the latter to the activities of Groups, Working Groups and Task Forces of the BCBS. In addition, the staff of the BCBS Secretariat also participates in the meetings of FRSAs in the banking sector from different regions so as to exchange views and get feedback on the work of the BCBS.

Since the late 1990s, the BCBS has increased its engagement with third parties, for example, through public consultations, although most contributions to such processes come from the financial industry. Consultations with the public constitute a key element in the functioning of the BCBS. Indeed, its Charter envisages the launch of public consultations with regard to draft standards, guidelines and sound practices, so that the BCBS can get input from stakeholders. When it comes to the policy processes regarding standards – e.g., the Basel Capital Accords – the BCBS Charter requires the launch of public consultations. Hence, the most relevant regulatory outputs of the BCBS must necessarily be subject to the possibility of feedback by interested parties.

In addition to the mechanisms for the engagement of the public referred above, the BCBS also supports and encourages the specific participation in its activities of financial sector organizations, such as banking institutions. For example, the BCBS...
Quantitative Impact Studies involve the participation of banking institutions from the BCBS’s jurisdictions in order to assess, *ex-ante*, the impact of the Basel Capital Accords on the banks to which they are addressed.\(^{223}\)

[2] **Transparency and Inclusiveness in the IOSCO**

The IOSCO Bylaws do not embrace transparency as an element of the IOSCO’s governance. Although the IOSCO has frequently recognized the importance of transparency for the adequate functioning of the financial markets,\(^{224}\) it has not formally embodied this concept with regard to its own functioning.

With regard to the access to the internal documents of the organization, until very recently, non-members did not have access to the IOSCO Bylaws. These were neither published on the IOSCO’s website nor available for consultation in the IOSCO’s headquarters in Madrid. The IOSCO only provided its Bylaws to its members and to the applicants to membership – that are obliged to accept those Bylaws and to comply with them.\(^{225}\) This changed in the year 2013, when the IOSCO decided to publish its Bylaws on its website, making them fully available to the public.\(^{226}\)

The meetings of the IOSCO’s governing organs are private – like in the BCBS. As a result, they are generally held without the attendance of outsiders. However, in certain cases, persons who are not members of the organization may be present at the meetings.\(^{227}\) For example, the Chairman of the Presidents Committee may invite observers and special guests to the meetings of the Presidents Committee – if such an invitation is supported by a majority of the members of the latter.\(^{228}\) In addition, the Chairman of the IOSCO Board may invite persons who are not members of the Board to its meetings.\(^{229}\) In general, the outsiders who attend the meetings of the IOSCO’s governing organs represent the financial services industry.\(^{230}\) For instance, the high

---

\(^{223}\) See e.g., BCBS, *Results of the comprehensive quantitative impact study* (2010), available at http://www.bis.org/publ/bcbs186.pdf - with respect to the Basel III rules.

\(^{224}\) For example, according to the IOSCO Objectives and Principles of Securities Regulation – (2003), p. 23: “Investors should be provided with the information necessary to make informed investment decisions on an ongoing basis. The principle of full, timely and accurate disclosure of current and reliable information material to investment decisions is directly related to the objectives of investor protection and fair, efficient and transparent markets”.

\(^{225}\) Section 11(c) IOSCO Bylaws.


\(^{228}\) Section 31 IOSCO Bylaws.

\(^{229}\) Section 47 IOSCO Bylaws.

\(^{230}\) For instance, according to the programme of the IOSCO 2013 Annual Conference, the attendance to the *IOSCO Board Roundtable on Emerging Risks and Consequences for IOSCO Policy* was restricted to the IOSCO Board, the Chair of the Self-Regulatory Organizations Consultative Committee, some industry representatives and the IOSCO Secretary General – IOSCO, IOSCO 2013 Luxembourg – Draft Programme.
fees that are charged to attend the IOSCO Annual Conference create serious barriers of access to most non-commercial organizations and to individuals wishing to participate.

Some information about the activities of the IOSCO’s governing organs and about the outcomes of their meetings is provided by, inter alia, the annual reports, press releases, statements and the Annual Conference's documents published by the IOSCO. These, however, do not offer a clear account of the deliberations during the meetings of the main governing bodies.

Finally, when it comes to the inclusiveness and the openness of the IOSCO’s rulemaking procedures to third parties, the IOSCO adopted, in the year 2005, a consultation policy that envisages the launch of public consultations in order to obtain input from the financial community in respect of the IOSCO’s work and activities. According to the IOSCO’s consultation policy, the IOSCO commits itself to give consideration to the opinions received: “IOSCO will take comments into account in framing Final Reports and will provide a summary explanation of the manner in which public comments have been addressed or the reasons why they have not been addressed in a memorandum accompanying Final Reports”. As a result, the reports published by the IOSCO often provide an assessment of the opinions made by the different respondents. In spite of the fact that the IOSCO’s consultations are generally open to all the persons interested in providing a response, the data shows that most respondents represent the financial industry sector.

231. This amounted, in the year 2013, to EUR 2100 – see http://iosco2013.lu/?page_id=85. During the IOSCO Annual Conferences there are meetings of, inter alia, the Presidents Committee, the IOSCO Board and the Emerging Markets Committee.
232. See e.g., IOSCO, Annual Report 2011, pp. 24-31 – with regard to the work of the IOSCO Working Committees.
237. IOSCO, IOSCO Consultation Policy and Procedure, p. 4.
239. See e.g., IOSCO, Elements of International Regulatory Standards on Funds of Hedge Funds Related Issues Based on Best Market Practices: Final Report, p. 15.
[3] Transparency and Inclusiveness in the IAIS

The Bylaws of the IAIS explicitly encompass the concept of transparency as one of the central elements that must guide the functioning of the IAIS: “The Association will operate in an open and transparent manner setting an appropriate example of transparency, administrative due process and governance …”. In addition, the IAIS Bylaws refer to several concrete instances where the IAIS must follow transparent procedures. This is, for example, the case of the consultation procedures with members and observers or the process of appointment of the Chairs and the Vice-Chairs of the Committees of the IAIS Executive Committee. This constitutes a relevant difference with the BCBS and the IOSCO that, although promoting the principle of transparency in respect of some actors and forums, do not explicitly endorse transparency with regard to their own governance.

Another example of the different approaches to transparency followed by the IAIS on the one hand and the BCBS and the IOSCO on the other, relates to the publication of internal functioning rules. The IAIS has, long since, published its Bylaws on its website, making them available to any interested party. In contrast, the IOSCO and the BCBS only started to publish their Bylaws and Charter in the years 2012 and 2013 respectively.

The meetings of the governing organs of the IAIS are, as in the case of the BCBS and the IOSCO, not public. The meetings of the Executive Committee are accessible only to its members. Both members and observers of the IAIS can attend the General Meetings, although the Executive Committee may exclude observers from attendance to some sessions of the General Meeting. Attendance to the IAIS Annual Conference is open, not only to members and observers, but also to other persons. However, the attendance fee, which ranges from USD 1800–2000, may limit the ability to participate of stakeholders representing consumers, retail investors or other non-commercial sectors.

The IAIS disseminates information concerning its meetings, activities and decisions through its annual reports, press releases and newsletters. These, however, do not include a detailed report about the deliberations of its governing organs.

When it comes to the issue of stakeholder engagement in the policy-making activities of the IAIS, most consultations launched by the latter seek comments from its

---

241. Article 2(3) IAIS Bylaws.
242. Article 2(3) IAIS Bylaws.
243. Article 15(4) IAIS Bylaws.
244. The IAIS Bylaws are available at http://www.iaisweb.org/By-laws-45.
245. Article 11 IAIS Bylaws.
246. Article 18(2) IAIS Bylaws.
248. The IAIS Annual Reports are available at http://www.iaisweb.org/Annual-reports-44.
own members and observers rather than from external parties. Indeed, the IAIS is bound by its Bylaws to consult its members and observers on the principles, standards and guidance to be adopted by the organization.\footnote{251. Article 2(3) IAIS Bylaws.} Hence, stakeholder participation in the IAIS is, in most cases, channeled through the input provided by its observers. The initiative of participation of consumer representatives as observers referred above in section §9.03[A][3], may contribute to increase the presence of consumer views among the input that the observers give to the IAIS.

In addition to the consultations with its own members and observers, the IAIS also launches, through its website, public consultations aimed at getting input from third parties.\footnote{252. See e.g., IAIS, Global Systemically Important Insurers: Proposed Assessment Methodology – Public Consultation Document (2012).} The responses to those consultations are also published on its website.

§9.04 CONCLUSIONS

From an input-legitimacy perspective, the internal rules of the BCBS, the IOSCO and – to a lesser extent – the IAIS, in the areas of membership, internal organization, transparency and public engagement, give a more pre-eminent position to FRSAs from advanced financial systems and to financial industry stakeholders. Assuming that, at the level of INFRSAs, there is a relation between input-legitimacy and output-legitimacy,\footnote{253. This relation is, for instance, established by Underhill and Zhang – ‘Setting the rules: private power, political underpinnings, and legitimacy in global monetary and financial governance’, p. 552. See also, S. Claessens, G.R.D. Underhill and X. Zhang, ‘The Political Economy of Basle II: The Costs for Poor Countries’ (2008) 31 The World Economy 313 – the authors argue that Basel II was the result of an exclusionary policy-making process dominated by FRSAs from highly advanced economies and by private sector representatives from those very same economies, and that this resulted in rules that favored, above all, the interests of the latter.} there is a serious risk that, under the INFRSAs’ governance structures that have been analyzed in this chapter, the policy-making outputs devised by INFRSAs will likely reflect and promote the interests of the parties vested with greater powers in the INFRSAs’ policy-making processes, probably, at the expense of less powerful members, non-member FRSAs and non-member stakeholders.

[A] Heterogeneity of Jurisdictions Represented in the Work of INFRSAs

When it comes to the heterogeneity of the jurisdictions represented, there are important differences among the BCBS, the IOSCO and the IAIS.

The BCBS is a highly selective and restricted network. Its 27 members represent the most sophisticated banking markets of the world. There is neither a clear and objective set of conditions to become a member nor an application procedure. The existing members decide, on a discretional basis, whether and whom to invite to join the BCBS. Although the BCBS engages in dialogues with FRSAs from other jurisdictions in the course of its policy-making activities, its regulatory outputs – e.g., the Basel
Capital Accords – are the result of decisions solely adopted by its members by consensus.

The IOSCO has a more open membership structure than the BCBS. Its members represent several jurisdictions and securities markets. However, the allocation of powers to members from different jurisdictions in the IOSCO is asymmetrical. Decisional powers within the organization have traditionally been concentrated in its Technical Committee, a now defunct structure that was composed of 18 FRSAs from the most developed securities markets. In spite of the reforms operated by the IOSCO in its internal governance structure in the year 2012, the members of the former Technical Committee still hold a majority of voting power within the executive body of the IOSCO – the Board. As a result, the regulatory outputs produced by the IOSCO may tend to reflect, above all, the interests of highly developed securities markets.

The IAIS is a highly inclusive INFRSAs. It has the largest membership among the three INFRSAs analyzed in this chapter. In addition, its internal rules incorporate mechanisms aimed at avoiding the concentration of decisional powers in members that represent only certain geographical areas or markets. For instance, its executive organ is composed of a very diverse group of FRSAs – geographically and qualitatively. In consequence, the regulatory choices of the IAIS are more likely to reflect a more varied set of interests than the policy-outcomes of the BCBS and the IOSCO.

[B] Heterogeneity of Stakeholders Represented in the Work of INFRSAs

The three analyzed INFRSAs involve stakeholders in their activities in different manners. The IOSCO and the IAIS admit, as affiliate members and observers respectively, organizations and persons – different from FRSAs – with an interest in their areas of work. While stakeholders do not have voting rights in the meetings of the governing organs of the networks, they may attend them and give their opinion about the issues discussed. They may also undertake work aimed at providing input to the INFRSAs’ policy-making activities. In addition, the three INFRSAs use public consultations as means for getting feedback on rule proposals from stakeholders with an interest in international standard-setting activities.

The analysis has evidenced that the participation of stakeholders in financial policy-making at the level of INFRSAs faces problems and challenges that are very similar to those encountered by stakeholders at the national and European levels. Notably, stakeholder participation presents important asymmetries. While the data shows that self-regulatory organizations and industry associations are highly involved in the activities of INFRSAs – through their membership and/or participation in consultations – the representatives from consumers are, in general, absent. In some instances, the internal rules of INFRSAs favor stakeholder asymmetries. For example, the IOSCO and the IAIS charge very high annual membership fees, which create barriers of entry to non-industry interest groups, such as consumer associations. Also, in the IOSCO, the stakeholder membership is essentially restricted to self-regulatory organizations, a fact that excludes, \textit{de facto}, entities such as consumer advocate...
groups. As shown in Chapter 4 and Chapter 7, the mechanisms of stakeholder engagement in the financial policy-making activities carried out by FRSAs generally give a pre-eminent role to financial industry actors, and this leads to a risk of regulatory capture of the regulatory outputs produced by FRSAs. Rather than promoting alternative and more inclusive forms of engagement, the instruments of stakeholder participation devised by the three analyzed INFRSAs replicate, to a certain extent, the weaknesses of the mechanisms of stakeholder involvement that are used by FRSAs at the national level.

[C] Diversity of Participatory Arrangements

There seems to be a negative correlation between the degree of inclusiveness of the membership and of the governing organs of INFRSAs on the one hand and the quality and the quantity of ad hoc institutional mechanisms of consultation and debate with actors that do not occupy a central position in the governance of INFRSAs on the other hand. For instance, the INFRSAs with the most restrictive membership – the BCBS – has devised fairly formal alternative mechanisms of engagement with non-member jurisdictions – e.g., the Basel Consultative Group – and with stakeholders – e.g., the compulsory consultations with stakeholders about draft standards. The IOSCO, where decisional power is asymmetrically distributed among its members, uses non-core governance structures – e.g., the Emerging Markets Committee – to involve in its main regulatory activities the parties vested with fewer decisional powers in the organization. From a legitimacy perspective, this may have different explanations; on the one hand, these instruments of engagement may aim at getting expert input and advice from jurisdictions and stakeholders that do not form part of the central decision-making structures of INFRSAs, so as to enhance the quality and the output-legitimacy of the latter’s policy-outcomes. On the other hand, these mechanisms may be used by poorly inclusive INFRSAs to foster the (perception about the) input-legitimacy of their policy-outputs without effectively allocating decisional powers to persons outside the core governing structures of INFRSAs; this, in turn, would enable the FRSAs that exercise control over INFRSAs to keep their status quo and to mitigate, at the same time, potential legitimacy concerns by FRSAs and stakeholders that may feel excluded from the functioning of those INFRSAs.

[D] The Financial Crisis and the Reforms in the Governance of INFRSAs

Since the start of the financial crisis, INFRSAs have undertaken several reforms of their governance structures that show a trend towards the adoption of a more inclusive and transparent approach to the participation of FRSAs and stakeholders in their activities and decisions. The BCBS expanded its membership in the year 2009, opening it to a number of additional jurisdictions. In addition, in the year 2013, in a move towards a greater transparency, the BCBS published its Charter, making its internal rules known to the public. The IOSCO embarked on a major reform of its governance structure in the year 2012, setting a new executive body – the Board – that may strengthen the power
of emerging markets in the affairs of the organization and put an end to the traditional
dominance of representatives from the most advanced securities markets in the
decisions of the IOSCO. In March 2013, the IOSCO decided to publish its Bylaws,
which, before that date, were only disclosed to its members. In the post-crisis period
the IAIS also undertook certain reforms, some of which had the purpose of facilitating
a balanced stakeholder engagement in its activities; an example was the call for
applications to membership of consumer representatives, launched in the year 2013
and aimed at increasing the participation in the IAIS, as observers, of entities from the
consumer realm.

On the one hand, these initiatives can be seen as logical reactions to develop-
ments in the international financial arena and to national trends in the governance of
FRSAs. For instance, with regard to the former, emerging markets play an increasingly
relevant role in the global financial markets, and, therefore, there is a rationale for
increasing their weight in the activities of INFRSAs. With regard to stakeholder
engagement, as shown in Part I and Part II of this book, jurisdictions worldwide have
progressively been encompassing a greater involvement of stakeholders in the rule-
making activities of FRSAs; the reforms operated by INFRSAs that enhance their
transparency and the inclusiveness of their regulatory procedures would be a reflection
of those national drifts.

On the other hand, these reforms can also be interpreted as moves adopted by
INFRSAs in a process of legitimacy building, aimed at enhancing their acceptance
among FRSAs, political forums and stakeholders worldwide. The fact the govern-
nance overhauls referred above took place in the period 2009–2013 would support this
view. In this regard, the role of INFRSAs before the crisis was highly contested by
several commentators; for example, some criticisms regarded the INFRSAs’ policy-
outcomes, which allegedly failed to prevent the credit crash. Other critical remarks
and calls for change were made by actors in the policy-making arena – such as the G-20
– as well as by members of the INFRSAs themselves; these pointed at the governance
of INFRSAs, characterizing it as non-inclusive. INFRSAs may have reacted to these
criticisms and demands for change by implementing governance reforms that make
their procedures and activities more open to the different interests and actors affected
by financial sector rules.

.com/en_US/gx/world-2050/assets/PwC_Banking_in_2050_-_May.pdf – regarding the evolu-
tion of the banking sector in emerging economies.
255. Legitimacy constitutes a core concern of INFRSAs because the success of their regulatory
outputs depends substantially on the voluntary acceptance and application of the latter among
the parties to which they are addressed – Black, Constructing and Contesting Legitimacy and
Accountability in Polycentric Regulatory Regimes, p. 21.
256. See e.g., C. Goodhart and A. Persaud, ‘How to avoid the next crash’, The Financial Times
779f62ac.html#axzz2TMsQ8i3T.
257. See e.g., Declaration: Summit on financial markets and the world economy (2008) or ‘IOSCO
Emerging Markets Prepare For Bigger Role In The Global Economy’, Mondovisioni
emerging-markets-prepare-for-bigger-role-in-the-global-economy/.
Albeit constituting a first step, the reforms operated by INFRSAs so far are limited in scope. First, with regard to the issue of the jurisdictions represented in the work of INFRSAs, the BCBS is still a rather closed network, with only 27 members; in the IOSCO, it remains to be seen whether and how the Board will effectively embrace a better representation of emerging markets in the governance of the organization. Second, with respect to stakeholder engagement, the greater transparency embedded in some of the post-financial crisis reforms may increase the ability and the willingness of stakeholders to participate in the activities of INFRSAs. However, generally, the rules of the latter tend to favor, explicitly and implicitly, the involvement of financial industry stakeholders rather than the engagement of other persons with interest in financial regulation and supervision. The narrow character of these reforms suggests that their underlying purpose may be the enhancement of the perceptions about the legitimacy of the INFRSAs that implemented them, rather than the adoption of measures that bring a major change in the internal allocation of powers within those INFRSAs. Indeed, in the BCBS and the IOSCO, the FRSAs from countries with highly developed financial markets still exercise an overarching influence in both organizations; also, stakeholders from the financial industry occupy a privileged position as interlocutors with INFRSAs. Those very same FRSAs and financial industry representatives may have incentives to keep their statuses within INFRSAs, as long as the benefits associated to maintaining that control – e.g., greater influence in the content of the INFRSAs’ regulatory outputs – are higher than the costs associated to the consequences of decreases in the perceptions about the legitimacy of INFRSAs – e.g., lack of acceptance of and compliance with the regulatory outputs produced by INFRSAs. In this context, future reforms in the governance of INFRSAs will likely and to a great extent be linked to the ability and the willingness of FRSAs and stakeholders excluded from membership or participation in the main governing structures of INFRSAs to undertake actions that create threats – real or perceived – to the diffusion and implementation of the rules produced by INFRSAs in their own jurisdictions and beyond them. This would create incentives in the actors that control INFRSAs to reconsider the allocation of powers within their organizations.
Concluding Remarks

This book has analyzed the accountability of Financial Regulation and Supervision Authorities (FRSAs) in Spain, the United Kingdom (UK), the United States of America (US) – national level – the European Union (EU) – EU level – as well as the accountability of international networks of FRSAs (INFRSAs) – international level. The next pages contain some final considerations related to the accountability of FRSAs from a multilevel perspective with a focus on elements of convergence and divergence across jurisdictions – notably, after the overhauls operated on the financial supervision architectures – as well as the complementarities between different levels of regulation.

I THE ACCOUNTABILITY OF FRSAs TOWARDS POLITICAL ACTORS

[A] Diversity of Regimes: The Importance of National Legal Traditions and the Trend towards the Parliamenterization of Political Accountability Mechanisms

In the jurisdictions analyzed in this book both parliaments and governments share responsibilities as account-principals and account-holders of FRSAs. There are, however, differences between legal systems and, in some countries, the parliament occupies a pre-eminent position as a forum of accountability of FRSAs, whereas in others, the central position in the accountability architecture is hold by the government. The characteristics of the mechanisms of political accountability of FRSAs are highly related to the constitutional and administrative legal and regulatory regimes and traditions of the jurisdictions where FRSAs exercise their regulatory and supervisory powers. For example, in the US, certain provisions of the US Constitution have contributed to the shaping of a system where the Congress stands as the main account-principal of FRSAs. In the UK, the traditional doctrine of ministerial accountability is reflected in the process of political accountability of FRSAs, which, in most instances, are accountable to the Government – and only indirectly to the Parliament. In the EU the reforms that have strengthened the role of the European Parliament in the
EU institutional setting – e.g., the Treaty of Lisbon – have resulted in the European Parliament acquiring and increasingly relevant role as an accountor within the EU financial supervision architecture.

Another element that explains the different approaches to the political accountability of FRSAs is the extent and scope of the delegation of regulatory and supervisory tasks to FRSAs. For instance, in jurisdictions where the legislator vests FRSAs with wide margins of discretion in the creation, implementation and enforcement of financial sector rules – e.g., the US and the UK – those very same legislators tend to react by building systems of political accountability where parliaments retain a central position as account-principals and/or by making a very active use of those accountability instruments – e.g., through frequent hearings with the heads of FRSAs – so as to counter-balance the high regulatory and supervisory autonomy of FRSAs. In the EU, the expansion of the regulatory and supervisory powers of the bodies entrusted with financial regulation and supervision functions has been matched with the European Parliament being granted a leading role as an account-principal in the EU system of financial supervision.

In spite of the cross-jurisdictional differences in the mechanisms of accountability of FRSAs towards political forums and actors, there are some common trends that can be observed at different levels of regulation. Probably, the most notable consists of the operation of legislative reforms that have increased the independence of FRSAs from governments and/or their accountability towards parliaments. In this regard, some of the jurisdictions analyzed in this book have adopted reforms that have resulted in a ‘parliamentarization’ of political accountability mechanisms, a process whereby parliaments are attaining a more relevant role as account-principals and account-holders in the accountability architectures applicable to FRSAs. This process often implies a shift of responsibilities from governments to parliaments or the creation of new accountability instruments where parliaments occupy a central position as accountors. The reforms – or proposals of reform – operated on the financial supervision architectures of the EU, Spain, the UK and the US constitute good examples of this trend. For instance, in Spain, the discussions about the transformation of the financial supervision institutional setting generally encompass a greater role for the parliament as an accountor – e.g., the proposals to substitute the government-based appointment system concerning the heads of FRSAs for a model of appointments conducted by the parliament. In the US the Dodd-Frank Act instituted several reporting duties of FRSAs to the Congress whereby the former are required to carry out investigations on matters of relevance to potential regulatory reforms and to inform the Congress about the results of those investigations. Moreover, the powers of the US Government in the budgetary process relating to some FRSAs – e.g. the Securities and Exchange Commission (SEC) – have been subject to additional limitations, with the consequence that there is now less scope for governmental interference in the appropriations procedure and hence, of instances of biased use of financial accountability mechanisms by the US Government. In the EU the European Parliament has been entrusted with key functions in the oversight of the European Supervision Authorities (ESAs) – e.g., it has a pre- eminent role in the appointment of the Chairpersons and Executive Directors of the ESAs. In one of the jurisdictions analyzed – the UK –, the legislator has adopted some
reforms that enhance the independence of FRSAs from the Government without necessarily increasing the accountability of those very same FRSAs towards the Parliament; this is for example evident in the system of appointments of part of the members of the governing body of the Prudential Regulation Authority (PRA), who are appointed by the Court of Directors of the BoE – instead of being directly appointed by the Government, as was the case in the extinct Financial Services Authority (FSA). Moreover, in recent years there has been a greater involvement of the UK Parliament in the process of appointment the heads of FRSAs – through the holding of hearings with the appointees to the relevant positions.

These reforms can be interpreted as a reaction of legislators to the failures of the laissez-faire legislative and regulatory regimes of the pre-crisis setting, where FRSAs often carried out their duties under weak degrees of parliamentary oversight. Indeed, the post-financial crisis overhauls have generally resulted in a greater statutory insulation of FRSAs from governmental influences and in more accountability of FRSAs towards parliaments. In these new settings the actions of FRSAs are subject to greater scrutiny of parliamentary forums and hence, theoretically, infused with higher degrees of input-legitimacy. Whether these improvements in input-legitimacy will be translated into enhanced output-legitimacy is not clear. Indeed, parliamentary groups may also instrumentalize the mechanisms of accountability of FRSAs with political purposes in order to maximize their own agendas. The extent to which this new framework will succeed in contributing to the independence, overall legitimacy and performance of FRSAs will very much depend on the behavior of parliamentary forums and, notably, on the incentives of parliamentary majorities and groups to avoid biased uses of the instruments of political accountability at their disposal as well as on the ability of the relevant members of parliament – e.g., the members of parliamentary committees dealing with financial sector issues – to make an efficient use of those accountability mechanisms. That ability is linked to elements such as knowledge and skills on financial markets’ issues that can be addressed only partially by the design of the system of political accountability of FRSAs but that will, nevertheless, be critical to the proper functioning of the latter.

One level of regulation where the role of parliaments as accountors is still very weak is the international arena. Indeed, the most relevant INFRSAs, such as the Basel Committee on Banking Supervision (BCBS), the International Association of Insurance Supervisors (IAIS) or the International Organization of Securities Commissions (IOSCO) still operate far from the scrutiny of national parliamentary forums. As will be further referred below, this has some effects on the scope of complementarities between regulatory levels.
II THE ACCOUNTABILITY OF FRSAs TOWARDS STAKEHOLDERS

[A] Asymmetries among Categories of Stakeholders Acting as Account-Principals: The Case of Stakeholder Participation in the FRSAs’ Activities

A common phenomenon that can be observed in all the three levels of regulation analyzed in this book – national, European and international – is the asymmetry in the position that different categories of stakeholders occupy in the accountability relationship with FRSAs. On the one hand, stakeholders representing the financial industry – e.g., representatives of financial institutions and financial industry associations – or groups whose interests are linked to those of the financial industry – e.g., consultancy and law firms hired by financial institutions – hold a pre-eminent position as accountors of FRSAs. One the other hand, the role played by consumers of financial services and retail investors as account-principals and account-holders of FRSAs is much more residual. This has led to a stakeholder accountability framework where FRSAs are accountable, above all, to the financial industry rather than to other actors and forums within the stakeholder realm.

The asymmetries referred above are particularly patent in the mechanisms and processes of participation of stakeholders in the regulatory activities conducted by FRSAs. For instance, whereas the financial industry representatives engage very actively in those procedures – e.g., in public consultations – individuals or organizations representing consumers of financial services are much less active. In consequence, most input, opinions and advice received by FRSAs in the framework of regulatory and supervisory processes comes from the regulated financial industry.

The laws and regulations applicable to FRSAs often encompass asymmetries among categories of stakeholders in the accountability processes and relationships. For example, in Spain, the UK, the US and the EU, the stakeholder advisory bodies in charge of providing advice to FRSAs in respect of their rulemaking activities are statutorily devised in a manner that results in the financial industry representatives having most voting power within them – e.g., through the allocation of a greater number of seats to the financial industry combined with simple majority decision-making procedures.

Participatory asymmetries are not always the result of legal barriers to engagement by non-financial industry stakeholders. The latter may also suffer from, inter alia, problems of collective action and rational ignorance that limit their ability and/or their willingness to be involved in the regulatory and supervisory processes carried out by FRSAs. This is evidenced in the data concerning participation in public consultations launched by FRSAs and INFRSAs, where the opinions provided by retail consumers and investors – or their representatives – constitute a very small portion of the overall percentage of answers.

One of the consequences of this framework is that in several instances financial regulatory and supervisory processes take place under an accountability relationship dominated by political actors on the one side and the financial industry on the other. These relationships entail the risk of regulatory capture of FRSAs by the regulated...
industry as well as a lack of independence of the former from the latter. This, in turn, may result in FRSAs adopting regulatory and supervisory actions that promote, above all, the interests of the financial industry. Besides input-legitimacy considerations, an industry-driven regulatory framework may lead to very negative consequences for financial stability and the proper functioning of the financial markets – as shown before the financial crisis that started in the year 2007. Strikingly, the post-financial crisis reforms with an impact on stakeholder engagement in the FRSAs’ rulemaking and supervision have generally increased the weight of financial industry interests in those processes without strengthening the position of other categories of stakeholders. For example, in Spain, the UK and the US the post-crisis reconfiguration of the FRSAs’ stakeholder advisory bodies reinforce, above all, the position of the financial industry in those bodies. In the EU, the legal provisions setting the stakeholder groups of the ESAs encompass asymmetries among categories of stakeholders that operate in the benefit of the financial industry. Even at the international level, the post-crisis reforms of the governance of the BCBS, the IAIS and the IOSCO address participatory issues in a very timid manner and do not constitute a real attempt to reform the system towards greater participation of stakeholders from outside the financial industry. This suggest that the latter has been able to capture the process of reconfiguration of the financial supervision architectures at different jurisdictional levels, with the consequence that, the post-financial crisis setting replicates, to a great extent, the asymmetries of the pre-crisis framework.

A solution to the imbalances in the participation of diverse categories of stakeholders in financial policy-making would require, not only legal changes that remove the primary sources of those asymmetries – e.g., the different number of seats given to diverse stakeholder groups in the FRSAs’ advisory bodies – but also more ambitious measures aimed at educating and empowering retail investors and consumers of financial services. In this regard it is worth reminding that, as shown by the data, non-organized retail consumers tend to be less participative than the financial industry, even in those cases where the former face no barriers of access to the activities performed by FRSAs – e.g., in public consultations. This can be explained by, inter alia, problems of collective action, rational apathy and lack of resources whose solution goes beyond the mere attribution of participatory rights to the persons or groups concerned.

[B] The Limitations of Judicial Accountability as a Stakeholder Redress Mechanism

This book has examined instances where the supervisory omissions of FRSAs have led to investors’ losses. A relatively recurrent case across jurisdictions concerns situations where FRSAs fail to detect or put an end to malpractices of financial firms that ultimately end with investors experiencing losses – e.g., AVA and Gescartera in Spain and Madoff in the US. This has triggered tort claims being made by investors against FRSAs. Despite the potential of tort liability as an instrument for the accountability of
FRSAs and stakeholder redress, there are several statutory barriers that limit substantially its applicability and that make tort claims brought against FRSAs for lack of supervisory performance unlikely to succeed.

First, while the legal and regulatory frameworks of most of the jurisdictions analyzed – Spain, the US, the EU – generally recognize the possibility of FRSAs being liable on a tort basis, at the same time, they often establish strict legal conditions for the applicability of that liability. For instance, in the US, the discretionary function exception precludes the tort liability of FRSAs with respect to actions or omissions related to the exercise of discretionary functions by FRSAs. Moreover, in some jurisdictions such as the UK, FRSAs are immune to tort claims except in cases where they act in bath faith.

Second, courts usually interpret the relevant legal and regulatory frameworks in a rather strict manner. Indeed, one of the recursive arguments used by courts to dismiss tort claims brought against FRSAs for damages resulting from supervisory omissions – even those that are negligent – is that the latter fall within the competences legally attributed to FRSAs and hence, do not contravene the law. In other words, courts tend to see the FRSAs’ supervisory omissions as lawful exercises of supervisory discretion. In effect, laws in the financial sector generally grant discretion to FRSAs – but do not require them – to adopt supervisory decisions – e.g., whether to investigate a financial firm or to stop its activities. In consequence, FRSAs have wide margins of appreciation in deciding whether to take action against financial institutions or not in a given case. Owing to the fact that most supervisory omissions constitute, to a greater or lower extent, the result of exercises of discretion by FRSAs, the tort accountability of FRSAs in those instances is unlikely at best. Indeed, tort claims brought by investors against FRSAs for damages linked to supervisory omissions – e.g., AVA and Gescartera in Spain or Madoff in the US - have been repeatedly dismissed by the courts.

The de facto immunity of FRSAs from tort liability raises serious concerns. From a performance perspective, it does not contribute to the creation of incentives on FRSAs to perform diligently. Lack of tort liability also entails shortcomings from a corrective justice perspective because investors who suffer losses owing to negligent supervisory performance of an FRSA might not able to get redress in the form of compensation. From a policy perspective there are some measures that could contribute to build a more responsive judicial accountability framework that would help to discipline FRSAs for bad supervisory performance, providing, at the same time, redress to stakeholders affected by the FRSAs’ supervisory omissions. In the first place, those jurisdictions were FRSAs are generally immune to tort claims – e.g., the UK – should move towards a statutory encompassment of broader forms of tort liability of FRSAs so as to enable tort claims, not only in the unlikely cases where FRSAs act in bath faith but also when their performance is deficient and causes damages to investors. Second, the laws and regulations applicable to FRSAs should define more clearly the supervisory duties of FRSAs, establishing more concrete rules as regards when they are required to act and to adopt decisions in respect of supervised firms as well as the minimum standards of performance that those FRSAs are expected to achieve in the exercise of their duties. This would promote greater legal certainty and the avoidance of the most flagrant instances of supervisory negligence – such as those represented by Gescartera or
Concluding Remarks

Madoff. A more clear determination of the duties of FRSAs with regard to the regulated firms under their supervision would also facilitate the tasks of the courts, which would have more precise criteria as regards the establishment of whether and when FRSAs lawfully exercise their discretion or not.

III COMPLEMENTARITIES BETWEEN DIFFERENT LEVELS OF REGULATION

One of the questions addressed in this book was whether the mechanisms of accountability of FRSAs operating in some levels of regulation might complement and fill the accountability gaps of other regulatory levels. Complementarities between different levels of regulation can be analyzed from both a bottom-up and a top-down approach. When it comes to the first type of complementarities, accountability mechanisms present in national regulatory systems may help to overcome the consequences associated to flaws in the accountability mechanisms of supranational regulatory levels – e.g., European or international. Regarding the second form of complementarities, accountability instruments corresponding to supranational levels of regulation may contribute to fill gaps in the accountability architectures of national regulatory systems.

The recent evolution of the regulatory landscape concerning financial markets shows a trend towards the integration and concentration of regulatory powers in certain levels of regulation. Notably, there is a shift of rulemaking responsibilities from national to supranational instances of regulation. For example, in the EU there is an increasing transfer of regulatory and supervisory functions in the financial sector to the EU institutions and bodies - eg., the ESAs. Also, in the international arena, INFRSAs such as the BCBS, the IAIS and the IOSCO have expanded their areas of activity and their influence in the regulation of the financial markets. In this context it is pertinent to assess whether and how accountability schemes applicable to supranational regulatory systems can fill the gaps present in national institutional settings. The analysis has shown that the extent and scope of top-down complementation is very limited. For example, when it comes to accountability towards stakeholders, INFRSAs do, to a great extent, replicate the limitations present in the national levels of regulation. For instance, the access of non-financial industry stakeholders to the regulatory procedures of INFRSAs is very limited, even more restricted than in national systems. Moreover, some supranational levels of regulation – e.g., those concerning INFRSAs – suffer from additional limitations, such as the lack of availability of judicial forms of accountability to which stakeholders can recourse or of parliamentary forums that exercise direct oversight over the activities of INFRSAs. In addition, despite the globalization of the financial markets there are areas and aspects of financial regulation with a marked national character and limited to national boundaries and regulatory processes – and, in relation to which there is no scope for top-down complementation.

The accountability of FRSAs at the national level may also play an important role in filling potential accountability gaps present in the institutional structures of supranational FRSAs or in the latter’s regulatory processes. In this respect, most rules
developed at the European and international levels require, in one way or the other, national implementation procedures. FRSAs constitute an important part of those processes – e.g., by launching public consultations on how to implement those rules and, eventually, by producing norms that transpose in their own jurisdictions the rules developed in supranational arenas. Those implementation procedures may help to overcome weaknesses in the supranational accountability relationships – e.g., if stakeholders that did not have access to consultations at the EU or international levels concerning a concrete regulatory procedure are enabled to participate in the process of national implementation. In spite of the potential for complementation, practice shows that there are obstacles for its effective achievement. For instance, in some cases national parliaments act as mere rubber-stampers of rules developed at other levels of regulation – e.g., by the BCBS – without engaging in an active and critical oversight. Moreover, the participation of a parliament or of stakeholders in those implementation processes relates to rules already developed in other arenas and cannot be equated to participation in the rulemaking process from the very beginning. Owing to the fact that supranational FRSAs have a network structure based on the participation of representatives from national FRSAs, national instruments of accountability could help to enhance the legitimacy of regulatory and supervisory processes carried out by supranational FRSAs from the onset. This could be done, for example, by devising tailor-made accountability instruments that address the activities of FRSAs in global regulatory forums – e.g., in the meetings and decision-making processes of the Basel Committee on Banking Supervision. However these are forms of accountability that, so far, have been highly dismissed by the regulatory systems of the jurisdictions covered by this book.

IV THE LIMITATIONS OF ACCOUNTABILITY MECHANISMS IN ENSURING ACCOUNTABILITY AND THE NEED FOR FURTHER RESEARCH

The analysis carried out in this book has shown that a sound legal design of the mechanisms of accountability of FRSAs towards political actors and stakeholders is a necessary but not a sufficient condition for ensuring the effective accountability of FRSAs. For example, as referred above, legal reforms may remove barriers of access of certain categories of stakeholders to financial policy-making processes but cannot guarantee that those very same stakeholders will contribute actively and meaningfully to those processes. The statutory framework may also build FRSAs that are independent from the government and accountable to parliaments but cannot ensure that the latter will make efficient uses of accountability with a positive effect on the independence, legitimacy and performance of FRSAs.

A better understanding of the accountability of FRSAs requires further research on aspects of the accountability relationships between FRSAs on the one side and political actors and stakeholders on the other side that might be complex to address solely through reforms in the system of financial supervision. Also, the literature on FRSAs’ accountability would benefit from additional empirical work. Owing to the
relevance of the instruments of stakeholder accountability and their high potential to complement the mechanisms of political accountability, an important area that deserves more research is related to the role played by diverse categories and subcategories of stakeholders in financial policy-making, and, in particular, the contribution of each of those categories to the output-legitimacy of different types of regulatory and supervisory processes in the financial sector. For example, some categories of stakeholders might contribute more meaningfully than others to the achievement of certain targets of financial regulation – e.g., financial stability, the orderly functioning of the markets or the protection of investors – or to regulatory processes in concrete areas. The results of future research in this field could potentially serve as the basis of measures aimed at building tailor-made systems of accountability that acknowledge not only accountability in the books but also accountability in action.