THE FINANCIAL ACTION TASK FORCE: A STUDY IN BALANCING SOVEREIGNTY WITH EQUALITY IN GLOBAL ADMINISTRATIVE LAW

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I. INTRODUCTION

Global administrative law is one of the more important emerging topics in international law. The term refers generally to a developing set of norms that govern the various transnational systems of regulation and regulatory cooperation designed to manage globalization.[1] The apparatus most closely associated with global administrative law is the transnational network—a broad term meant to highlight institutions, both formal and informal, in which national regulators gather and attempt to set, coordinate and enforce common policies.[2]

The typical methodology used to examine global administrative law is "top-down."[3] Such investigations are "top-down" in that they either focus on a broad swath of transnational networks in an attempt to define common characteristics or, as is common in the field of international law, compare global administrative entities with similar domestic systems.[4] For example, a typical approach is to examine global administrative law through the lens of the American administrative law system, for example the Administrative Procedures Act.[5]

This article takes the other analytical approach to the global administrative law phenomenon. Rather than viewing global administrative law in its vast entirety, this article's focus is comparatively narrow. By examining one administrative institution, the Financial Action Task Force ("FATF"), this

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1. Benedict Kingsbury et. al., *The Emergence of Global Administrative Law*, LAW & CONTEMP. PROBS., Summer/Autumn 2005, at 15, 16. Put another way, "[t]he concept of Global Administrative Law begins from the twin ideas that much global governance can be understood as administration, and that such administration is often organized and shaped by principles of an administrative law character." Benedict Kingsbury et. al., *Foreword: Global Governance as Administration—National and Transnational Approaches to Global Administrative Law*, LAW & CONTEMP. PROBS., Summer/Autumn 2005, at 1, 2.

2. For a discussion of the various forms of transnational networks *see infra* Part II.A.

3. *See, e.g.*, Richard B. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law*, LAW & CONTEMP. PROBS., Summer/Autumn 2005, at 63.

4. *See id.*

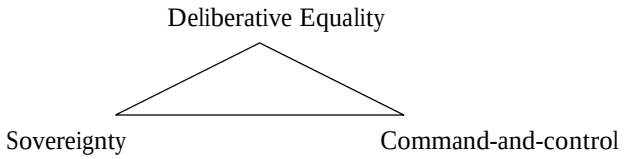
5. *See generally id.*

article illustrates obstacles to effective and legitimate global governance when regulatory networks operate in the proverbial "real world." As such, the article adds a case study to the emerging literature.

This article examines the FATF according to the normative principles of legitimacy and effectiveness as applied to global administrative law. Also, this article critiques the assumption that global administrative law, as an apolitical and quasi-legal structure, adds a degree of objectivity into global governance. Specifically, this article explores: membership in the FATF, checks-and-balances on the institution's power, oversight and implementation of its goals, and interactions between civil-liberties and the FATF's adopted policies. As an illustration of the FATF in action, the article analyzes the Cayman Islands' tumultuous relationship with the organization.[6]

The article will show how the FATF negotiates the difficult trade-offs between: 1) protecting civil-liberties while combating money laundering; 2) respecting concepts of state sovereignty; and, 3) adhering to the norm of deliberative equality, all of which inevitably constrain the potential of global administrative law in a heterogeneous environment. Global networks such as the FATF, and more specifically jurisdictions affected by its policies, accept less "pure" forms of sovereignty, deliberative equality, and command-and-control regulation over the civil liberties/security tradeoff in what will be deemed the triangle of financial governance.[7]

The Triangle of Financial Governance



The result of the examination is a conceptual device highlighting some of the constraints facing effective and legitimate global administrative law. Finally, the article will offer a critical assessment of the underlying assumptions driving the FATF's quest for legitimacy.

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6. *See infra* Part II.B.

7. I have been inspired to create this model from a similar one used to describe the conundrum facing Israel. As one scholar describes the inevitable trade-offs facing the Israelis in their relationship with the Palestinians: "I only see three choices for the future of [Israel]: A Jewish state that isn't democratic, a democratic state that isn't Jewish, or a Jewish and democratic state that doesn't include all of the Greater Land of Israel. I don't see any other choices." Eatta Prince-Gibson, *Across the Great Divide*, JERUSALEM POST, Dec. 22, 2000, at 4B.

II. THE FINANCIAL ACTION TASK FORCE

A. Background

Established as an independent organization by the G-7 in 1989, the FATF's main purpose is to implement national and international policies to combat money laundering and terrorist financing.[8] The FATF is a significant part of an emerging global administrative structure intended to regulate, or at least monitor, the flow of capital.[9] As evidence of the organization's impact, the FATF nearly doubled in size from its original sixteen members (the G-7, the European Commission, and eight other countries) to twenty-eight jurisdictions in the span of three years.[10] Currently, the FATF has thirty-one member jurisdictions, two member organizations, and one state with observer status (mainland China).[11] The group's membership encompasses the major financial centers of Europe, Asia and America.[12]

The FATF illustrates the many different functions that global administrative institutions fulfill.[13] First, the FATF is an information network. The organization reviews money laundering and terrorist financing techniques, as well as the resulting countermeasures, in order to establish best practices for capital-handling entities.[14]

Second, the FATF is an enforcement network. The organization supervises members' progress in implementing common measures and maintains a list of jurisdictions that do not comply with fundamental standards.[15] Maintenance of the non-complying list is an attempt to "name-and-shame" members and

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8. Financial Action Task Force on Money Laundering, *What is the FATF?*, http://www.fatf-gafi.org/document/57/0,2340,en_32250379_32235720_34432121_1_1_1_1,00.html (last visited Sept. 8, 2006) [hereinafter *What is the FATF?*].

9. Other international organizations play a substantial role in the fight against money laundering and terrorist financing. One example is the United Nations Office on Drugs and Crime. *See, e.g.*, United Nations Office on Drugs and Crime, *Money Laundering*, (July 30, 2006), http://www.unodc.un.or.th/money_laundering/.

10. Financial Action Task Force on Money Laundering, *About the FATF*, http://www.fatf-gafi.org/pages/0,2966,en_32250379_32236836_1_1_1_1_1,00.html. (last visited Sept. 8, 2006) [hereinafter *About the FATF*]. The word jurisdiction is used to refer to all members of the FATF since some states have different territories that *de facto* act as independent members of the FATF.

11. Financial Action Task Force on Money Laundering, *FATF Members and Observers*, http://www.fatf-gafi.org/pages/0,2966,en_32250379_32236869_1_1_1_1_1,00.htm (last visited Sept. 8, 2006) [hereinafter *Members and Observers*].

12. FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, ANNUAL REPORT 2000-2001 3 (June 22, 2001), *available at* http://www.fatf-gafi.org/dataoecd/13/2/34328033.pdf [hereinafter 2001 ANNUAL REPORT].

13. I am referring to the competencies and taxonomy of global networks as outlined by Professor Anne-Marie Slaughter in her article *Sovereignty and Power in a Networked World Order*, 40 STAN. J. INT'L L. 283 (2004).

14. *See, e.g.*, FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, REPORT ON MONEY LAUNDERING TYPOLOGIES 2003-2004, *available at* http://www.fatf-gafi.org/dataoecd/19/11/33624379.pdf.

15. Professor Slaughter suggests that enforcement networks "contribute to world order by helping nations enforce law they have individually or collectively determined to serve the public good." Slaughter, *supra* note 13, at 291.

non-members alike into general compliance with a core group of FATF policies.[16] As is common with such networks, the organization lacks an independent, coercive enforcement mechanism. Instead, the FATF relies on its potential to recommend the implementation of domestic actions by members against uncooperative jurisdictions and, in a more nuanced manner, its ability to signal the market that a particular area is a haven for illicit behavior.[17] Adherence to the FATF's principles means that cooperating jurisdictions avoid the additional scrutiny and corresponding red-tape to which non-complying jurisdictions are subject via Recommendation 21, which calls for FATF members to undertake special attention to transactions with named jurisdictions.[18]

Finally, the FATF is a harmonization network.[19] One of the FATF's enumerated goals is to promote the adoption and implementation of uniform measures to fight money laundering.[20] For example, the FATF's Nine Special Recommendations on Terrorist Financing are designed for universal application.[21]

In the context of harmonization, the FATF's most significant contribution to global financial governance comes from its report known as the "Forty Recommendations." The Forty Recommendations is a plan of action the

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16. "Name-and-shame" refers to a process in which non-compliant jurisdictions are identified in a hope that the publicity will cause them to change their policies.

17. Andrew Ayers, *The Financial Action Task Force: The War on Terrorism Will Not Be Fought on the Battlefield*, 18 N.Y.L. SCH. J. HUM. RTS. 449, 451 (2002).

18. Financial Action Task Force on Money Laundering, *The Forty Recommendations* (2003), *available at* http://www.fatf-gafi.org/document/28/0,2340,en_32250379_32236930_33658140_1_1_1_1,00.html#40recs [hereinafter *Forty Recommendations*]. Recommendation 21 states:

> Financial institutions should give special attention to business relationships and transactions with persons, including companies and financial institutions, from countries which do not or insufficiently apply the FATF Recommendations. Whenever these transactions have no apparent economic or visible lawful purpose, their background and purpose should, as far as possible, be examined, the findings established in writing, and be available to help competent authorities. Where such a country continues not to apply or insufficiently applies the FATF Recommendations, countries should be able to apply appropriate countermeasures.

Id.

19. Professor Slaughter argues that harmonization networks allow "nations to standardize their laws and regulations in areas where they have determined that it will advance their common interests . . . ." Slaughter, *supra* note 13, at 291.

20. *About the FATF*, *supra* note 10.

21. *Id.* A ninth special recommendation was added on October 22, 2004. Press Release, Financial Action Task Force, FATF Targets Cross-Border Cash Movements by Terrorists and Criminals, *available at* http://www.fatf-gafi.org/dataoecd/8/5/34301987.pdf (last visited July 12, 2006).

organization deems essential in the fight against money laundering.[22] Many of the Forty Recommendations require specific action to be undertaken by adhering jurisdictions.[23] To date, the FATF has completed two rounds of self-assessment, followed by mutual evaluation of its member and some non-member jurisdictions, critiquing their implementation of the Forty Recommendations.[24] The Forty Recommendations were updated in 2003, after a notice-and-comment period with civil society and private sector participation, to reflect new thinking about money laundering.[25]

Following the attacks of 9/11, the development of a global standard in the fight against terrorist financing was added to the mission plan of the FATF.[26] Subsequently, the group issued standards for combating terrorist financing – the Nine Special Recommendations.[27] Like the Forty Recommendations, the Nine Special Recommendations are not a binding international convention. Rather, they represent a political commitment from all member jurisdictions to take common action to prevent their financial institutions from supporting terrorist activity.[28]

Self-assessment exercises and mutual evaluations by sister jurisdictions and the FATF Secretariat are the two instruments by which the organization monitors progress in implementing the Recommendations.[29] The self-assessment consists of a standardized questionnaire all members are required to complete.[30] The results are posted on the FATF's website and included in the organization's annual reports. During the mutual evaluation process, each jurisdiction is examined by the FATF in the course of an on-site visit conducted by a team of experts who go through the jurisdiction's domestic legislation to check for consistency with FATF-based policies.[31]

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22. *Forty Recommendations*, *supra* note 18.

23. FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, ANNUAL REPORT 2001-2002 19 (June 21, 2002), *available at* http://www.fatf-gafi.org/dataoecd/13/1/34328160.pdf [hereinafter 2002 ANNUAL REPORT]. Twenty-eight of the recommendations require specific action. *Id.*

24. *About the FATF*, *supra* note 10.

25. FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, REVIEW OF THE FATF FORTY RECOMMENDATIONS CONSULTATION PAPER iii. (May 30, 2002), *available at* http://www.fatf-gafi.org/dataoecd/32/3/34046414.pdf [hereinafter FORTY RECOMMENDATIONS CONSULTATION PAPER].

26. Financial Action Taskforce on Money Laundering, *Mandate for the Future of the FATF (September 2004-December 2012)*, *available at* http://www.fatf-gafi.org/pages/0,2966,en_32250379_32236846_1_1_1_1_1,00.html# mandate (last visited July 16, 2006) [hereinafter *Mandate for the Future of the FATF*].

27. *About the FATF*, *supra* note 10.

28. Financial Action Task Force on Money Laundering, *Money Laundering: FATF Documents on the Forty Recommendations*, *available at* http://www.fatf-gafi.org/document/28/0,2340,en_ 32250379_32236930_33658140_ 1_1_1_1,00.html.

29. Financial Action Task Force on Money Laundering, *FATF Standards: Monitoring the Implementation of the Forty Recommendations*, http://www.fatf-gafi.org/document/60/0,2340,en_32250379_32236920_3403 9228_1_1_1_1,00.html (last visited July 25, 2006) [hereinafter *Monitoring the Implementation*].

30. *Id.*

31. *Id.*

At first, the FATF relies on peer pressure to deal with jurisdictions not in compliance with its policies.[32] For a wayward jurisdiction, the first remedial action is additional monitoring in the form of a progress report.[33] At the same time, the organization can use the bully pulpit of the FATF Secretariat to shame jurisdictions into compliance.[34]

Next, the FATF can call on members to apply Recommendation 21, which calls for financial institutions to give special attention to any financial transaction with entities in a non-complying area.[35] Recommendation 21 takes the form of domestic legislation, like 31 C.F.R. 103.18 in the United States (discussed below), that increases the cost of doing business in the jurisdiction via the red-tape of additional reporting requirements. Also, membership in the FATF can be suspended.[36] The FATF prefers, however, to keep dialogue open with members who have gone astray from the group's policy. The FATF has never suspended any jurisdiction's membership despite the fact that many are behind in their implementation of the Forty Recommendations.[37]

In 1999 the FATF introduced a major project to force non-members with deficient anti-money laundering legislation to implement new laws.[38] The non-cooperative countries and territories ("NCCT") initiative is designed to ensure that all financial centers "adopt and implement measures for the prevention, detection and punishment of money laundering."[39] The creation of the NCCT list, and the focus on non-members, was partially caused by the success of the FATF in harmonizing standards between its members. As FATF members cleaned up their domestic financial infrastructure, weaknesses in non-members became more apparent as short-term capital began to flow into the lax areas.[40] As of June 23, 2006, there was one state on the NCCT.[41]

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32. *Id.*

33. *Monitoring the Implementation*, *supra* note 29.

34. *Id.*

35. *Monitoring the Implementation*, *supra* note 29. Also, the FATF has called on members to implement counter-measures against wayward jurisdictions beyond those under Recommendation 21. *See, e.g.*, Press Release, Financial Action Task Force on Money Laundering, FATF Decides to Impose Counter-Measures on Myanmar (Nov. 3, 2003), *available at* http://www.fatf-gafi.org/dataoecd/43/53/33690664.pdf.

36. *Monitoring the Implementation*, *supra* note 29.

37. For example, the United States was in full compliance with only 17 of the 40 Recommendations according to the 2002 Annual Report. 2002 ANNUAL REPORT, *supra* note 23, at Annex C, Chart (b). It should be noted, however, that the FATF came very close to suspending Austria's membership. *See* Press Release, Financial Action Task Force on Money Laundering, FATF Welcomes Proposed Austrian Legislation to Eliminate Anonymous Passbooks (June 15, 2000), *available at* http://www.fatf-gafi.org/dataoecd/59/10/35717942.pdf.

38. Amy Walters, *The Financial Action Task Force on Money Laundering: The World Strikes Back On Terrorist Financing*, 9 LAW & BUS. REV. AM. 167, 169 (2003).

39. Financial Action Task Force on Money Laundering, *NCCT Initiative: More Information About the Non-Cooperative Countries and Territories Initiative*, http://www.fatf-gafi.org/document/51/0,2340,en_32250379_32236992_33916403_1_1_1_1,00.html.

40. FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, FATF REVIEW TO IDENTIFY NON-COOPERATIVE COUNTRIES OR TERRITORIES: INCREASING THE WORLD-WIDE

The NCCT attempts to ensure a minimal level of compliance with the FATF policies through an enforcement method similar to the one utilized in the context of the Forty Recommendations. First, the NCCT exists as a "name-and-shame" device.[42] The list is made public to alert interested parties and the market that a jurisdiction has taken insufficient steps to combat money laundering. Second, FATF members are encouraged to take actions to convince the jurisdiction of the need to improve its legislation and domestic practices.[43] In the United States, financial institutions in the listed jurisdictions are subject to the reporting rules contained in 31 C.F.R. 103.18.[44] Although transactions between American entities and entities in NCCT jurisdictions are not banned, 31 C.F.R. 103.18 imposes additional reporting and scrutiny requirements that increase the cost of doing business in the affected area.[45]

The first step on the path to possible listing is review by an *ad hoc* regional group. The four regional review groups (the Americas, Asia/Pacific, Europe, Africa and the Middle East) meet regularly to prepare the NCCT discussions.[46] Next, the *ad hoc* group seeks to identify jurisdictions that should be considered as "not fully participating in international co-operation," a concept that the FATF has broadly defined.[47] In addition to the *ad hoc* group's investigation, FATF members may submit names of jurisdictions where members have had

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EFFECTIVENESS OF ANTI-MONEY LAUNDERING MEASURES 3 (June 21, 2002), *available at* http://www.fatf-gafi.org/dataoecd/4/32/33922320.pdf [hereinafter 2002 NCCT REVIEW].

41. The jurisdiction is: Myanmar. *See* Financial Action Task Force on Money Laundering, *NCCT Initiative: Current NCCT List* (June 23, 2006), http://www.fatf-gafi.org/document/4/0,2340,en_32250379_32235720_1_1_1_1,00.html [hereinafter *Current NCCT List*].

42. *See supra* note 16.

43. FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, REPORT ON NON-COOPERATIVE COUNTRIES AND TERRITORIES 7, 8 (Feb. 14, 2000), *available at* http://www.fatf-gafi.org/dataoecd/56/43/33921824.pdf [hereinafter 2000 NCCT REPORT].

44. JAMES F. SLOAN, UNITED STATES DEPARTMENT OF THE TREASURY FINANCIAL CRIMES ENFORCEMENT NETWORK, FINCEN ADVISORY: TRANSACTIONS INVOLVING THE CAYMAN ISLANDS 3 (July 2000), *available at* http://www.fincen.gov/ADVIS14.html [hereinafter FINCEN REPORT ON THE CAYMAN ISLANDS].

45. *Id.* For example, the Treasury Department has warned:

> Thus, banks and other financial institutions operating in the United States should carefully consider, when dealing with transactions originating in or routed to or through the Cayman Islands . . . how the deficiencies of the counter-money laundering controls in the Cayman Islands affect the possibility that those transactions are being used for illegal purposes. A financial institution subject to the suspicious transaction reporting rules contained in 31 C.F.R. 103.18 . . . and in corresponding rules of the federal financial institution supervisory agencies, should carefully examine the available facts relating to any such transaction to determine if such transaction . . . requires reporting in accordance with those rules.

Id.

46. FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, ANNUAL REVIEW OF NON-COOPERATIVE COUNTRIES OR TERRITORIES 4 (June 20, 2003), *available at* http://www.fatf-gafi.org/dataoecd/4/30/33922392.pdf [hereinafter 2003 ANNUAL REVIEW].

47. 2000 NCCT REPORT, *supra* note 43, at 6.

difficulty in enforcing anti-money laundering procedures.[48] Although membership bestows the privilege of placing jurisdictions on the NCCT "radar" for possible listing, affiliation with the FATF, according to the body, should not be a factor in the group's ultimate decision.[49]

The *ad hoc* group undertakes a fact-finding review of the jurisdiction in question with the assistance of other FATF members, as well as the Secretariat or the relevant FATF-style regional body.[50] Review does not necessarily mean that a state will be placed on the NCCT list. For example, Costa Rica, Palau, and the United Arab Emirates were all reviewed by their respective regional bodies in 2001, yet were not placed on the NCCT.[51]

Jurisdictions being considered for listing are entitled to certain procedural "rights." Areas being reviewed are informed of their initial status by the FATF.[52] After a draft report is made by the *ad hoc* group, the jurisdiction is allowed to comment on the report before it is submitted to the FATF Plenary.[53] The next step is a dialogue between the FATF as a whole and the jurisdiction in question for the purpose of negotiating possible alternatives to listing.[54] The final decision rests in the hands of the FATF Plenary.[55]

As a function of the discretion inherent in the FATF's rejection of a straight litmus test for listing, decisions by the organization often take on a political dimension:

> Diplomatic horse trading appeared to figure in the final list, says one person familiar with the talks. For instance, France pushed hard to get all or most of the British overseas territories named as laundering havens . . . and Britain was forced to focus its efforts on keeping the Channel islands of Jersey and Guernsey off the list, leaving little capital to defend other territories and former colonies such as the Caymans.[56]

Political considerations do not, however, always dominate. The esteem of the FATF was greatly enhanced when it took the popular, some say courageous, step of listing two powerful jurisdictions: Israel and Russia.[57]

The exact substantive mechanics of de-listing are relatively transparent. The requirements are listed on public documents produced by the organization:

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48. *Id.*
49. 2000 NCCT REPORT, *supra* note 43, at 6.
50. *Id.*
51. 2002 NCCT REVIEW, *supra* note 40, at 16-17.
52. 2003 ANNUAL REVIEW, *supra* note 46, at 4.
53. *Id.*
54. *Id.*
55. *Id.*
56. Michael Allen, *Laundering Crackdown Intensifies With List of Offending Countries*, WALL ST. J., June 22, 2000, at A18.
57. Bruce Zagaris, *Trends in International Money Laundering from a U.S. Perspective*, 35 INT'L LAW. 839, 843 (2001).

> The FATF will be assessing the progress made by [listed] jurisdictions over the coming months to determine whether any jurisdictions should be removed from the list of NCCTs. These assessments will be done initially by the FATF review groups, including through face-to-face meetings, and will be discussed as a priority item at each Plenary of FATF. In making these assessments, the FATF will need to be satisfied as to the existence of comprehensive and effective anti-money laundering systems. Decisions to revise the list . . . will be taken in the FATF Plenary.
>
> In deciding whether a jurisdiction should be removed from the list, the FATF Plenary must be satisfied that the jurisdiction has addressed the deficiencies previously identified. The FATF will rely on its collective judgment, [sic] and will attach particular importance to reforms in the area of criminal law, financial supervision, customer identification, suspicious activity reporting, and international co-operation.[58]

Generally, listed jurisdictions submit an implementation plan as a predicate step towards formal de-listing.[59] Despite the relative transparency of the de-listing procedure, some states have vocally complained that there is no clear process for being taken off the NCCT.[60] Nevertheless, the transparency of the NCCT's mechanism for de-listing states is markedly superior to the de-listing procedures for alleged members of the Taliban and Al-Qaida, whose assets have been frozen pursuant to Security Resolution 1267—a gap that has been widely criticized as a violation of human rights vis-à-vis the listed individuals.[61]

In fact, de-listing occurs quite regularly. Of the fifteen jurisdictions initially designated by the organization as a NCCT, none are still on the list.[62] Following de-listing, the jurisdiction is subject to increased monitoring by the FATF "in consultation with the relevant FATF-style regional body."[63] As in the case of the Bahamas, formal monitoring can last years and serve as a form

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58. Press Release, Financial Action Task Force on Money Laundering, Progress Report on Non-Cooperative Countries and Territories (Oct. 5, 2000), *available at* http://www.caymanbar.org.ky/pressrel.pdf.

59. *See*, *e.g.*, 2003 ANNUAL REVIEW, *supra* note 46, at 10 (discussing the Ukraine's plan).

60. Tatiana Boncompagni, *Countries Branded as Money Launderers Fight to Clear Their Names*, LEGAL TIMES, Dec. 12, 2000, *available at* http://www.law.com/jsp/statearchive.jsp?type=Article&oldid=ZZZFFDNQMGC.

61. *See*, *e.g.*, José E. Alvarez, *The UN's War on Terrorism*, 31 INT'L J. LEGAL INFO. 238, 248 n.14 (2003). Security Council Resolution 1267 and 1333 created and empowered the 1267 Committee with the authority to order the freezing of Taliban and Al-Qaida assets. *See* Peter Gutherie, *Security Council Sanctions and the Protection of Individual Rights*, 60 N.Y.U. ANN. SURV. AM. L. 491, 494 (2004); S.C. Res. 1267, ¶ 4, U.N. Doc. S/RES/1267 (Oct. 15, 1999); S.C. Res. 1333, ¶¶ 4, 8, U.N. Doc. S/RES/1333 (Dec. 19, 2000).

62. *Current NCCT List*, *supra* note 41. The Bahamas, Cayman Islands, Cook Islands, Dominica, Israel, Lebanon, Liechtenstein, Marshall Islands, Nauru, Niue, Panama, Philippines, Russia, St. Kitts and Nevis, and St. Vincent and the Grenadines were the first jurisdictions listed. *See id.*

63. 2003 ANNUAL REVIEW, *supra* note 46, at 5.

of punishment for a jurisdiction that continues to defy the FATF at the margins, yet has made important progress overall.[64]

Spurned by dramatic changes in the field of money laundering, the FATF began the process of updating the Forty Recommendations. In May 2002, it published a consultation paper designed to foster debate about ways to modernize the Recommendations.[65] The consultation paper hinted that the FATF, following a broader trend in anti-money laundering efforts, was considering requiring many professional service providers, such as lawyers, to scrutinize the financial transactions of their clients.[66] Ultimately, the FATF recommended that lawyers be subject to many of the provisions of the updated Forty Recommendations.[67]

As a result, the FATF's policies now have a direct impact on the confidentiality aspect of the attorney-client relationship.[68] The FATF began referring to lawyers and accountants as "gatekeepers" and noted that: "[a]nother major issue of concern [to the organization] in recent years has been the increased use by criminals of professionals and other intermediaries to provide advice or otherwise assist in laundering criminal funds."[69] The FATF's focus on advocates came about after members began noticing an increase in the involvement of lawyers in money laundering schemes.[70] As articulated in the consultation paper, the ability of lawyers to create financial entities capable of engaging in fraud was a significant factor in the FATF's need to update the Forty Recommendations.[71] The FATF targeted the attorney-client relationship by considering the direct application of [old] Recommendations 10-21 and 26-29 to lawyers.[72] Specifically, the FATF proposed three different options as to when these reporting requirements should apply to attorneys:

> Option 1 - Lawyers and independent legal professionals in all their activities.
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> Option 2 - Lawyers and independent legal professionals, but only where they are acting as financial intermediaries on behalf of or for the benefit of the client.

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64. 2003 ANNUAL REVIEW, *supra* note 46, at 1 (noting that "[a]lthough removed from the NCCTs list in June 2001, the Bahamas has been subject to FATF monitoring since that time. The FATF encourages the Bahamas to improve mechanisms for international co-operation so that the FATF may end formal monitoring.").

65. *See generally* FORTY RECOMMENDATIONS CONSULTATION PAPER, *supra* note 25, at 4.

66. Patricia Shaughnessy, *The New EU Money-Laundering Directive: Lawyers as Gate-Keepers and Whistle-Blowers*, 34 L. & POL'Y INT'L BUS. 25, 26-27 (2002).

67. *Id.*

68. *See, e.g.*, 2001 ANNUAL REPORT, *supra* note 12, at 16.

69. *Id.* at 17-18.

70. Shaughnessy, *supra* note 66, at 29-30.

71. FORTY RECOMMENDATIONS CONSULTATION PAPER, *supra* note 25, at 1.

72. *Id.* at 80.

> Option 3 - Lawyers and independent legal professionals where they are involved in the planning or execution of financial, property, corporate or fiduciary business for the client.[73]

The American Bar Association ("ABA") responded to the FATF's proposal by forming the ABA Task Force on Gatekeeper Regulation and the Profession.[74] On August 23, 2002, the ABA submitted its response to the consultation paper.[75] The group's position can best be described as supportive of option 2; the ABA argued that the extension of the Forty Recommendations to lawyers "should be carefully tailored and focused primarily on attorneys who, when acting as financial intermediaries, receive and transfer funds on behalf of clients."[76] Regardless of the character of the transaction, the ABA was vehemently against requiring lawyers to submit suspicious transaction reports ("STRs") as required under [old] Recommendations 14-18.[77]

The results of the final draft of the Forty Recommendations were mixed for the ABA. In general, the updated Forty Recommendations follow option 2; they require non-anonymity (Recommendation 5), additional scrutiny of politically exposed persons (Recommendation 6), and record keeping and training (Recommendations 8-11) by lawyers when acting as financial intermediaries (Recommendation 12).[78] Recommendation 16, however, imposes STR requirements on lawyers with safeguards deemed to be inadequate by the Bar.[79] Although the FATF purports to exempt privileged communications and attorney work-product from the investigation and disclosure obligations, the ABA has argued that the point at which the exemptions would apply is unclear. In addition, lawyers may not notify their clients when a report has been filed, a fact infuriating to the ABA. In the ABA's opinion, it casts lawyers as a police presence in the life of the client, which will harm the attorney-client relationship.[80] To date, the ABA has had more success domestically in protecting its version of the attorney-client

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73. FORTY RECOMMENDATIONS CONSULTATION PAPER, *supra* note 25, at 100.

74. Eric J. Gouvin, *Bringing Out The Big Guns: The USA Patriot Act, Money Laundering, and the war on Terrorism*, 55 BAYLOR L. REV. 955, 985 (2003).

75. *See generally* AMERICAN BAR ASSOCIATION TASK FORCE ON GATEKEEPER REGULATION AND THE PROFESSION, COMMENTS OF THE ABA TASK FORCE ON GATEKEEPER REGULATION AND THE PROFESSION ON THE FINANCIAL ACTION TASK FORCE CONSULTATION PAPER (2002), *available at* http://www.abanet.org/buslaw/attorneyclient/publichearing20050421/testimony/laundering4.pdf.

76. *Id.* at 4.

77. *Id.* at 4, 15-16.

78. *Forty Recommendations*, *supra* note 18. In fact, Recommendation 12 seems to mirror the even weaker option 3. *See id.*

79. *Id. See also* AMERICAN BAR ASSOCIATION TASK FORCE ON GATEKEEPER REGULATION AND THE PROFESSION, *supra* note 75, at 18-21.

80. *See, e.g.*, Rhonda McMillion, *Gatekeeper's Burden: Money Laundering Proposals Raise Concerns About Attorney-Client Privilege*, A.B.A. J., Dec. 2002, at 72.

relationship; Congress has not enacted any of the reporting requirements for lawyers proposed by the FATF.[81]

The FATF's attempt to change the nature of the attorney-client relationship is not the only example of an effort to reshape the security/civil-liberties balance in member and non-member jurisdictions. The FATF has pressured jurisdictions to lower the evidentiary burden needed for police to access banking records.[82] Furthermore, Recommendation 2 of the Forty Recommendations attempts to decrease the *mens rea* level for money-laundering crimes from proof of knowledge or intent to mere recklessness.[83]

B. Case Study: The Listing of the Cayman Islands as a NCCT

The Cayman Islands were placed on the NCCT list in June 2000 as part of the FATF's first NCCT Review.[84] The Caymans' stay on the list was short. In June 2001, as part of the FATF's second NCCT Review, the Islands were de-listed.[85] The FATF justified the de-listing by noting that the Caymans had issued money laundering regulations and had enacted other laws amending areas in its domestic law that were previously identified as deficient.[86]

The scrutiny paid to the Cayman Islands was far from surprising. The United States Treasury noted that:

> [T]he Cayman Islands is home to a well-developed offshore financial center. In March 2000, authorities in the Cayman Islands reported that more than 570 banks and trust companies, 2,238 mutual funds, and 499 captive insurance companies were licensed in the Cayman Islands. In addition, approximately 40,000 offshore companies are registered in the Cayman Islands.[87]

The listing itself, however, came as a reported shock to the Islands' administration. The authorities were especially surprised because the

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81. Sandra Guerra Thompson, *The White-Collar Police Force: "Duty To Report" Statutes in Criminal Law Theory*, 11 WM. & MARY BILL RTS. J. 3, 30 (2002).

82. 2003 ANNUAL REVIEW, *supra* note 46, at 7.

83. Recommendation 2 states: "[t]he intent and knowledge required to prove the offense of money laundering is consistent with the standards set forth in the Vienna and Palermo Conventions, including the concept that such mental state may be inferred from objective factual circumstances." *Forty Recommendations*, *supra* note 18.

84. FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, REVIEW TO IDENTIFY NON-COOPERATIVE COUNTRIES OR TERRITORIES: INCREASING THE WORLDWIDE EFFECTIVENESS OF ANTI-MONEY LAUNDERING MEASURES 12 (June 22, 2000), *available at* http://www.fatf-gafi.org/dataoecd/56/43/33921824.pdf.

85. FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, REVIEW TO IDENTIFY NON-COOPERATIVE COUNTRIES OR TERRITORIES: INCREASING THE WORLDWIDE EFFECTIVENESS OF ANTI-MONEY LAUNDERING MEASURES 18 (June 22, 2001), *available at* http://www.fatf-gafi.org/dataoecd/56/41/33922055.pdf.

86. *Id.* at 8-9.

87. FINCEN REPORT ON THE CAYMAN ISLANDS, *supra* note 44, at 1.

jurisdiction had chaired the Caribbean section of the FATF's mutual evaluation process through its participation and leadership in the Caribbean Financial Action Task Force ("CFATF").[88]

The aforementioned factors led the Caymans' Financial Secretary, George McCarthy, to claim, "[t]he decision [to list the Caymans] was made without due process, and is inconsistent with reports made by the FATF as late as [the week before listing]."[89] Moreover, Secretary McCarthy claimed the FATF failed to heed requests that the Secretariat conduct an on-site evaluation of the jurisdiction's banking sector, as well as allow the Caymans additional time to respond to the report of the regional review group.[90]

Moreover, sister Caribbean nations argued that European jurisdictions, specifically Austria and Monaco, were allowed to negotiate compliance agreements that kept them off the NCCT.[91] In contrast, Caribbean jurisdictions were forced to work under the name-and-shame rubric of the NCCT while similarly situated European jurisdictions were allowed to stay off the list by implementing domestic legislation that the Caribbean areas would have enacted if given the chance. Furthermore, Cayman administrators thought the FATF, in conjunction with the OECD, was simply trying to reduce the Islands comparative advantage as a tax-shelter.[92] The exclusion of the European jurisdictions was offered as evidence of an effort to reduce the flow of taxable capital from the high tax jurisdictions of the EU to the lower tax regions of the Caribbean.[93]

III. DELIBERATIVE EQUALITY

A. The FATF's Spectrum of Membership

The founding members of the FATF, mainly the jurisdictions of the G-7 and Western Europe, have a strong and concentrated interest in combating money laundering.[94] In this regard, the current membership retains much of

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88. Portfolio International, *Caymans outraged over FATF list* (July 2000), *available at* http://www.archive.org/web/web.php (type in http://www.portfolioint.co.uk/archive/article.asp?id=104&a=7&m=25&y=) (on file with author). [Hereinafter, *Portfolio International*].

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* Although the two are separate organizations, the FATF's Secretariat is housed at the OECD. Financial Action Task Force on Money Laundering, *General FAQ*, http://www.fatf-gafi.org/document/26/0,2340,en_32250379_32236836_34312026_1_1_1_1,00.html (last visited Sept. 10, 2006).

93. 2003 ANNUAL REVIEW, *supra* note 46, at 10.

94. The initial membership consisted of G-7 participants (United States, Japan, Germany, France, United Kingdom, Italy, Canada, and the Commission of the European Communities) and eight additional countries (Australia, Austria, Belgium, Luxembourg, Netherlands, Spain, Sweden and Switzerland). FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, REPORT 3-6 (Feb. 7, 1990), *available at* http://www.fatf-gafi.org/dataoecd/20/16/33643019.pdf.

its original character.[95] The FATF has, however, expanded its ranks to include jurisdictions traditionally considered havens for money laundering. For example, offshore banking hubs, such as the states of the Gulf Co-operation Council,[96] as well as jurisdictions that have had prior difficulty with the FATF when they were non-members, such as the Russian Federation, participate in the current FATF as members.[97] Nevertheless, although some of the more notorious jurisdictions with a culture of "no questions asked" banking secrecy are represented, many familiar havens such as Liechtenstein and the Bahamas are either non-represented or "under-represented" in that they do not participate in the FATF as full-fledged members.[98]

Such areas, many of which are offshore financial centers, are severely "under-represented" in that they participate in the FATF through observer bodies, which often have a regional membership. Observer bodies have a "similar form and function" to the FATF.[99] Some full FATF members also participate in regional affiliates.[100] For example, the CFATF, comprised of the Bahamas, the Caymans, and numerous other Caribbean offshore hubs, is an observer organization of jurisdictions that have agreed to implement common counter-measures against money laundering—mainly the Forty Recommendations.[101] Another example of a regional FATF-style body is the Offshore Group of Banking Supervisors whose members undertake a political commitment to implement the Forty Recommendations.[102]

In light of the observer status granted to the FATF-style bodies and their commitment to implement either the Forty Recommendations or measures consistent with the FATF's goals, complaints have been registered concerning

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95. Currently, the following jurisdictions and bodies are members of the FATF: Argentina, Australia, Austria, Belgium, Brazil, Canada, Denmark, European Commission, Finland, France, Germany, Greece, Gulf Co-operation Council, Hong Kong, Iceland, Ireland, Italy, Japan, Luxembourg, Mexico, Kingdom of the Netherlands, New Zealand, Norway, Portugal, Russian Federation, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom, and United States. *Members and Observers*, *supra* note 11. The presence of Hong Kong as a member of the FATF demonstrates that the body takes a functional, rather than strictly legal, view of sovereignty.

96. The Gulf Co-operation Council is a member organization of the FATF. Its member states are represented by the organization as a group. Its members include Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates. Financial Action Task Force on Money Laundering, *Co-operating Council for the Arab States of the Gulf (GCC)*, http://www.fatf-gafi.org/document/9/0,2340,en_32250379_32236869_34438857_1_1_1_1,00.html (last visited July 29, 2006).

97. For a discussion of the listing of the Russian Federation, *see supra* note 57 and accompanying text.

98. *Members and Observers*, *supra* note 11.

99. *Id.*

100. *Id.*

101. Financial Action Task Force on Money Laundering, *Caribbean Financial Action Task Force (CFATF)*, http://www.fatf-gafi.org/document/28/0,2340,en_32250379_32236869_34355164_1_1_1_1,00.html (last visited July 29, 2006).

102. 2002 ANNUAL REPORT, *supra* note 23, at 11.

the disparate treatment between members of the FATF and members of FATF-style bodies. Alfred Sears, as Chairman of the CFATF, argued:

> that his country [the Bahamas] and several other countries in the region had given up legitimate business worth millions of US dollars and implemented several pieces of new legislation in their efforts to comply with the FATF standards. [Thus,] [h]aving borne this high cost of implementing the international standards against money laundering, [CFATF members deserve] equality of treatment [with] all countries, including FATF member countries.[103]

Against this backdrop, the FATF is cognizant of a need to increase representation. The organization is content, however, to equate representation with a fluid conception of membership that does not necessarily include full and equal participation. [104] Two of the three pillars of the organization's strategy are enlarging FATF membership and developing FATF-style regional bodies, which often do not have the ability to vote.[105] Furthermore, the FATF has made a concerted effort to have geographically diverse membership. The addition of Argentina, Brazil and Mexico as full members was made partially to reinforce Central and South America's representation.[106] Thus, the concept of virtual representation factors in membership decisions.

The need to bring numerous jurisdictions into the FATF fold, whether via observer bodies, regional organizations or full membership, is a function of

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103. Caribbean Financial Action Task Force, Opinion, *Caribbean Insists on Equal Treatment*, PANAMA NEWS, Nov. 10-23, 2002, *available at* http://www.thepanamanews.com/pn/v_08/issue_21/opinion_05.html.

104. To be admitted, the prospective member criteria are as follows:

- to be fully committed at the political level: (i) to implement the [2003] Recommendations within a reasonable timeframe (three years), and (ii) to undergo annual self-assessment exercises and two rounds of mutual evaluations;
- to be a full and active member of the relevant FATF-style regional body (where one exists), or be prepared to work with the FATF or even to take the lead, to establish such a body (where none exists);
- to be a strategically important country" [regardless of economic development];
- to have already made the laundering of the proceeds of drug trafficking and other serious crimes a criminal offence; and
- to have already made it mandatory for financial institutions to identify their customers and to report unusual or suspicious transactions.

2001 ANNUAL REPORT, *supra* note 12, at 4. The FATF's desire to increase membership may, however, be waning. In the organization's mandate for the future, the report warns "the FATF has perhaps approached the limit of members if it is to continue to retain its current structure and character. Any future identification of possible strategically important countries should address the issue of geographical balance and the impact on the efficiency of FATF." *Mandate for the Future of the FATF*, *supra* note 26, at 2.

105. 2002 ANNUAL REPORT, *supra* note 23, at 7.

106. *Id.* at 8.

the ability of a few jurisdictions to effectively meet the demand for terrorist financing and money laundering. The non-tangible nature of terrorists' preferred medium—highly-liquid capital—and the ease of electronic banking make the smallest defector an unacceptable risk to the entire system. The problem is evident in the organization's oft-repeated mantra that FATF regulations vary in effectiveness because they have not been universally adopted.[107]

The FATF's membership can be examined through the "foundational" normative criteria of deliberative equality.[108] Deliberative equality stipulates that in a world of conflict and deliberation "all affected individuals, or their representatives, are entitled to participate" in forming regulatory policies.[109] As applied to global administrative institutions such as the FATF, deliberative equality stipulates that the network in question adopts clear criteria for participation that are fairly applied.[110]

With regard to deliberative equality, the FATF receives a mixed grade.[111] On a positive note, the criteria for membership are transparent and codified. Moreover, the FATF has managed to take jurisdictions once at odds with the organization and guide them toward partial or even full membership.[112] The disparate treatment between jurisdictions that have adopted the Forty Recommendations through FATF-style regional or observer bodies rather than through full membership in the FATF, however, is troublesome because the discrimination, at first glance, de-legitimizes the organization by treating like jurisdictions in an unlike manner. From the lens of deliberative equality, there is little justification for a two-tiered system of membership that leaves jurisdictions, such as the Cayman Islands or Bahrain, either under-represented, through entities like the Gulf Co-operation Council, which pool the votes of many states, or virtually represented through like-minded jurisdictions.

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107. Todd Doyle, *Cleaning Up Anti-Money Laundering Strategies: Current FATF Tactics Needlessly Violate International Law*, 24 HOUS. J. INT'L L. 279, 295 (2002).

108. Anne-Marie Slaughter, *Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks*, 39 GOV'T & OPPOSITION 159, 175-76 (2004).

109. *Id.* at 176.

110. *Id.* at 177.

111. I note that Slaughter's conception of deliberative equality is more forgiving of different levels of membership. Slaughter argues:

> Yet countries that want to join such networks and that meet the stated criteria must be allowed in, in some form or other. At the same time, deliberative equality, as an ideal, means that those countries that have decided to join a network receive an equal opportunity to participate in agenda setting, to advance their position, and to challenge the proposals or positions of others.

Id. I will return to her definition in Section VII.

112. *See supra* notes 57, 97 and accompanying text.

In the same vein, an expansion of membership to include strategically important offshore jurisdictions would serve the goal of mitigating the de-legitimizing perception that the FATF is dominated by the United States. It is widely reported that the United States possesses significant power over the FATF even though the organization operates via consensus.[113] For example, when Liechtenstein was listed as a non-cooperating territory, the small state appointed its first ambassador to the Untied States for the primary purpose of getting de-listed.[114]

Finally, expanded membership would further the FATF's legitimacy since the FATF has increased its influence over non-member jurisdictions that have no affiliation with the organization. In this vein, the FATF's attempt to impose its Recommendations on non-members is in tension with those jurisdictions' sovereignty. Nonetheless, in an effort to maintain legitimacy in situations where the FATF operates against the traditional concept of state sovereignty by imposing its regulations on non-members, the FATF has taken steps to increase accountability by granting non-member jurisdictions procedural rights.[115]

IV. SOVEREIGN CONSENT

A. The Procedural Rights of Non-Members

The traditional concept of sovereignty is in tension with global administrative law. Specifically, the traditional form of sovereignty is inconsistent with the impetus behind the decentralized, *i.e.* non-state based, development of standards and norms to govern global administrative law. Networks such as the FATF regulate globalization, a phenomenon that challenges the very notion of state sovereignty by de-emphasizing state power. At the same time, and parallel to the argument that globalization is too often without "government" in that there is a lack of debate as to its proper scope and function, many argue that global administrative law needs a greater influx of political accountability via the representations and deliberations of sovereign nations, once the traditional backbone of international law.[116]

In this context, the traditional, or what can be called the ideal-type, of sovereignty represents the freely given consent of those jurisdictions impacted by global administrative agencies such as the FATF. Put another way, sovereignty represents the initial, affirmative agreement to be regulated by the FATF and then, subsequently, follow whatever norms the body proffers. In

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113. *See* Boncompagni, *supra* note 60.

114. *Id*.

115. *See infra* Part IV.A.

116. *See, e.g.*, Slaughter, *supra* note 108, at 159 (quoting Paul Martin, *Notes for an Address by the Honorable Paul Martin to the Royal Institute of International Affairs* (Jan. 24, 2001), http://www.fin.gc.ca/news01/01-009e.html: "Only governments bear the political imprimatur that is bestowed by political accountability. Neither multinational corporations nor international bureaucracies are a substitute. Addressing the most complex challenges posed by globalization requires the direct accountability carried by the representatives of sovereign nations.").

this context, sovereignty differs from the aforementioned norm of deliberative equality; deliberative equality is based on the ability to participate in determining the actions of the organization while sovereignty is a function of voluntarism, *i.e.* the consent to be regulated by such actions. Thus, the consent of those jurisdictions affected by FATF policies is another norm by which the institution can be analyzed.

Given the smallest of free-riders can satisfy the money laundering needs of criminals, the FATF entices greater adherence to its policies through its liquid concept of membership and the corresponding ability to influence the direction of the organization. Alternatively, when a jurisdiction's membership is otherwise undesirable, procedural rights are bestowed upon a jurisdiction when it is forced, against the notion of sovereign consent, to yield to the dictates of the group. For example, all states have been invited to participate in FATF activities regarding terrorist financing on the same terms as member jurisdictions.[117] The policy stems from the organization's broad call on non-members to take part in the self-assessment for the Nine Special Recommendations on Terrorist Financing.[118] As an extra incentive, members have stated that they stand ready to assist non-members in achieving full implementation of the Recommendations.[119] Also, as previously discussed, jurisdictions subject to the NCCT enjoy certain procedural protection before being listed.

The aforementioned procedures followed by the FATF when dealing with non-members in the context of the NCCT mirror the procedures outlined in the World Trade Organization Appellate Body's Shrimp-Turtle decision, which established a minimum level of due process protections afforded by the GATT to states when dealing with other members' administrative bodies.[120] In the case of the FATF, the due process-like protections are applied internationally, rather than domestically, and without the formal commitment as is seen in the GATT/WTO regime. In contrast, the FATF's procedural protections are driven by a desire on the part of the organization for legitimacy and participation rather than adherence to a legal commitment.

To a significant degree, the procedural carrots given to non-members have succeeded in inducing compliance; the FATF has received completed self-assessment questionnaires from 130 jurisdictions, many of which are non-

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117. Financial Action Task Force on Money Laundering, *FATF Standards: FATF Action Plan Against Terrorist Financing*, http://www.fatfgafi.org/pages/0,2966,en_32250379_32236947_1_1_1_1_1,00.html#actionplan.

118. *Id.*

119. *Id.*

120. Sabino Cassese, *Shrimps, Turtles and Procedure: Global Standards for National Administrations* (2004), at 2, *available at* SSRN: http://ssrn.com/abstract=692761 (discussing United States—Import prohibitions on certain shrimp products, 12 October 1998, WT/DS58/AB/R). In the case, the WTO ruled that the lack of procedures surrounding the United States restrictions on shrimp imports from complaining states constituted arbitrary discrimination in violation of the GATT. *Id.* at 3.

members.[121] This number mirrors the level of jurisdictions that have endorsed the Forty Recommendations.[122] The extent of non-member participation is especially impressive given that the pressure on non-member jurisdictions that have not completed a self-assessment has been relatively light. For example, the FATF President wrote to uncooperative jurisdictions encouraging them to participate.[123] In addition, the FATF has taken steps to increase the group's contacts with non-member jurisdictions through other more informal mechanisms. For example, the FATF organized a joint workshop with non-member and future observer, China, in March 2003.[124]

Returning to the definition of sovereignty, rather than follow the traditional ideal-type of sovereignty as the consent of the affected state, the FATF obeys the concept of "disaggregated sovereignty" defined, alternatively, as "positive sovereignty" or the capacity to interact with international administrative regimes, rather than "the negative right to be left alone."[125] Much like in the case of membership, where a spectrum of affiliation levels is observed rather than the ideal-type of full membership, procedural rights, or positive sovereignty, take the place of the traditional consent-driven definition of the term.

B. Procedural Controls on the FATF: Checks and Balances

Along with the procedural rights given to both members and non-members in their interactions with the institution, the FATF, like other global administrative bodies, is constrained to a varying degree by checks and balances on its exercise of power. Those checks and balances are one of the principal mechanisms by which states ensure that global administrative institutions remain accountable.[126] As such, the checks and balances are another form of the traditional notion of sovereign consent in that they bind the FATF to the founding states' intent at the time of forming the network.

Unlike many other international organizations, the FATF does not have a significant accountability mechanism stemming from an obligation to stay within its founding mandate. The FATF acknowledges that the group does not possess a "tightly defined constitution."[127] This lack of accountability is tempered, however, by the fact that the FATF has a finite life-span.[128] Under the agreement establishing the body, the FATF exists so long as its five-year

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121. FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, ANNUAL REPORT 2002-2003 1 (June 20, 2003), *available at* http://www.fatf-gafi.org/dataoecd/13/0/34328221.pdf [hereinafter 2003 ANNUAL REPORT].

122. *Id.* at 4.

123. *Id.* at 9.

124. *Id*. at 2.

125. Slaughter, *supra* note 108, at 163-64. The concept of disaggregated sovereignty can still be conceptualized in a way as to separate it from deliberative equality. One way would be to apply deliberative equality when speaking of policy formation and disaggregated sovereignty when speaking of application and enforcement.

126. *Id.* at 184-85.

127. *What is the FATF*, *supra* note 8.

128. *Mandate for the Future of the FATF*, *supra* note 26, at 4.

mandate remains in force. Thus, the desire for renewal serves as a powerful form of accountability on FATF supporters and its Secretariat.

Also, the FATF has a number of internal controls. One example is its voting structure. The decision-making process within the group is based on consensus, rather than majority rule.[129] Consequently, members must actively work to reach agreement on the many issues they face.[130] In theory, smaller jurisdictions have an enhanced ability to block policies favored by more powerful states, which have greater power in other voting systems, such as the proportional mechanism of the International Monetary Fund.[131]

Another accountability mechanism not based on state consent stems from the organization's openness to civil society input. For example, the FATF frequently holds a Financial Services Forum with representatives from the financial sector to discuss topics of common concern.[132] Furthermore, the FATF held numerous forums with the private sector during the updating of the Forty Recommendations.[133] In general, the process of updating the Forty Recommendations was open for comment by any interested party so long as the submitter agreed to allow publication of the comment on the FATF's webpage.[134] Also, the FATF created a focal point for civil society input by producing a Public Consultation Paper that set out the issues to be considered in the review.[135] The Consultation Paper alleviated the conundrum of information overload and asymmetry by identifying issues of relevancy for the organization.[136] After comments were received, the FATF agreed to hold a forum with invited representatives of non-member jurisdictions and other affected entities from the financial sector.[137]

The legitimacy enhancing effect of civil society participation is buttressed by a related increase in the organization's effectiveness. Money laundering and terrorist financing are evolving activities; therefore, the FATF must stay abreast of changes in methods that criminals and terrorists use for obtaining

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129. *See* FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, ANNUAL REPORT 1991-1992 18-19 (June 25, 1992), *available at* http://www.fatfgafi.org/dataoecd/31/19/34041197.pdf.

130. *See id.*

131. For a description of the IMF's voting structure *see* INTERNATIONAL MONETARY FUND, IMF EXECUTIVE DIRECTORS AND VOTING POWER (Sept. 19, 2006), *available at* http://www.imf.org/external/np/sec/memdir/eds.htm.

132. *See* FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, ANNUAL REPORT 1996-1997 9 (June 1997), *available at* http://www.fatf-gafi.org/dataoecd/13/28 /34326529.pdf.

133. 2003 ANNUAL REPORT, *supra* note 121, at 1.

134. FORTY RECOMMENDATIONS CONSULTATION PAPER, *supra* note 25, at iii.

135. *See generally id.*

136. Joseph H. Weiler, To Be a European Citizen—Eros and Civilization 24 (April 1, 1998), reprinted in The Constitution of Europe 349 (Cambridge Univ. Press, 1999). In this vein, Professor Weiler asks the important question: "if you do not know what is going on, which documents will you ask to see?" *Id.*

137. FORTY RECOMMENDATIONS CONSULTATION PAPER, *supra* note 25, at 4.

and transferring funds.[138] In order to gather as much information as possible, the FATF opens its typologies review to private experts and jurisdictions outside the organization's membership.[139] The interaction with civil society and the private sector serves to increase the effectiveness of the FATF by providing information while, at the same time, increasing the group's legitimacy.

Another important check on the FATF is that the group's Recommendations are often either based on or derived from treaties or other sources of international law.[140] For example, in many cases the FATF simply calls for the implementation of United Nations' Resolutions or Conventions through its own Recommendations. For instance, Special Recommendation One calls on FATF members to ratify the UN Convention on the Suppression of Terrorist Financing.[141]

V. COMMAND-AND-CONTROL

A. Civil-Liberties and the FATF

The interaction between FATF policies and civil liberties has been an area of great concern for followers of the organization. For example, some civil-libertarian groups accuse the FATF of having a structural bias that renders the organization unwilling "to place any appreciable value on the privacy and civil liberties of individuals."[142] In arguing for the benefits of some forms of financial privacy, and against contradictory FATF policies, such groups note that:

> Financial privacy can be the difference between an opposition group in a country governed by a dictator surviving or being systematically tortured or assassinated. . . . Financial privacy can help prevent corrupt officials from abusing their trust. Financial privacy is the instrument citizens can use to protect themselves from corrupt or criminal influences. Financial privacy can allow people to protect their life savings when a government confiscates its citizens [sic] wealth, whether for political, ethnic or other reasons. . . . Financial privacy, in short, is of deep and abiding important [sic] to the improvement of the human condition because many, perhaps most, governments have shown themselves capable of routinely abusing private financial information.[143]

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138. FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, REPORT ON MONEY LAUNDERING TYPOLOGIES 2002-2003 1 (Feb. 14, 2003), *available at* http://www.fatf-gafi.org/dataoecd/29/33/340379.pdf.

139. *Id.*

140. *See generally* Walters, *supra* note 38.

141. 2003 ANNUAL REPORT, *supra* note 121, at 8.

142. Letter from David R. Burton, Executive Director, Task Force on Information Exchange and Financial Privacy, to Secretariat, Financial Action Task Force on Money Laundering (August 30, 2002), at 2, *available at* The Propensity Institute, http://www.freedomandprosperity.org/ltr/PI-FATF.pdf [hereinafter Prosperity Institute Letter].

143. *Id.*

The FATF's policies vis-à-vis financial privacy, specifically its desire to limit nondisclosure, are the logical result of the makeup of the organization's delegates. As noted by the group, its delegates "are drawn from a wide range of disciplines, including experts from the Ministries of Finance, Justice, Interior and External Affairs, financial regulatory authorities and law enforcement agencies."[144] In essence, the FATF is heavily influenced by the law-and-order contingent of the civil-liberties/security spectrum.

The most salient libertarian criticism of the FATF centers on the group's unyielding commitment to sovereign equality; the organization does not distinguish between jurisdictions that are both allowed and required to share banking information as articulated in the Recommendations.[145] Generally, there is no restriction on how different members can use shared financial information.[146] Furthermore, there is no thought given to the rather simple observation that some jurisdictions, on account of their general disregard for civil liberties, may provide an ample reason for, rather than against, bank secrecy.

B. The FATF's Limited Use of the Market

The FATF can implement its desired policies through the traditional "command-and-control" method of regulation. "Command-and-control" occurs when the FATF states a policy initiative and then relies on domestic jurisdictions to enforce the group's dictate through the typical methods of state-based enforcement, including coercion. The FATF's efforts to change the *mens rea* requirement for money laundering crimes is one example of the command-and-control method.[147] The ability to implement agreed upon

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144. 2001 ANNUAL REPORT, *supra* note 12, at 3.

145. Richard W. Rahn, *Nightmare on FATF Street*, WASH. TIMES, Sept. 6, 2002, at A20.

146. Christine Hall, *Financial Info Unsafe in Foreign Hands, Task Force Says*, CNSNEWS.COM, Apr. 5, 2002, http://www.cnsnews.com/ViewNation.asp?Page=\Nation\archive\200204\NAT200 20405b.html. One way such information may be exchanged was articulated by David R. Burton:

> [The] FATF has expressed support for using Interpol (see Recommendation 31) as a means of exchanging information. Indeed Interpol recently established a database for purposes of sharing information about terrorism. This database will be made available to all Interpol members. Interpol includes countries known to sponsor terrorism (e.g. Iran, Iraq, Libya, Somalia, Syria, Sudan), other countries that may be hostile to the West (e.g. the People's Republic of China, Cuba, Yugoslavia) and countries with major corruption problems (e.g. Bulgaria, Colombia, Nigeria). Financial Action Task Force members (particularly its regional and observer status participants) also pose unacceptable security risks.

Prosperity Institute Letter, *supra* note 142, at 4.

147. *See supra* note 83 and accompanying text.

policies through "command-and-control" mechanisms is another tradition or ideal-type.

Another way the FATF can implement its desired policies, with less effect on civil liberties, is by utilizing the market or market participants. For example, Recommendation 21 relies on financial institutions to self-regulate by investigating suspicious transactions.[148] Also, harnessing the market and market actors works in other, more subtle ways. For example, as long as the NCCT transmits credible information regarding the lack of financial safeguards in cited jurisdictions, the name-and-shame aspect of the list can harness the power of the market to increase compliance without sanctioning otherwise repressive measures at the domestic level.[149] The market is harnessed in that the typical financial manager is well-advised to avoid entangling investors' money in jurisdictions that may be tainted by terrorist financing. The United States, its allies, and even the U.N. Security Council have shown willingness to quickly and broadly freeze assets related in any way to terrorist activity.[150] As such, the very real "possibility that non-terrorists, including foreigners and U.S. citizens, may become targets of asset freezing" must be mitigated by the rational investor.[151]

Getting even further from government intervention, the socially conscious investment movement, specifically its non-altruistic theoretical underpinnings, demonstrates that investments in entities which are not "good global citizens," whether in the context of enjoying the externalities of environmental degradation or the externalities of allowing terrorist access to banking services, is perilous to the rational investor in the long-term.[152] Banks that handle terrorist finances are unsound investments, and the fact that a bank would run the risk is a proxy variable for other systemic problems within the institution, most generally bad management. Jurisdictions that allow such institutions to operate are similarly dubious in regard to their general oversight. Thus,

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148. *See supra* notes 18, 35-36 and accompanying text.

149. This can be analogized to a form of market accountability on the FATF's policies. *See* Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29, 35-37 (2005).

150. R. Colgate Selden, *The Executive Protection: Freezing The Financial Assets of Alleged Terrorists, The Constitution, and Foreign Participation in U.S. Financial Markets*, 8 FORDHAM J. CORP. & FIN. L. 491, 493. (2003) (citing Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001)).

151. *Id.* at 494.

152. *See* Robert J. Klee, *Enabling Environmental Sustainability in the United States: The Case for a Comprehensive Material Flow Inventory*, 23 STAN. ENVTL. L.J. 131, 163 (2004) (noting that "[t]he stock market may also play a role here, if socially conscious investors shun a poor performer's stock, *or* if an investor sees poor [environmental] performance as indicative of overall poor management. Similarly, a brand name is tarnished by poor [environmental] performance, and as a result suffers poor stock ratings. Economists have shown a significant correlation between the publication of this negative information and stock performance") (internal citation omitted). In the context of the FATF, observers have noted that: "appearing on the list of [FATF] 'wrongdoers' means seeing the country's financial reputation ripped to shreds in the international press. This can result in capital flight and loss of investor confidence for the country concerned, and so directly affect its economy." OFFSHORE-FOX.COM, *Financial Surveillance: Paris-based Plot Alters World*, http://www.offshore-fox.com/financial-privacy/offshore_ banking_0103.html.

financial managers have a market incentive to avoid potential entanglements with wayward jurisdictions by observing a reasonably wide margin above and beyond the coercive instructions of member's domestic legislation. As a result of the market's demand for legitimate information, a jurisdiction must be credibly named in order to signal the market that the area in question needs additional scrutiny. Credible information is a function of the legitimacy of the process in which the FATF operates.

The use of the market is especially beneficial when more direct enforcement options that use the coercive power of the state are either absent or undesirable; such as in the case of a state with weak civil liberties protection that may use the cloak of FATF legitimacy to crack down on political dissent. If the NCCT list is, however, seen as a political, rather than informational, device, the market will likely deafen to its signals, and the FATF will be forced to sanction more coercive measures via command-and-control.

Use of the market, rather than "command-and-control," has other benefits. For example, many of the debates regarding criminal law are shaped by a perceived need to balance the inherent tradeoffs between legitimacy and effectiveness.[153] As evidence, it is alleged that many effective actions in the fight against crime suffer from a lack of legitimacy.[154] Domestically, critics of the practice of racial profiling contend that *even if* the action is effective it is illegitimate.[155] Internationally, allies of the United States have begun to question effective investigative techniques utilized and exported from America on the grounds that they do not meet the host jurisdiction's requirements for legitimacy.[156]

To a relatively limited degree, the FATF has been able to mitigate the aforementioned tradeoff by relying on market-based mechanisms. Civil libertarians have noted that the use of market mechanisms helps the FATF "adhere to a policy of encouraging [action] at the national level and, in so doing, pass the costs of risks associated with illegal transactions onto the offending nations while simultaneously respecting national sovereignty."[157] As mentioned before, the market helps merge the concepts of legitimacy and effectiveness, rather than placing them at odds, because any attempt to harness the market to combat terrorist financing and money laundering must be legitimate or the market will fail to respond to the attempted signal.

The FATF's use of market-based remedies has found support from some unlikely sources. Critics of the FATF's more coercive policies have proposed that the body continue its trend of market-based remedies. Specifically, civil libertarians argue that the organization:

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153. *See, e.g.*, Sharon L. Davies, *Profiling Terror*, 1 OHIO ST. J. CRIM. L. 45 (2003).

154. *Id.*

155. *Id.*

156. *See, e.g.*, Jacqueline E. Ross, *Tradeoffs in Undercover Investigations: A Comparative Perspective*, 69 U. CHI. L. REV. 1501 (2002).

157. Doyle, *supra* note 107, at 282.

> require that banks institute a risk-based transaction fee schedule for transactions with foreign banks. That is, to the extent that non-FATF bank record-keeping policies deviate from those of FATF member banks, member banks could assess upon their foreign partners a service fee proportionate to the risk of incurring money-laundering fines and penalties for facilitating an illicit transaction.[158]

VI. CONCEPTUALIZING THE FATF'S PRACTICES VIA THE TRIANGLE OF GLOBAL CRIMINAL GOVERNANCE

Broadly speaking, the FATF illustrates some of the constraints facing global governance, particularly as applied in the criminal realm. The FATF is incapable of respecting the traditional notion of sovereignty and deliberative equality while at the same time attempting to set the civil liberty/security tradeoff within and between jurisdictions via the traditional command-and-control model of regulation. In an effort to mitigate these limitations, the FATF has three choices, all of which it regularly utilizes. The FATF can: (1) rely on the mechanism of partial membership; (2) grant procedural rights to non-member jurisdictions subjected to FATF policies, or; (3) decide not to set the civil liberty/security tradeoff within and between jurisdictions and, instead, rely on market-based mechanisms to accomplish its goals.[159] As to the last mechanism, in reality, the FATF's utilization of market-based mechanisms is relatively limited.

A. The Relationship Between Sovereignty and Deliberative Equality

The FATF cannot create an effective, legitimate regime that is respectful of the traditional notions of both sovereignty and deliberative equality and also capable of employing command-and-control modes of regulation. Given the ability of a few areas to sufficiently meet the demand for illegal financial transactions, adequate fulfillment of the norm of deliberative equality and effectiveness require the participation of many jurisdictions. Such participation would naturally include jurisdictions that are highly intolerant of civil liberties, and others that have a less concentrated interest in policing suspicious financial transactions. Any attempt either to limit the information given to such jurisdictions to prevent the data being used for repression, which would introduce another layer of discrimination into the regime, or to demand fundamental changes in order to protect the human rights-based concerns of limited financial privacy,[160] would begin to tread on the notions of consent and equality inherent in the term sovereignty.[161] If, however, the FATF were to share financial information with repressive regimes, or to clothe further

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158. Doyle, *supra* note 107, at 311.

159. *See supra* Part III, IV, V.

160. *See generally* Anita Ramasastry, *Secrets and Lies? Swiss Banks and International Human Rights*, 31 VAND. J. TRANSNAT'L L. 325, 328 (1998).

161. U.N. Charter art. 2, para. 1.

repressive actions by the state with the mantra of the organization, it would be a grave threat to civil liberties and, consequently, the legitimacy of the group.

One way for the FATF to respect both sovereignty and deliberative equality while not allowing its name to be used as an excuse to infringe on civil liberties, is to rely on market-based penalties rather than attempt to enlist the command-and-control power of the state vis-à-vis its internal matters. Such reliance avoids entanglement with the state apparatus. Mechanisms such as the NCCT's name-and-shame aspect, and its reliance on the fiduciary responsibilities of financial managers to protect investments, bring the market to bear on behavior that would otherwise be regulated by the potentially overly coercive power of the state. As evidenced by the aforementioned reactions by civil libertarians to the FATF, the use of market-based mechanisms, rather than command-and-control, is still rare.[162]

B. The Interaction Between Deliberative Equality and Command-and-Control

An effective network that utilizes command-and-control methods, while adhering to deliberative equality, would be incapable of respecting the traditional form of sovereignty. The FATF could not accommodate the requisite large number of jurisdictions, with their varying commitments to human rights and international security, while at the same time attempt to directly influence the civil liberty/security tradeoff without forcing repressive jurisdictions to change their practices towards human rights. To ignore the distinction between jurisdictions means that the FATF would face the de-legitimizing prospect of having its mantra used to justify human rights abuses. Such a course of action would, however, violate the traditional concept of sovereignty as consent.

At the same time, a non-representative network, such as the FATF, that attempts to infringe on state sovereignty by mandating its security/civil liberty tradeoff fails for a lack of legitimacy. In order to gain legitimacy while still reserving the ability to use more direct measures to influence the security/civil liberty tradeoff, the FATF must replace sovereign legitimacy with procedural legitimacy. The FATF accomplishes this by, for example, opening its deliberations to notice and comment and, more importantly, affording procedural due process to non-members when subject to the FATF's reach.

C. Balancing Command-and-Control and Sovereignty

The FATF could create an effective anti-money laundering network respectful of both sovereignty and civil liberties by limiting membership to a few jurisdictions with a strong history of protecting civil liberties and a concentrated interest in financial integrity and then utilize the market and

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162. *See* Doyle *supra* note 107, at 311.

diplomatic power of these mostly Western nations to impose the FATF's norms on non-complying jurisdictions. Such a regime would, however, suffer from a lack of legitimacy stemming from its disregard of deliberative equality.

In order to correct for this lack of legitimacy, the FATF has created a liquid concept of membership complete with different tiers, such as observer status and affiliation via regional bodies.[163] The fluid concept of membership allows many jurisdictions to participate in FATF proceedings and, consequently, increase the legitimacy of the organization. At the same time, the limits of partial membership and observer status allow the FATF to keep jurisdictions that may be either destructive to the FATF's overall goals or willing to use the FATF's mantra to justify human rights abuses from overly influencing the general direction of the network and its policies. Alternatively, when possible limited affiliation with the FATF is so risky as to threaten the integrity or direction of the organization, the network can rely on the use of procedural mechanisms vis-à-vis targeted non-members in order to increase the legitimacy of acting outside the traditional notion of sovereignty as consent.

D. The Triangle

The FATF attempts to satisfy the normative goals of legitimacy, effectiveness and respect for civil liberties while fulfilling the notions of sovereignty and deliberative equality, through a triangle of strategies. When the interests of sovereign consent and equality become too burdensome to maintain an effective regime, the FATF is forced to grant procedural rights to non-state actors to maintain the organization's legitimacy. When deliberative equality has threatened the goals of the FATF, the organization has created a liquid concept of membership to impose itself on jurisdictions which, consequently, can no longer critique the organization's legitimacy on the grounds of exclusion. Finally, and to a lesser degree, when the risks that the FATF's policies may unleash a maelstrom of human rights abuses by sanctioning the coercive power of the state, the organization has relied on market-backed mechanisms to induce compliance with its policies and preserve its own legitimacy.

The Triangle

With Proxy Goals

Deliberative Equality Liquid Concept

Sovereignty Procedural Rights Market-based Effect Command-and-control

The international community is faced with the choice of what ideal-types are to be preserved in the face of globalization: deliberative equality, sovereignty or command-and-control. Seemingly, global administrative law is

163. *See supra* Part III.A.

poised to sacrifice the traditional notion of sovereignty, and its substantive shield of consent, in exchange for the procedural protections as seen in the administrative state of the United States.

VII. CODA AND CONCLUSION: THE TURN TO PROCEDURE

Finally, it is interesting to examine the actions of the FATF in light of the broader question of whether and when the emerging field of global administrative law represents an influx of objectivity into global governance. The claims of objectivity inherent in the terms sovereignty and sovereign equality have been thoroughly critiqued, especially by scholars associated with the Critical Legal Studies or New Stream movement.[164] Now, the move to utilize procedural mechanisms and de-emphasize the traditional notion of sovereignty, both in the context of the FATF and other global networks, presents a new set of inconsistencies and blind spots equally availing to criticism. While the objectivity of technocratic decision making by such bodies as the FATF has been critiqued on various levels,[165] the turn to procedure in global administrative law presents another, more structural problem.

One of the more important questions generated by the turn to procedure is what kind of action, or perhaps inaction, generates the call for the type of "due process" protections seen at the FATF. For example, the creation of the NCCT list was an evolving process. At first, "the U.S. started the regime by slowly building a 'white list' of nations who would be given preferential treatment by the U.S. financial system."[166] Later, and "after many nations had qualified for the 'white list,' the regime shifted to 'black listing' nations based more on negative sanctions for failure to meet the regime's standards."[167] The change in white to black listing corresponded with the procedural protections afforded under the NCCT regime; white listing occurred at the discretion of the U.S., while black listing invoked the aforementioned remedial set of procedural protections for the listed. The result is question begging vis-à-vis the normative understanding that procedure produces a certain objectivity into the regime; why would a state's failure to afford preferential treatment be acceptable without procedural protections, yet a state's affirmative act of

164. For the standard bearer, *see generally* MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (1989).

165. *See, e.g.*, David Kennedy, *Challenging Expert Rule: The Politics of Global Governance*, 27 SYDNEY L. REV. 5, 24 (2005). For a counterargument that promotes a certain type of technocratic expertise in international criminal law, *see* Jared Wessel, *Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analyzing International Adjudication*, 44 COLUM. J. TRANSNAT'L L. 377 (2006).

166. John Braithwaite, *Methods of Power for Development: Weapons of the Weak, Weapons of the Strong*, 26 MICH. J. INT'L L. 297, 329 (2004).

167. *Id.*

listing a state necessitates a level of participation? Put another way, why should white and black listing be distinguished?

The default rule of the sovereignty-based international system is the Lotus principle: states are free to act absent an explicit prohibition forbidding the conduct in question.[168] The Lotus principle privileges a libertarian and individualistic assumption of freedom of action; it is the community that bears the burden of stopping the individual [state]. Whether the Lotus principle adequately serves the international community is open to debate. Nonetheless, at the dawn of global administrative law, and the subsequent turn to procedure, the international community has a chance to determine, debate, and contest the proper base line for the system of global administrative law. The base line, like the Lotus principle, speaks to the nature of the international community and is, at its core, a political decision.

The international community can choose, as was the case with the NCCT, to use a common-law base line derived from the distinction between an act and an omission. The base line distinction summons forth a plethora of assumptions about the international community; for example, and like the Lotus principle, the act/omission dichotomy is libertarian and preferences freedom of action.[169] What is important to realize is that the base line is neither a choice that globalization should leave to chance nor implicit imposition, nor is it a choice inherently within the technocratic expertise of the FATF to be made by its bureaucracy.[170]

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168. The Case of the S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18.

169. For an example of the common-law base-line, *see* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1031 (1992) (using common-law principles to distinguish a taking from the a nuisance regulation for purposes of the Fifth Amendment). For a critique of the common-law base line, and its claims of neutrality and objectivity, *see* Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 882 (1987) (noting that the common law base line "was state-created, hardly neutral, and without prepolitical status."). Interestingly, Sunstein's alternatives to the common-law base-line bear an uncanny relationship to the apology/utopia critique of international law articulated by Koskenniemi:

> If the baseline provided by the common law or the status quo is abandoned, there are two principal alternatives. . . . [The apologetic] response . . . would be to conclude that constitutional courts ought to play little or no role in deciding whether the existing distribution of wealth and entitlements should be changed. . . . [The utopian approach] would attempt to generate a baseline independent of either the common law or the status quo through some theory of justice.

Id. at 904-07.

170. The FATF also illustrates a similar problem with the concept of deliberative equality. In the FATF's latest mandate, the authors noted that: "the FATF has perhaps approached the limit of members if it is to continue to retain its current structure and character. Any future identification of possible strategically important countries should address the issue of geographical balance and the impact on the efficiency of FATF." *Mandate for the Future of the FATF*, *supra* note 26, at 2. Similarly, Professor Slaughter limits the scope of deliberative equality to jurisdictions with "a particular degree of economic or political development" or, more importantly, "a level of performance in terms of compliance with agreed principles." Slaughter, *supra* note 108, at 177. The mandate's reference to "character" and Professor Slaughter's

The aforementioned critique highlights the embryonic nature of global administrative law. As with any "newborn," it is an exciting time in international law in that the profession has a tremendous ability to shape the norms that will govern transnational networks. In many ways, the profession is writing on a blank slate. This is an opportunity we should all embrace.

reference to "principles" both imply pre-set, normative criteria that are inconsistent with the impetus behind deliberation. Rather than deliberation setting the character and principles of the organization, the character and principles of the organization set the membership. The content and formation of these principles is unaccounted for by the current understanding of deliberative equality. Whether these principles should be articulated via a technocratic or political process is unclear. *See* Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490, 1511-12 (2006) (arguing that "[w]hen a matter is largely scientific or technical, having designated supranational experts address the problem may be uncontroversial. As an issue becomes more political or normatively charged, however, delegation to those lacking electoral legitimacy becomes increasingly problematic.").