THE POWER AND INFLUENCE OF IOSCO IN FORMULATING AND ENFORCING SECURITIES REGULATIONS

JANET AUSTIN*

INTRODUCTION

The International Organization of Securities Commissions (IOSCO) has become the main international organization dedicated to the advancement of the coordination of securities regulation and enforcement. It has evolved into one of the key organizations to which international bodies, such as the G20, delegate responsibility for the development of the policies needed to strengthen and stabilise securities markets.[1] Another factor which has contributed to its success is its Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (MMoU).[2] This MMoU assists

* BCom (UNSW), LLB (UNSW), LLM (Sydney), Associate Professor University of New Brunswick, Canada.

[1] "G20 Finance Chiefs' Communiqué", *Reuters* (15 October 2011), online: <www.reuters.com/article/2011/10/15/g20-communique-idUSL9E7LE01I20111015>.

[2] IOSCO, *Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information* (May 2012), online: <www.iosco.org/library/pubdocs/pdf/IOSCOPD386.pdf> [IOSCO, *MMoU*].

securities regulators in obtaining information from outside of their jurisdiction, enabling them to undertake cross border investigations of possible violations of their securities regulations.

IOSCO's current goals and priorities are first to identify and address systemic risks to the fair and efficient functioning of markets. Second it intends to maintain and improve the international regulatory framework for securities markets by setting international standards. Third is that it will work to strengthen its role within the international financial community. Within these goals IOSCO intends to build regulatory capacity through the systematic implementation of the *IOSCO Objectives and Principles of Securities Regulation*.[3] This document sets out a framework of objectives for securities regulation and principles which it recommends should be incorporated within all nations' systems of securities regulation.[4] In addition IOSCO has stated that it intends to work towards its goals through "full implementation of the IOSCO MOU by asking all IOSCO ordinary members and associate members...to become signatories to the IOSCO MOU, possible enhancements to the IOSCO MOU, and working with uncooperative and/or under regulated jurisdictions."[5]

Mindful of IOSCO's stated goals, this article considers IOSCO's future. Section I outlines how IOSCO has grown in significance, and, in particular, the success of its MMoU. Section II then moves on to consider how IOSCO can achieve full implementation of the MMoU, the future of the MMoU generally and how IOSCO should seek to further develop it and capitalize on its success. Section III of this article reflects upon IOSCO's role in policy formulation. Section IV then considers whether IOSCO could have a role beyond policy development and the MMoU. In particular it seems that IOSCO could, and perhaps should, develop other systems and mechanisms to assist securities regulators focusing on the detection, investigation and enforcement of securities offences. Finally, in Section V, I consider whether these other systems and mechanisms could, like the MMoU, be used as leverage by IOSCO as it continues to work towards its goal of achieving global convergence of securities regulations.

---

[3] IOSCO, Presidents' Committee, *Resolution on IOSCO's Mission, Goals and Priorities* (July 2010), online: <www.iosco.org/library/resolutions/pdf/IOSCORES26.pdf> [IOSCO, Presidents' Committee, *Mission, Goals and Priorities*].

[4] IOSCO, *Objectives and Principles of Securities Regulation* (June 2010), online: <www.iosco.org/library/pubdocs/pdf/IOSCOPD323.pdf> [IOSCO, *Objectives*].

[5] IOSCO, Presidents' Committee, *Mission, Goals and Priorities*, *supra* note 3.

I. IOSCO GROWTH AND ACHIEVEMENTS

a. Establishment and structure

IOSCO was formed in 1983 from an inter-American regional organization of securities regulators which had been established in 1974.[6] From 1984 IOSCO began expanding its membership beyond the Americas.[7] IOSCO now has 124 ordinary members who regulate over 95% of the world's securities markets.[8]

IOSCO is a network of securities regulators, it is not the subject of any international treaties and has no formal status in international law.[9] As an organization it operates as a non-profit, domiciled in Spain, and is funded by members.[10] As an international network of regulators IOSCO is one of a number of international regulatory networks that have grown in prominence over the last few decades. These transnational regulatory networks are characterised by their members not being nation states but national regulatory agencies. These networks also tend to have no international status beyond that conferred by the national law of their host countries.[11] In relation to global financial regulation, other transnational regulatory networks exercise similar functions to IOSCO in that they seek standardization of laws, coordination and cooperation. For example, the International Association of Insurance Supervisors seeks to promote effective and globally consistent supervision of the insurance industry;[12] and the Basel Committee on Banking Supervision provides a forum for cooperation on banking supervisory matters and the setting of international banking standards.[13] However transnational regulatory networks are not limited to global financial regulation. There are

---

[6] IOSCO, "About IOSCO", online: <www.iosco.org/about/?subsection=about_iosco>.

[7] Howard Davies & David Green, *Global Financial Regulation: The Essential Guide* (Cambridge, UK: Polity Press, 2008) at 60. The pressure to expand membership came initially from market institutions who wanted the development of common standards for prospectuses in response to the increasing globalisation of markets, see Michael Blair & George Walker, *Financial Markets and Exchanges Law* (Oxford: Oxford University Press, 2007) at 468.

[8] See IOSCO, "About IOSCO", *supra* note 6; IOSCO, "Ordinary Members of IOSCO", online: <www.iosco.org/about/?subsection=membership&memid=1>.

[9] See Anne-Marie Slaughter, *A New World Order* (Princeton, NJ: Princeton University Press, 2004) at 33.

[10] IOSCO, *Annual Report* (2011) at 60, online: <https://www.iosco.org/annual_reports/2011/pdf/annualReport.pdf>.

[11] See generally Pierre-Hugues Verdier, "Transnational Regulatory Networks and Their Limits" (2009) 34:1 Yale J Intl L 113; Slaughter, *supra* note 9.

[12] See International Association of Insurance Supervisors, online: <www.iaisweb.org/>.

[13] See Basel Committee on Banking Supervision, online: <www.bis.org/bcbs/>.

also such networks in relation to competition law,[14] environmental law[15] and international criminal law.[16]

One of the key reasons why these kinds of networks have grown in importance is due to the inability of the bilateral and multilateral treaty process to solve some of the challenges which the world faces today. The treaty negotiation and subsequent ratification process is time consuming and complex and may not result in a resolution. It can be particularly unsuited for problems requiring more immediate or comprehensive solutions.[17]

b. The development of the MMoU

Cooperation and the exchange of information have been at the forefront of IOSCO's mission almost since its inception.[18] Initially it was envisaged that this would be achieved between members primarily via bilateral and multilateral memoranda of understanding negotiated by individual members with other members, rather than being negotiated by IOSCO. In particular, the US Securities and Exchange Commission (SEC) pursued a policy of directly negotiating bilateral and multilateral memoranda of understanding.[19]

However the events of September 11, 2001 resulted in an important shift in approach, particularly by the US. These events triggered a concern that financial markets may have been used for terrorist financing.[20] In October 2001, IOSCO announced the formation of a special Project Team to "explore actions that securities regulators should take in view of the events of

---

[14] See e.g. International Competition Network, online: <www.internationalcompetitionnetwork.org/>.

[15] See e.g. International Network for Environmental Compliance and Enforcement, online: <www.inece.org/>.

[16] See e.g. International Criminal Police Organization – INTERPOL, online: <www.interpol.int/public/icpo/default.asp>.

[17] For a description of failures in formal treaty negotiations see G John Ikenberry, "The Global Governance Crisis", *The Interdependent* (Spring 2006) 33.

[18] In 1986 the members at the time passed a very brief resolution calling upon members "to the extent permitted by law, to provide assistance on a reciprocal basis for obtaining information related to market oversight and protection of each nation's markets against fraudulent securities transactions", IOSCO, Executive Committee *A Resolution Concerning Mutual Assistance ("Rio Declaration")*" (November 1986), online: <www.iosco.org/library/resolutions/pdf/IOSCORES1.pdf>.

[19] See e.g. comments by SEC General Counsel James R Doty, "The Role of the Securities and Exchange Commission in an Internationalized Marketplace" (1992) 60:6 Fordham L Rev S77 at S83.

[20] See IOSCO, *Final Communiqué of the XXVIIIth Annual Conference of the International Organization of Securities Commissions* (October 2003) at 9, online: <www.iosco.org/news/pdf/IOSCONEWS61-English.pdf>.

11 September and their aftermath."[21] It was this Project Team that formulated the MMoU, which was endorsed by the Presidents' Committee in May 2002.[22] Currently 105 IOSCO members are signatories to the MMoU and another 18 have committed to seeking the legal authority necessary for them to become signatories.[23]

c. The impact of the MMoU

The MMoU standardizes the process by which securities regulators who are members of IOSCO and have signed the MMoU can obtain information from other member securities regulators for enforcement purposes. This is important because increasingly the circumstances surrounding securities offences straddle one or more jurisdictions. It provides a framework of procedures to obtain information to enforce a wide range of domestic laws prohibiting securities fraud, including insider trading and stock market manipulation. The scope of the information that can be requested under the MMoU is framed in quite broad terms. Although it must be directed towards the enforcement of member's securities and derivatives laws, it also includes information and documents held in the files of the securities regulator, as well as taking or compelling evidence.[24]

The MMoU provides that a requested party can only deny providing assistance in limited circumstances. The broadest of these circumstances is "public interest" or "essential national interest" grounds, however, these terms are not defined. If a denial is made on these grounds then reasons must be provided to the regulator that requested the information.[25]

Once information has been provided it can be used for a broad range of purposes without referring back to the securities regulator from which it obtained the information. In addition to the purposes set out in the request, information can be used for "a purpose within the general framework of the use stated in the request for assistance" which includes civil, administrative or criminal proceedings and for "assisting in a self-regulatory organization's

---

[21] IOSCO, Press Release, "Creation of a Special Project Team" (12 October 2001), online: <www.iosco.org/news/pdf/IOSCONEWS14-English.pdf>.
[22] IOSCO, Presidents' Committee, *A Resolution of the Presidents' Committee on the IOSCO MOU* (May 2002), online: <www.iosco.org/library/resolutions/pdf/IOSCORES21.pdf>.
[23] IOSCO, "Current Signatories and Members Listed on Appendix B", online: <www.iosco.org/about/?subSection=mmou&subSection1=signatories>.
[24] IOSCO, *MMoU*, *supra* note 2, see "Laws and Regulations" defined at 2.
[25] *Ibid* at 3–4.

surveillance or enforcement activities".[26] Although the information is subject to confidentiality provisions, it can be disclosed in certain limited circumstances or in accordance with a legally enforceable demand.[27]

The express terms of the MMoU belies the fact that the MMoU is not just concerned with regulators agreeing to share information. Rather the MMoU is inextricably linked to IOSCO's agenda of having countries incorporate into their own laws the *Objectives and Principles of Securities Regulation* promulgated by IOSCO.[28] Securities regulators cannot sign the MMoU until they have undergone a screening process by IOSCO.[29] A member wishing to sign the MMoU must be assessed by a screening group of other members to ensure that they have in place laws which comply with Principles 11-13 of IOSCO's *Objectives and Principles of Securities Regulation*. If the member lacks laws reflective of these principles IOSCO will provide assistance to these countries to achieve the necessary legislative changes.[30]

This process ensures that a regulator who signs the MMoU can comply with their obligations under the MMoU. So, for example, the MMoU requires that a party "represent that no domestic secrecy or blocking laws or regulation should prevent the collection or provision of the information."[31] Secrecy laws have been a source of frustration for the SEC in their enforcement efforts and have resulted in the failure of some of their actions.[32] Therefore countries which have such secrecy laws cannot become parties to the MMoU. The only option available to securities regulators of countries that have such laws is to pressure the legislature of their country to change the laws to comply with the requirements of the MMoU. Removing secrecy laws and increasing the regulators' access to information aligns the laws of that country with Principle 13 of IOSCO's *Objectives and Principles of Securities Regulation* which provides that "[t]he Regulator should have authority to share

---

[26] *Ibid* at 6.

[27] *Ibid* at 7.

[28] This dual purpose of the MMoU was, in fact, acknowledged by the IOSCO Technical Committee in 2005. See IOSCO, Technical Committee, *Strengthening Capital Markets against Financial Fraud* (February 2005) at 30, online: <www.iosco.org/library/pubdocs/pdf/IOSCOPD192.pdf>.

[29] IOSCO, *Annual Report* (2005) at 5, online: <https://www.iosco.org/annual_reports/annual_report_2005/pdf/Annual_Report_05.pdf>.

[30] IOSCO, "Multilateral Memorandum of Understanding Concerning Consultation and Co-operation and the Exchange of Information (MMoU): Frequently Asked Questions" online: <www.iosco.org/library/mou/pdf/MoU-FAQS.pdf>; IOSCO, *Annual Report* (2008) at 8, online: <https://www.iosco.org/annual_reports/annual_report_2008/pdf/annualReport2008.pdf >.

[31] IOSCO, *MMoU*, *supra* note 2 at 3.

[32] See e.g. Felice B Friedman, Elizabeth Jacobs & Stanley C Macel IV, "Taking Stock of Information Sharing in Securities Enforcement Matters" (2002) 10:1 J Financial Crime 37.

both public and non-public information with domestic and foreign counterparts."[33]

The MMoU is therefore being used by IOSCO as a lever to work towards the global convergence of the principles governing the regulation of securities. This link between the MMoU and changes to domestic legislation is a significant achievement for IOSCO. Through the use of the MMoU, IOSCO has managed to bring about changes in domestic laws including the laws of signatory countries such as Switzerland, the Cayman Islands and the British Virgin Islands. These countries were once known for their banking secrecy laws and perhaps would be thought of by those engaging in violations of securities laws as places beyond the reach of investigations undertaken by regulators such as the SEC. However as a direct result of the MMoU, information regarding the beneficial owners of companies and bank accounts can be now be obtained from these, and many other countries.

II. BUILDING UPON THE SUCCESS THE MMOU

The MMoU has had a positive impact on the enforcement capabilities of IOSCO members and, as a result, IOSCO's overall status as an organization. For this reason it appears that IOSCO will continue to champion its use by its members and continue to press for all of its members to become signatories. However, in continuing its progress in this regard IOSCO may have to confront certain challenges. First, it may not be able to coerce all jurisdictions to sign the MMoU. If that is the case, this may leave a gap in the enforcement capabilities of its members. Second, as regulators make and receive more requests for information under the MMoU and become more reliant upon the MMoU for the success of their investigations, tensions and conflicts may possibly arise. In such circumstances it is unclear whether members will continue to meet their obligations.

a. Persuading all jurisdictions to sign the MMoU

Since the creation of the MMoU, IOSCO has stressed the need for all of its members to become signatories. The rationale for insisting that members sign the MMoU is that as long as some countries have not signed there will be gaps in the enforcement capacity of members who are

[33] IOSCO, *Objectives*, *supra* note 4 at 7.

signatories.[34] Without all members signing, other members of IOSCO may not be able to obtain information they require for their investigations. As such, perpetrators of securities violations could potentially escape investigation and enforcement action. Furthermore IOSCO also aims to set high standards globally for securities regulation and enforcement and the MMoU is a key part of achieving this objective. Without the implementation of such high standards there exists a risk of a 'race to the bottom' for securities regulation. High standards curb the temptation for countries to set lax standards of regulation and enforcement as a way of attracting corporations and individuals to their jurisdictions.

The goal of IOSCO is to have all member regulators sign the MMoU. Over the last few years their rhetoric in relation to those members who have not signed has become increasingly robust as each self-imposed deadline for all members to sign passes without this goal being achieved.[35] In addition IOSCO has increasingly ratcheted up its initiatives to pressure members to sign. Initially this consisted only of providing what was called 'technical assistance' to help non-signatories make the necessary legislative changes required to allow the member to sign the MMoU. Next in 2010 IOSCO decided to establish a public watch list on its website of members who had not signed.[36] In addition to the name of the member, this watch list also lists the progress each non-signatory has made towards becoming a signatory. For example, the website lists whether the initial step has been taken of providing IOSCO with a draft of legislation required to make the member compliant with the obligations under the MMoU. Presumably this watch list was designed to 'name and shame' those members and thereby pressure them to sign. Although it is unclear if IOSCO's tactics were the catalyst, a number of members have signed the MMoU since the watch list was established.

Following the establishment of the watch list IOSCO has restricted

---

[34] The IOSCO stated that "[a]s long as these jurisdictions remain outside the international enforcement regime, they offer potential safe havens for wrong doers and create gaps in IOSCO's international enforcement network", see IOSCO, Media Release, IOSCO/MR/11/2013 "IOSCO to Progress Reform Agenda Under New Leadership" (1 April 2013) at 6, online: <iosco.org/news/pdf/IOSCONEWS273.pdf>.

[35] IOSCO set 1 January 2010, then 1 January 2013 as the deadline for members to sign the MMoU, see IOSCO, *Final Communiqué of the XXXth Annual Conference of the International Organization of Securities Commissions (IOSCO)* (7 April 2005), online: <https://www.iosco.org/news/pdf/IOSCONEWS88-English.pdf>; IOSCO, Presidents' Committee, *Resolution on IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information* (2010), online: <https://www.iosco.org/library/resolutions/pdf/IOSCORES27.pdf> [IOSCO, Presidents' Committee, *Resolution on MMoU* (2010)].

[36] IOSCO, Presidents' Committee, *Resolution on MMoU* (2010), *supra* note 35.

the ability of non-signatories to vote, serve in leadership positions or nominate persons for leadership positions. IOSCO also called for its members to take precautions in dealing with entities or individuals linked to non-signatory jurisdictions.[37] Again, this action seems calculated to pressure members who are not signatories to sign. Indeed some members of IOSCO are already acting on this recommendation. For example, IOSCO has reported that India now requires that foreign investors in Indian mutual funds and equity shares must be resident in a country that is a signatory to the MMoU or a signatory of a bilateral memorandum of understanding with India's securities regulator, the Securities and Exchange Board of India. The Hong Kong Securities and Futures Commission now requires that an overseas company seeking a listing on the local exchange be incorporated in a jurisdiction where arrangements are in place to ensure reasonable regulatory cooperation.[38] In Canada the British Columbia Securities Commission is now considering imposing a condition upon investment dealers who trade in the US Over the Counter (OTC) Markets. Under this proposal investment dealers would be barred from engaging in any activity involving a security of an OTC issuer where the issuer's financial institution is located in a jurisdiction not a signatory to the MMoU.[39]

Although the majority of IOSCO members have signed the MMoU there are still 21 regulators who have not. Twenty of these have taken some steps to signing the MMoU, for example they have expressed a commitment to having their laws changed so that the laws will become compliant with the obligations of signatories under the MMoU.[40] However, Venezuela, has not yet even made this commitment.[41] There are also a small number of countries in the world that are not yet members of IOSCO including Monaco, Liberia, the Marshall Islands and Vanuatu. Each of these countries is considered an uncooperative jurisdiction or offshore financial centre. As it is now a condition of new members of IOSCO that they sign the MMoU, if these

---

[37] IOSCO, Presidents' Committee, *Resolution on IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information* (2013), online: <www.iosco.org/library/resolutions/pdf/IOSCORES50.pdf>.

[38] IOSCO, Media Release, IOSCO/MR/37/2013 "IOSCO Reinforces Standard on Cross-Border Cooperation" (18 September 2013), online: <www.iosco.org/news/pdf/IOSCONEWS299.pdf>.

[39] See British Columbia Securities Commission, *Conditions of Registration: Investment Dealers with a BC Office that Trade in the US Over-the-Counter Markets* (29 October 2013), online: <https://www.bcsc.bc.ca/Securities_Law/Policies/PolicyBCN/PDF/OTC_Conditions_of_Registration__Clean__October_29_2013/>.

[40] IOSCO, "2013 List of Non-Signatories to the MMoU", online: <www.iosco.org/about/?subSection=mmou&subSection1=2013_list>.

[41] *Ibid.*

countries wish to become members each will also have to ensure that their laws are consistent with the obligations of signatories of the MMoU and sign the MMoU before IOSCO will allow them to join.

One potential problem for IOSCO is that the ability to become a signatory often requires a change in the domestic laws of a jurisdiction. It may be that in some cases, politically, this simply cannot be achieved. Accordingly, despite the best efforts of IOSCO, some regulators may never be able to become full signatories if they cannot convince their domestic legislative body to make the necessary changes. Furthermore it is quite possible that some offshore financial centres are refusing to sign the MMoU and are not applying for IOSCO membership because they perceive that there may be a competitive advantage in protecting the privacy of their residents. For example, Monaco's securities regulator, the Commission de Contrôle des Activités Financières, stated that it will only provide information to a foreign authority if first, the authority is bound by professional secrecy offering the same level of guarantees as in the Principality and second, only if the information is exclusively used for the purposes for which it has been disclosed.[42] In 2008 the International Monetary Fund produced a report critical of this restrictive privacy requirement and recommended that it be changed to reflect the terms of the IOSCO MMoU.[43] However despite this recommendation it appears nothing has changed.

As a mere network of securities regulators IOSCO has no power to take any formal action against countries under international law. Nevertheless IOSCO has demonstrated that it is willing to take very robust action within the limitations of its power to coerce members to sign the MMoU. Its latest measure is to encourage members to restrict the ability of persons and entities resident in non-signatory jurisdictions from engaging in securities transactions. This technique has the potential to have the greatest influence thus far in pressuring countries to sign the MMoU. This is because if many IOSCO members introduce such restrictions, this could effectively constrain some of the activities of investors and entities resident in those non-signatory jurisdictions. For example, it may restrict investors resident in Monaco from accessing investment opportunities in some of the world's largest capital markets. This could in turn lead to such investors pressuring the securities

[42] Commission de Contrôle des Activités Financières, "International Action", online: <www.ccaf.mc/en/knowing-the-ccaf/international-action>.

[43] International Monetary Fund, *Technical Note on IOSCO Objectives and Principles of Securities Regulation-Update* (June 2008), online: <www.imf.org/external/pubs/ft/scr/2008/cr08218.pdf>.

authority of Monaco to sign the MMoU.

However there are some risks for IOSCO as an organization in moving towards stronger coercive measures. What has contributed significantly to IOSCO's growth and strength as an organization has been its broad and inclusive membership policy and assistance to regulators from emerging markets. The introduction of policies designed to isolate certain countries may paradoxically serve to weaken the organization and its influence particularly if other nations who are already members align themselves with the recalcitrant nations for political or economic reasons.

b. Will the signatories to the MMoU continue to meet their obligations?

It is critical to the overall success of the MMoU that members comply with requests that they receive under the MMoU. The MMoU, like other bilateral memoranda of understanding, is ultimately a form of 'soft law' as they are not binding on the parties. However, as noted by Roberta Karmel and Clair Kelly, in practice bilateral memoranda of understanding have proved to be quite effective:

> But sometimes soft law operates like hard law prior to codification... MOUs are not legally binding instruments. They are negotiated between the SEC and foreign regulators. Despite their nonbinding status, however, these agreements are followed. As previously noted, in 2007, the SEC made 556 requests to foreign regulators for assistance and information under MOUs and responded to 454 requests.[44]

Because of the multilateral nature of the MMoU and the procedures incorporated to resolve conflicts, the MMoU seems to be proving to be even more successful than bilateral memoranda of understanding. The MMoU has the effect of virtually compelling a response by a signatory to a request for information. The procedures to ensure compliance contained within the MMoU provide that in the event of non-compliance the matter is referred to the 'Monitoring Group' which can consider and recommend a range of possible options. These options include "providing a period of time for the signatory to comply; full peer review of a signatory that may not be in compliance; public notice of non-compliance; suspension of a signatory from

[44] Roberta S Karmel & Claire R Kelly, "The Hardening of Soft Law in Securities Regulation" (2009) 34:3 Brook J Intl L 883 at 940 [footnotes omitted].

MOU participation; or termination from MOU participation as provided in the MOU."[45]

Furthermore, despite the increase in requests for information via the MMoU and the fact that IOSCO members represent the full array of political and legal systems, to date conflict has been minimal in relation to member's obligations in complying with requests. This lack of conflict can be attributed to IOSCO's thorough and demanding screening process used in MMoU applications. Before a country is able to become a signatory, the applicant is assessed to determine whether they have the laws in place which would allow them to exchange required information and comply with the MMoU. In addition to the screening process, it can be argued that conflicts are also minimized by the strong motivation members feel to comply with the MMoU in order to preserve their reputation and credibility.[46]

One conflict has become public and perhaps shows the first break from the universal cooperation that has thus far been characteristic of cooperation under the MMoU. Since 2010 the SEC has been trying to obtain information from the China Securities Regulatory Commission (CSRC) in relation to allegations involving what have been called Chinese 'concept stocks' listed on US exchanges. These consisted of Chinese companies which were floated in the US market via reverse-mergers of existing, listed companies, thereby avoiding the SEC disclosure rules for new listings.[47] Many US investors lost their entire investment in these stocks when it became known that some of these companies had falsified their financial statements. As a result, the SEC launched an investigation. As part of that investigation the SEC sought, via the MMoU, the audit working papers prepared by the auditors of these companies. However the CSRC claimed that under their rules domestic auditors were prohibited from sending audit working papers on Chinese companies listed overseas to anyone outside of China. As such, it was argued by the CSRC that the MMoU did not obligate them to share such audit working papers with the SEC. It was reported that this issue was not resolved when SEC and CSRC representatives met in May 2012 in Beijing at an annual IOSCO conference. At this meeting SEC and CSRC officials exchanged retorts, the SEC arguing that it was not looking to assert itself

[45] IOSCO, *MMoU*, *supra* note 2 at 13.
[46] Rita Cunha, "The IOSCO Multilateral Memorandum of Understanding (MMoU): An International Benchmark for Securities Enforcement" (2010) 15:3-4 Unif L Rev 677 at 682.
[47] See generally Katherine T Zuber, "Breaking Down a Great Wall: Chinese Reverse Mergers and Regulatory Efforts to Increase Accounting Transparency" (2014) 102:4 Geo LJ 1307.

globally whereas CRSC officials argued China had the sovereign right not to cooperate with US investigators.[48]

This failure of the SEC in gaining access to these audit working papers demonstrates three possible limitations of the MMoU. First, the MMoU may not be specific or broad enough in terms of the information that must be provided and consideration may have to be given to expanding these terms. Second, it illustrates that the provision in the MMoU that allows a signatory to refuse to comply with a request on the grounds of "public interest" or "essential national interest" could be manipulated if an IOSCO member is lobbied by political or business groups not to comply. Finally, it may also indicate that tensions can arise if a signatory aggressively utilizes the MMoU to investigate the activities of persons who are not its own nationals.

Another possible issue that may lead to members not complying with their obligations under the MMoU is the lack of procedures to deal with sharing of the costs associated with processing requests. This could conceivably cause regulators from smaller countries with limited resources to renege on their obligations under the MMoU. Even for larger, well-funded regulators the work required to process requests could be seen as taking resources away from what may be more pressing domestic concerns. Indeed the resources of domestic regulators was one reason for the tension in relation to the Chinese concept stocks dispute. It was reported that approximately 200 of the CSRC's 1,200 staff are specifically assigned to investigations compared to one third of the SEC's 3,700 staff.[49]

It is therefore possible that members may not comply with requests they receive. However it is likely that these will only comprise the minority of cases and that most requests will be complied with. It also seems unlikely that such tensions will lead to a widespread non-compliance and or a breakdown in the operation of the MMoU. This is because of the interconnectedness of markets and the fact that the MMoU seems to be fulfilling a need of securities regulators to quickly and easily obtain information they require to effectively enforce their domestic securities laws.

---

[48] Shen Hu et al, "Watchdogs Growl over Concept-Stock Probes", *Caixin Online* (6 November 2012), online: <english.caixin.com/2012-06-11/100399298.html>. It was also reported that that CSRC officials may not have access to the financial information as many Chinese concept-stock companies are incorporated in the Cayman Islands, see also Shen Hu & Zheng Fei, "SEC Probes Hit a Wall in Uncooperative China", *MarketWatch* (11 June 2012), online: <www.marketwatch.com/story/sec-probes-hit-a-wall-in-uncooperative-china-2012-06-11>.

[49] Hu & Fei, *supra* note 48.

III. POLICY DEVELOPMENT

Apart from the MMoU, IOSCO's major achievements have been in the formulation of policies in relation to securities regulation which can then be used as a guide by members to formulate their own laws and policies. This policy work has involved both the development of an outline of what should be included within the general framework of securities regulation in a country, as well as more targeted policy recommendations to address specific issues.

The general framework for securities regulation formulated by IOSCO is contained in its key policy statement, the *Objectives and Principles of Securities Regulation.*[50] These objectives and principles were originally formulated in 1998. Since that time these objectives and principles have remained relatively constant with only infrequent modification. The most dramatic change occurred after the global financial crisis in 2008, which exposed gaps in the framework of securities regulation in many countries. As such, IOSCO added one objective and eight more principles.[51] In addition to the *Objectives and Principles* IOSCO has also published a detailed methodology document setting out how these principles should be interpreted and what kinds of factors need to be considered in relation to whether each of these principles have been met.[52]

Furthermore IOSCO regularly promulgates detailed and more specific policy statements to address particular issues. These more targeted policy statements are formulated and developed through IOSCO's committee structure. Such policy statements are also designed to be consistent with the overall framework contained in the *Objectives and Principles* and provide more details as to the exact type of rules which should be adopted. For example, during 2014 IOSCO published 14 reports, 11 consultation documents, 3 staff working documents and a research note.[53] Some of these documents comprised policy recommendations in relation to specific areas of securities regulation[54] while others consisted of surveys of the progress of members in

---

[50] IOSCO, *Objectives*, *supra* note 4.

[51] *Ibid.*

[52] IOSCO, *Methodology for Assessing Implementation of the IOSCO Objectives and Principles of Securities Regulation* (September 2011), online: <www.csrc.gov.cn/pub/newsite/gjb/gjzjhzz/ioscojgmbyyz/201004/P020150520677186250144.pdf > [IOSCO, *Methodology* (2011)].

[53] IOSCO, "Public Reports", online: <www.iosco.org/publications/?subsection=public_reports>.

[54] See e.g. IOSCO et al, *Point Of Sale Disclosure in the Insurance, Banking and Securities Sectors* (30 April 2014), online: <www.iosco.org/library/pubdocs/pdf/IOSCOPD439.pdf>.

adopting recommended regulations.[55]

This policy development work by IOSCO is clearly important and will undoubtedly continue and probably expand due to widespread support from both IOSCO members and international organizations such as the G20. In developing its policies IOSCO fulfills the need to formulate consistent global policies to deal with issues in securities regulation which cannot be effectively addressed at a national level. Furthermore IOSCO can use these policy statements to encourage countries to adopt more stringent standards for securities regulation.

Nevertheless, while IOSCO can develop specific policy recommendations, it cannot force countries to actually adopt these recommendations. The ultimate decision to adopt a particular policy by a given country is determined by the body in that country which sets the rules for securities regulation. That could be the legislature or perhaps the securities regulator if it has been delegated such powers. As such, on one view, IOSCO's role in setting the system of global securities regulation can be viewed as relatively weak. For example, Roberta Karmel states:

> IOSCO's harmonization efforts tend to be at a level of generality that may be an insufficient prod to regulatory reform. When national interests are at stake, securities regulators follow those interests rather than IOSCO directives. Since IOSCO has no enforcement mechanisms aside from peer pressure, and its members are so numerous and varied, it is unrealistic to expect rigorous and detailed harmonization of new standards of conduct or regulation. Nevertheless, IOSCO can play a useful role in highlighting critical emerging areas where securities regulation is in need of reform, and it has done so with regard to a number of systemic risk issues in the trading markets.[56]

It can be argued that this perspective perhaps too readily devalues IOSCO's power and influence in the harmonization of securities regulation. In particular IOSCO can influence the setting of securities regulation in two important ways. First, IOSCO has had and continues to have an important role in setting the discourse of securities regulation. It is likely that IOSCO's numerous policy statements often become a first reference point to guide policy makers within a particular country who have been tasked with developing rules and policy in relation to a particular issue. As such many of

---

[55] See e.g. IOSCO, *Peer Review of Regulation of Money Market Funds: Report of Key Preliminary Findings to the G20 Leaders' Summit* (November 2014), online: <www.iosco.org/library/pubdocs/pdf/IOSCOPD463.pdf>.
[56] Roberta S Karmel, "IOSCO's Response to the Financial Crisis" (2012) 37:4 J Corp L 849 at 850–51.

the ultimate rules that are adopted are likely to contain at least some elements which reflect the policies set by IOSCO. Second, as is demonstrated by the MMoU process, IOSCO may be able to exert significant pressure on countries to adjust their laws to fit within the policy framework it has developed. As such IOSCO could perhaps adopt a similar methodology in the future in order to pressure countries to make adjustments to their laws.

IV. IOSCO'S ROLE BEYOND THE MMOU AND POLICY DEVELOPMENT

It seems clear that IOSCO's role will continue to expand as it works towards pursuing standardization of principles of securities regulation and improving the enforcement outcomes of its members. To this end IOSCO will continue to develop policy in relation to problematic areas of securities regulation and will continue to promote the use of the MMoU. What is open to debate is whether it should have a role beyond these two areas and, if so, what this role should be.

a. The impetus for change

The momentum for an expanded role for IOSCO is unlikely to come only from its current prominence as the world leader in the coordination of securities regulation. The push for an expanded role for IOSCO will continue as closer links are forged between governments, securities regulators and securities industry participants over the next few decades. As such there will likely be continued pressure for consistent global regulation and problems in securities regulation are likely to continue to emerge for consideration by governments and global political bodies such as the G20. Although this may suggest that there is a need for a global securities regulatory body to set, coordinate and enforce compliance with consistent standards of securities regulation, in reality the likelihood of such a global regulator is small to nonexistent. As summarized succinctly by Chris Brummer, it is difficult to envisage that there would be the political will to create such a regulator:

> First, and perhaps most obvious, it would be almost impossible to generate sufficient international support for the creation of a single, global regulator that would carry with it, for individual states, the relinquishment of national sovereignty and autonomy. Establishing a global authority would require countries to delegate authority to a supranational authority, an act involving a

> "dynamic" delegation of authority such that any decision made by that authority would create de facto changes in the domestic laws of member regulators. It is unlikely that national legislatures would agree to compromise their domestic powers of policymaking and governance in that way, especially in relation to large domestic financial institutions and firms.[57]

For these reasons it is very likely that it will fall to IOSCO to de facto fulfill the role as a global securities regulator to the extent that is possible within the limitations of its mandate.[58]

b. An operational role in relation to detection, investigation and enforcement?

IOSCO currently does not play any operational role in the detection, investigation and enforcement of securities regulation. The closest it comes to assuming such a role is by assisting members in resolving disputes that arise in the process of requesting information under the MMoU. As connections between regulators develop there may be a need for IOSCO to take a more operational role. This could include, for example, by helping conduct or coordinate investigations that cross international boundaries. IOSCO's links with other international organizations and networks, such as Interpol, could potentially be used to facilitate such investigations.[59]

However it is unlikely that IOSCO would obtain, or even seek, such an operational role. Again this is because of the substantial jurisdictional hurdles that would have to be overcome for IOSCO to be able function in

---

[57] Chris Brummer, *Soft Law and the Global Financial System* (New York: Cambridge University Press, 2012) at 269 [footnotes omitted].

[58] This is particularly the case as the G20 to date has no permanent secretariat. Whilst establishing a permanent secretariat has been suggested, at present there is no consensus as to whether this should be established, how it will be staffed and where it will be located. See generally Johannes F Linn, "Preliminary Suggestions for a G20 Summit Secretariat", *The Brookings Institution*, online: Wolfensohn Center for Development <www.kdi.re.kr/upload/15230/2-3.pdf>; Barry Carin, "A G20 'Non-Secretariat'", *Center for International Governance Online*, online:
<https://www.cigionline.org/sites/default/files/A%20G20%20'Non-Secretariat'.pdf>; Jongryn Mo, "Placing the G20 in an Emerging System of Global Governance" (2010) Hills Governance Center at Yonsei Working Paper No 10-02, online:
<csis.org/files/publication/HGCY_Working_Paper_No_1002.pdf>.

[59] In 2007 IOSCO stated that "[i]n tackling securities violations IOSCO has also increased its contact and engagement with other international bodies in this area including the Financial Action Task Force, the FSF Offshore Financial Centre Review Group, Interpol and the Egmont Group." IOSCO, *Annual Report* (2007) at 21, online:
<https://www.iosco.org/annual_reports/annual_report_2007/pdf/annual_report_2007.pdf>.

such a position. This would include the challenges of working within multiple different legal systems as well as the fact that it may require sovereign nations to concede powers to IOSCO. Even certain organizations more established under international law than IOSCO are not recognised by some countries. An example of this is the International Criminal Court, which is not recognized by the United States.[60]

Nevertheless, although IOSCO is unlikely to have an operational role in investigations in the foreseeable future, as the MMoU has demonstrated, it is still possible that IOSCO can have an impact beyond the mere formation of policy. As such it could potentially develop other mechanisms or tools which its members might utilize in relation to their regulation and enforcement functions.

Indeed IOSCO has signalled that it is considering developing such new tools for members. One focus appears to be on how it can facilitate the mutual recognition of market intermediaries across borders. IOSCO has set up a taskforce to develop such a mutual recognition regime. This taskforce has been directed to:

> [D]evelop a tool box of measures in regulating securities markets that cross borders. If appropriate, it will then develop principles to guide the coordinated use of these tools. The tools to be considered may include substituted compliance, mutual recognition and supervisory co-operation. The Task Force's work is intended to help policy makers and member regulators in addressing the challenges they face in regulating cross-border activity.[61]

Although the details have yet to be developed, it appears that such a mutual recognition regime will likely comprise a system that would allow a market participant registered in one country (subject to the supervision of that jurisdiction's securities regulator), to easily obtain recognition in another country. In devising such a system it seems inevitable that IOSCO will set universal standards which will have to be met by securities regulators in

---

[60] See e.g. William A Schabas, *An Introduction to the International Criminal Court*, 2nd ed (Cambridge, UK: Cambridge University Press, 2004) at 420.

[61] IOSCO, Media Release, IOSCO/MR/11/2013 "IOSCO to Progress Reform Agenda Under New Leadership" (1 April 2013) at 4, online: <www.iosco.org/news/pdf/IOSCONEWS273.pdf>. See also the comments of Jane Diplock, former IOSCO chairman, in Brooke Masters, "IOSCO Pact Reshapes Market Enforcement", *Financial Times* (8 January 2010), online: <www.ft.com/cms/s/0/b843b8f0-ee45-11de-a274-00144feab49a.html?nclick_check=1>,where she stated "[n]ow that almost all of the enforcers are signed up … Iosco's next cooperative effort will focus on cross-border supervision".

relation to the supervision of their market intermediaries before they can become party to such a mutual recognition regime.

It appears that there is also an opportunity for IOSCO to expand the scope of their activities and further develop other systems which could assist securities regulators, particularly in their role to detect, investigate and enforce securities regulation. IOSCO recently resolved that "[w]ith regard to building on the IOSCO MMoU after 1 January 2013, the Executive Committee was asked to consider if a further standard beyond the existing IOSCO MMoU should be developed, taking into account developments in markets and supervisory and enforcement practices."[62]

There are a number of such standards or systems which could be developed by IOSCO. For example, IOSCO could develop a system to share intelligence in relation to possible breaches of securities regulations. One major deficiency with the MMoU is that its focus is on the investigation and enforcement of securities violations that have already been detected by the requesting member. It was not designed to share other types of information. The MMoU does provide that "[e]ach Authority will make all reasonable efforts to provide, without prior request, the other Authorities with any information that it considers is likely to be of assistance to those other Authorities in securing compliance with Laws and Regulations applicable in their jurisdiction."[63]

This passage could possibly lead members to share other types of less precise information, commonly referred to as 'intelligence'. This could include, for example, information as to possible market abuse schemes or the names of persons and organizations under investigation. Yet given the imprecise nature of this intelligence, it is unlikely that this will lead regulators to proactively assist each other with the sharing of intelligence information. As such the MMoU could be strengthened and expanded by providing more specific details of the type of intelligence information to be shared. Alternatively it may be more effective to develop an alternative system to share such information.

If such a system was to be developed the types of intelligence that would be shared would have to be identified. Most securities regulators maintain one or more databases of 'intelligence' type information which can consist of, for example, information they have collected from complaints

---

[62] IOSCO, Presidents' Committee, *Resolution on IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information* (2012), online: <www.iosco.org/library/resolutions/pdf/IOSCORES36.pdf>.

[63] IOSCO, *MMoU*, *supra* note 2 at 8.

received from the public. They may also have access to other intelligence databases such as those maintained by other law enforcement agencies.

Of course many regulators may not be comfortable releasing such information outside their jurisdiction by sharing it with other regulators. The concern might be that information may be imprecise or even wrong and as such there could be legitimate concerns with releasing it. Inaccurate information may be used inappropriately and could therefore expose the regulator who released it to liability if misused. However, notwithstanding such concerns, it may be something which IOSCO could at least explore as a possibility as there may be some information that regulators are comfortable sharing.

For example, most regulators publically release information in relation to the names of persons and organizations that have been prosecuted or sanctioned. Often this is accompanied by information in relation to the nature of their activities and penalties imposed. It is likely that there would be little resistance to disseminating this type of information more broadly. Therefore IOSCO could, as a minimum, develop a way to facilitate the sharing of this type of information by establishing a central database requiring members to provide information about persons and organizations that had been prosecuted or sanctioned for securities violations.

V. REPLICATING THE MMOU METHODOLOGY TO OBTAIN REGULATORY CONVERGENCE

a. The assessment process

A key part of IOSCO's mission is to work towards the worldwide harmonization of securities regulation. This is reflected in the fact that it in 2010 it changed one of its aims from "to cooperate together to promote high standards of regulation" to "developing, implementing and promoting adherence to internationally recognised and *consistent* standards of regulation".[64]

Part of IOSCO's strategy to date in terms of working towards achieving harmonization of securities regulation has been an evaluation process in relation to the level of implementation by each country of the

[64] IOSCO, Presidents' Committee, *Mission, Goals and Priorities*, *supra* note 3 [emphasis added].

IOSCO *Objectives and Principles of Securities Regulation*.[65] Initially IOSCO instigated this process by way of a self-assessment exercise. Alternatively a member could elect to have the International Monetary Fund (IMF) assess its compliance through what is called its Financial Sector Assessment Program.[66]

In 2011 IOSCO established an Assessment Committee to develop and deliver programs to identify and assess implementation of both IOSCO's *Objectives and Principles of Securities Regulation* as well as other standards and polices contained in IOSCO reports or resolutions.[67] It appears that as a result IOSCO is moving from a focus on member self-assessment to IOSCO assessing each of its own members. The rationale may be that the number of self-assessments is too low and is hindering progress in achieving worldwide consistency of securities regulation.

b. Using the MMoU methodology to achieve harmonization

At present IOSCO envisages the assessment process as pivotal in working towards harmonization. Yet despite this aim it is likely that this assessment process methodology will not, of itself, be sufficient over the longer term to persuade all members to harmonize their securities regulation to conform to the IOSCO framework. Without more, members may try to tailor their securities regulation to domestic concerns rather than the international standards promulgated by IOSCO.

However, IOSCO has shown that members are more willing to accept increased convergence of domestic regulation to international standards if there is an incentive in place. By holding out the ability to access the MMoU as a 'carrot' IOSCO has been effective in having most of its members change their domestic laws to bring them into line with some of IOSCO's *Objectives and Principles*.

Given this success, IOSCO could perhaps consider trying to replicate this methodology with a view to working towards convergence in relation to some of the other *Objectives and Principles*. As referred to above, there appears to be the potential for IOSCO to develop other systems and mechanisms which are needed by securities regulators. Giving securities regulators access

---

[65] IOSCO, *Methodology* (2011), *supra* note 52. This replaced IOSCO, *Methodology for Assessing Implementation of the IOSCO Objectives and Principles of Securities Regulation* (October 2003), online: <www.iosco.org/library/pubdocs/pdf/IOSCOPD155.pdf>.

[66] See "The Financial Sector Assessment Program (FSAP)", *International Monetary Fund* (15 April 2015), online: <www.imf.org/external/np/exr/facts/fsap.htm>.

[67] IOSCO, *Annual Report* (2011), *supra* note 10 at 44.

to these proposed systems could be made contingent upon regulators making changes to their own laws and, in turn, this could be used as a lever to bring about further convergence of securities regulation. As such IOSCO could work towards hardening its 'soft law' policies by having them incorporated into domestic statutes.

The success of such a strategy may depend upon the area in which IOSCO is seeking convergence. Critics of the capacity of transnational regulatory networks (TRNs), such as IOSCO, question their ability to secure global cooperation. Among them are Pierre-Hugues Verdier who contends that there are limits to obtaining convergence and that securities regulators will cooperate only where preferences are aligned. Verdier argues that where domestic preferences diverge, agreement is unlikely to take place.[68] In 2009 Verdier predicted that IOSCO would not be able to continue to have offshore financial centres (OFCs) cooperate under the umbrella of the IOSCO MMoU as OFCs have incentives to renege, and it is doubtful that sustained compliance can be obtained through TRNs.[69] However, despite Verdier's predictions, IOSCO has been able to obtain significant cooperation from some OFCs. IOSCO has managed to have some jurisdictions change their domestic laws from that which may have given them a competitive advantage. For example, Switzerland's signing of the MMoU indicates that in some circumstances domestic preferences are giving way to considerations of international cooperation.

As an example of a situation where domestic preferences diverged Verdier points to the fact that in early 1990s IOSCO did not reach agreement on capital adequacy rules for securities firms, despite the fact that this would have reduced global systemic risk. IOSCO failed to reach agreement principally because US banks, concerned about their international competitive position, pressured US regulators to resist agreeing to the proposed rules.[70]

While it is true that cooperation in relation to enforcement of securities regulations is something that would be attractive to most countries, the fact remains that IOSCO may not experience the same level of cooperation in certain areas of regulation. This is because there may be more diverse domestic preferences in relation to other areas (such as disclosure standards required for companies engaging in public fundraising), and as

---

[68] Verdier, *supra* note 11.
[69] *Ibid* at 150.
[70] *Ibid* at 149–50.

such countries may perceive a competitive advantage in keeping their securities regulations distinct.[71] However, even in areas where problems may exist, as markets become more global, pressure for international cooperation will likely increase. Pressure for cooperation will not be based solely upon increased and repeated interactions between governments and their officials, but also from corporations that operate globally and are seeking consistent and predictable standards. This is likely to result in an increased likelihood that, over time, domestic agendas may yield to international pressures for convergence of securities regulations.

CONCLUSION

Over the last two decades IOSCO has evolved to become an important organization for securities regulators, improving their ability to enforce cross jurisdictional securities offenses by way of the MMoU. The importance of the MMoU is likely to continue to grow and evolve as the number of requests made pursuant to its provisions increase and the number of countries that have not signed continues to decline as IOSCO's initiatives to coerce countries to sign the MMoU take effect.

IOSCO has also emerged as an important organization in setting global standards for securities regulation through its *Objectives and Principles* as well as by way of more specific policy recommendations. This standard policy setting role is also likely to continue to progress as governments and corporations recognise the advantages associated with universal standards of securities regulation.

Moreover, as described in the final parts of this article, in addition to policy work and enforcement of the MMoU, it seems that there are further opportunities for IOSCO to increase its influence and the scope of its mission. Whilst this is unlikely to take the form of an operational role, IOSCO does seem to have capacity to develop systems and other multilateral memoranda of understanding of potential utility for its members. Such mechanisms could, in turn, be used by IOSCO as a lever as it works towards fulfilling its mission to harmonize securities regulations. If IOSCO does in fact proceed along such a path, it is likely to further increase in importance. Whilst this will not likely result in it becoming a supranational regulator, this

[71] See generally Amir N Licht, "Games Commissions Play: 2x2 Games of International Securities Regulation" (1999) 24:1 Yale J Intl L 61.

will, to at least some extent, enable it to play an increasingly significant role in the global governance of securities regulation.