GLOBE GLOBAL GOVERNANCE AND THE EUROPEAN UNION Future Trends and Scenarios

REPORT

From Rule Intermediaries to Rule Takers - Banks and the Making of Global Anti-Money Laundering Regime

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Table of Contents

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ABSTRACT

Regulatory governance in domestic and transnational settings is typically conceived as a two-party relationship between a rule-maker or regulator (R) and a rule-taker or target (T). Private governance is usually understood as self-interested behavior and in competition to the inter/governmental one. This paper qualifies these two conventions. It first extends an agenda for the study of regulatory governance as a three- (or more) party relationship -- with intermediaries and intermediation processes (I) at the center of the analysis. Intermediaries play major and varied roles in regulatory governance, not always as I show voluntarily. They provide expertise and feedback, facilitating implementation, monitoring the behavior of regulatory targets and building communities of assurance and trust. Despite their central role in governance in general and global governance in particular they have received little scholarly attention. This paper applies the framework of R-I-T to the case of the emergence and globalization of the US anti money laundering regimes. It demonstrates how Banks became intermediaries against their will and indeed rule-target, carrying fines in the billions. Regulatory responsibilities were forced on banks and how they surprisingly were orchestrated and responsibilized in the US' and global community fight against tax-evasion, drug trafficking, corruption and terror. The implications of the finding to the study of intermediation in global regulatory governance more broadly, emphasizing the important of (some) states in current global governance.

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1. Introduction

When we think, conceptualize and analyze regulatory governance we usually think about the distinction between rule-makers and rule-takers. It should not be surprising, or controversial, to suggest that the conventional way to think about governance is to think on a world of rulers and ruled; regulators and regulatees. This is largely taken for granted, and is not even explicitly stated, not to mention critically problematized. Still and perhaps another way, and indeed potentially, more productive is to think about governance, as a three-way game. A world where the interaction between rule makers and rule takers is mediated and sometimes governed by rule intermediaries (Levi-Faur & Starobin, 2014; Abbott, Levi-Faur and Snidal, 2017). Intermediaries with roles and capacities that are less clear and less stable than we often assume when we analyze power and legitimacy in governance. Think, for example, about the transnational governance of fair coffee. Fair coffee, and fair trade, more generally represent an important and effective global regime and a moral challenge to the idea of market governance. Here a certification and labeling by NGOs who act as intermediaries provide regulatory information to the consumers who may decide to trust or not to trust the label. The rule takers are the firms in the global production and marketing chains of the coffee. The rule makers are formal and informal actors who shape the regulatory and normative environments of what "fair' means in the context of regulatory intermarries. The rule-beneficiaries of the global 'fair coffee' are workers and sustainability values who are effected by the global production and marketing of coffee. The role of the fair coffee NGOs – or the rule intermediaries - is critical for the legitimacy and effectiveness of the regime.

Rule intermediation, that is, the mediation processes between rule-makers and the rule-takers, are not unique to the fair-coffee regime. Intermediaries are everywhere. Economics 101 tells you that the banks are the intermediaries between savers and borrowers. Political science 101 tells you that members of the parliament in democracies are the intermediaries between government and the people. And so it goes. If you'll look around openly you can see that intermediation abound. It is a good business. It is a good politics, and it is a social good. Still and unfortunately, awareness for intermediation is less prevalent in the academic worlds of global governance and regulation. Intermediaries, it is argued, play major and varied roles in regulation, from providing expertise and feedback to facilitating implementation, monitoring the behavior of regulatory targets and building communities of assurance and trust. Their functions, power, scope of authority and effectiveness are critical to understanding of the complex regulatory networks and regimes that govern the world.

To demonstrate the potentially powerful insights of the intermediaries and the ways they help us to understand three different logics of governance this paper analyzes the emergence and current architecture of the global money laundering regime. Money laundering, that is, the processing of criminal proceeds into the financial system or legal economic activity, in order to disguise their illegal origin (Levi, 2002; Reuter, 2005; Unger, 2011). This process is of critical importance, as it enables the criminal to enjoy these profits without jeopardising their source. Criminalizing the concealment of the sources of the money allow authorities to "go after the money" rather than the solely on the crime itself. Its historical institutionalization from the fight against Al Capone in the 1930 to the fight against Al Qaeda and other terrorist organization provides a fascinating story of the origins and techniques of global governance (Unger, 2011; Tsingou, 2010; Hülsse & Kerwer, 2007). The analysis covers the use of hybrids of soft law and hard law; Legalization at the global level via de-facto domestic laws of powerful states. It portrays the use of the power of national and global networks of regulators and via them extending the power of the US and the EU in governing the world. It also allows us to point to processes of responsibilization of seemingly powerful actors – financial institutions – as intermediaries against their will. Not only that banks are now investing hundreds of millions in monitoring and reporting suspicious money laundering activities but they become one of the most unlikely rule-takers in the global regime. They have started in the modest role of rule-intermediaries but gradually became major targets of the regime. As rule takers that are fined billions dollars each year in the last decade for not complying with money laundering regulations. The process of making the bank intermediaries against their will is conceptualize as a process of responsibilization and is contrasted with more common strategies of delegation and orchestration (Abbott and Snidal, 2009a/b; Abbott et al. 2015; Hawkins et al, 2006).

The rest of the paper is organized in four parts. The first offers an overview of the regulatory governance literature on transnational regulatory governance. It points to an understanding of private governance as self-interested behavior by non-state actors. The second introduce regulatory intermediary and the RIT model. The third focus on the origin and development of the global Anti-Money Laundering [AML] regime and on the role of banks as intermediaries with it. The fourth concludes emphasizing the theoretical implications of the analytical framework and the empirical findings.

2. Regulatory Governance on Global Governance

Global governance is expanding via both transnational and intergovernmental institutions. This expansion is often regulatory rather than fiscal (e.g., financial transfers in the forms of aid) or discretionary (e.g., a unilateral decision and action by the powerful and charismatic person). Such regulatory expansion means that power is projected, leveraged, and accommodated via rules, regulatory institutions, and regulocrats rather than solely or mainly via other legitimate and illegitimate forms of institutionalized power, such as bureaucratic and charismatic discretion or taxing and spending (Brunsson and Jacobsson 2000; Djelic and Sahlin-Andersson 2006). With the institutionalization of rule-based governance, new demands for accountability, transparency, and extended liability are emerging (Power 1999, Rose and Miller 2010). At the same time, new actors are coming into the spotlight, and new opportunities for rent-seeking, opportunism and capture as well as policy learning and experimentalism arise (Vogel, 2008, 2010; O'Rourke, 2003; Mayer & Gereffi, 2010; Mattli & Woods, 2009; Büthe, 2004: 2010a/b; Potoski, & Prakash, 2005; Graz & Nölke, 2007; Auld, Bernstein & Cashore, 2008; Cafaggi, 2011; Sable & Zeitlin, 2012; Wolf, 2008; Marx, Maertens & Swinnen, 2012).

Why bother with transnational governance and transnational regulatory governance in particular? One of the many good reasons is simply the fact that some problems—climate change and public health, for example—are transnational in nature. Consequently, global public policy is emerging as a transnational arena of policy making, as a policy network, and as a problem-driven response shaped by particular ideas, interests, and institutions (Coleman, 2012; Stone, 2004; Reinicke, 1998). Many actors critically engage at the transnational level with polities and cultures that are considered unacceptable in various regions of the world and check the abuse of power at yet another level of political action (Risse, Ropp & Sikkink, 1999). The world is becoming smaller, and thus processes of diffusion are increasingly becoming global. Diverse institutional structures with varying degrees of scope, effectiveness, and legitimacy create a new epoch in the history of world governance. Changes take time and come in diverse forms and places, but the institutional arena in global governance is becoming more crowded than ever. A new global institutional script is born and diffused and with it a new institutional layer is being added to global governance (Meyer & Rowan, 1977, Levi-Faur, 2005; Djelic & Sahlin-Andersson, 2006, Meyer, Drori & Hwang 2006).

All of these provide important reasons and compelling rationales for studying transnational governance, but there is one more reason that is especially important for the purposes of this paper. We should study the transnational because it helps us to better understand regulatory governance. Transnational regulatory governance offers a new angle from which we can understand regulation and regulatory processes and thus to reflect on the basic assumptions that shape the theories of regulation (Abbott & Snidal, 2013). In other words, the transnational arena is not only a theoretical puzzle, a challenge to be solved and defeated. It is also an opportunity to develop yet another and richer understanding of regulatory governance in general and the politics of regulation in particular. Regulatory governance scholarship needs the transnational arena as much as the transnational arena calls for the application of regulatory governance scholarship. The transnational arena presents a diversification and fragmentation of regulatory authority, rules, roles, and architectures of governance to an extent that helps us to better understand politics in the context of the expansion of rule-making. The promises of gains exist, therefore, on both sides. The theories of regulation can be highly useful for the study of transnational governance, and transnational governance allows us to refine and extend the theories of regulation.

The regulatory governance perspective on transnational governance has emerged since the early 2000s from an exchange among diverse and loosely connected groups of scholars who focus on new pluralist forms of governance, institutionalization,

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legalization, authority, and control within the transnational arena. These scholars place a diverse set of regulatory actors within a broad governance framework and with regard to the various facets of the regulatory process—rule-making, rule-monitoring, and rule-enforcement, rule-adaptation, rule-evaluation and rule-revision (localization, transplanting, or translation, which can sometime present experimentalist governance), and with an emphasis on the multiple and plural sources of rule-making, technologies of regulation, and enforcement strategies where markets are nurtured, embedded, and guided by public and private institutions via political action (Braithwaite & Drahos, 2000; Bartley, 2007). The regulatory governance perspective captures, explains, and makes sense of a world characterized by horizontal and vertical fragmentation of authority, of actor constellations, and of institutional architecture (Jordana & Levi-Faur, 2004; Scott, 2004; Börzel & Risse, 2005; 2010 Djelic & Sahlin-Andersson, 2006; Bernstein & Cashore, 2007). It brings together scholars with empirical and positivist orientations as well as normative ones. It deals not only with the architecture of governance but also with actors and strategies, that is, the orchestration of various actors into regimes of rules, monitoring, and enforcement institutions (Abbott & Snidal, 2010).

The expansion and diversification of transnational governance makes the three main images of international relations—anarchy, hierarchy and intergovernmental ןדצ—increasingly unsatisfactory. The study of the emergence, consolidation, and expansion of private governance, meaning both civil and business, across borders aims to fill the gaps left by traditional state-centered institutions and single-level analysis and at the same time to offer an alternative. Certainly, anarchy is evident at the national and global levels as are intergovernmental institutions, yet they capture much less than in the recent past (Rosenau, 2007; Enderlein, Wälti, & Zürn, 2010). Rules, regimes, norms, and laws constitute formal and informal institutions that govern spaces previously conceptualized as largely or mainly “anarchic” or “hegemonic” (Shaffer, 2012). Yet new actors and technologies of governance are coming into play, making the transnational arena denser, more diverse and more pluralistic than ever before (Cutler et al. 1999; Hall & Biersteker 2002; Djelic & Sahlin-Andersson 2006).

The suggestion that a regulatory governance perspective should be one of the main approaches for the study of transnational governance represents a challenge for the

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traditional theoretical power and the dominance of the international relations and international law literatures (Koenig-Archibugi, 2010, p. 1142; See also, Falkner, 2003). The dominance of the traditional approach for international analysis in the study of transnational politics is evident in a recent *Handbook of Transnational Governance* (Hale & Held, 2011). The handbook provides a comprehensive map of more than fifty transnational regulatory organizations, yet the framework for the analysis of this otherwise useful handbook rests on mainstream theories of international relations. Functionalism, interests, ideas, and historical approaches provide the causal framework. Theories of regulation and the regulatory governance perspective are represented in the handbook only on the very margins. Mattli and Woods's *The Politics of Global Regulation* present this same point forcefully: "Few topics are as central and of consequence to the lives and well-being of individuals as regulation, broadly defined as the organization and control of economic, political, and social activities by means of making, implementing, monitoring, and enforcing of rules. Regulation has become increasingly global as elements of the regulatory process have migrated to international and transnational actors in areas as diverse as trade, finance, the environment, and human rights" (Mattli & Woods, 2009, 1).

One illustrative example of the rise of regulatory organizations at the global level is GlobalG.A.P—a private association that sets voluntary standards by bringing together agricultural producers and retailers that want to establish certification standards and procedures for Good Agricultural Practices. Certification covers the production process of the certified product from before the seed is planted until it leaves the farm. Encompassing crops, livestock, and aquaculture and covering more than 700 products, GlobalG.A.P, via 159 accreditation bodies, certified over 200,000 food producers in more than 135 countries.[1] However, another type of such capacities is corporate-based regulatory actors. Take the transnational corporation chain store

[1] http://www.globalgap.org/uk_en/what-we-do/ Last accessed August 11th 2019.

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Walmart as an example. As the largest private employer in the world, Walmart has some 11,200 stores under 55 different banners in 27 countries, and 265 million customers a week are served by 2.2 million employees.[2] At the same time, Walmart has tens of thousands of suppliers over which it holds some power (Ruggie, 2007; 823, ff11). Because Walmart has some power over its suppliers, one can target and orchestrate not only Walmart itself but also its suppliers and affect at least in theory the working conditions of many millions of other workers who are part of the Walmart global chain of production.

However, the world of transnational regulatory governance is not only corporate based (in the form of the Walmarts of the world) or associational (e.g. GlobalG.A.P) but also NGO based. One such example is the Fair Labor Association (FLA), a US-based collaborative initiative of apparel and sportswear companies, universities, and NGOs that promote compliance with core international labor standards within their transnational supply chain. It emerged as a direct response to the anti-sweatshop protests in the late 1980s and the 1990s. The initiative that brought the two opposing sides to collaboration thanks to direct pressure from the Clinton Administration led to the creation of the Apparel Industry Partnership (AIP) in 1996. Three years later, this coalition expanded its reach and became incorporated as a non-profit under the new name of the Fair Labor Association (MacDonald, 2011). The association is controversial. Some critics question the FLA's accountability and effectiveness, "highlighting what they perceive to be its corporate-dominated governance structure" (MacDonald, 2011, 244). Others regard it as a leader in innovation in compliance initiatives, "pointing to its progress toward building independent auditing and complaints processes, and its efforts in recent years to strengthening the capacity building dimensions of its compliance program" (Ibid, 2011). Most recently, the strong reputation of the FLA proved useful. Thus, when Apple and Foxconn faced criticism over working and safety conditions in the production of Apple's products, they had to turn out to the FLA's inspection in order to demonstrate their credibility.

[2] https://corporate.walmart.com/our-story Last accessed August 11th 2019.

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Transnational regulatory governance in the forms discussed above is both more diverse and messier than traditional regulatory approaches at the national level, but it is not different in principle. Traditional approaches at the national level have often been based on factory-centered, fixed rules and standards, government monitoring and enforcement, and judicial review (O'Rourke, 2003, pp.5-6). Transnational regulatory governance is based, however, on networks and centers on global value chains, on new actors, in new roles, and in multiple and shifting relationships, experimenting with new processes of rule-making, rule-monitoring, and rule-enforcement (Ibid). While national, hard-law regulation focuses on the factory and mobilizes the power of the state, transnational regulatory governance mobilizes the power of all stakeholders in order to achieve similar, complementary, or better levels of social performance. The emergence of these institutions, regimes, networks of actors, and discourse is evident. Yet, as already noted by Mattli & Woods, it is less so in the international relations literature. They write:

> "It is surprising that no sustained attempt has been undertaken in the field of international relations (IR) to take stock of the broad picture of the politics of global regulation by systematically tackling questions such as: What major global regulatory changes have taken place in key issue-areas over the past few decades and what drove these changes? What institutional forums are selected for regulatory activities and what explains these choices? How is compliance monitored and enforced? Who are the winners and losers of global regulation and why? What explains variation across issue-areas?" (Mattli & Woods, 2009, 2).

Unlike Mattli and Woods' agenda – which might as well be the major agenda in global governance – our case, as will demonstrated in the money laundering case, is one in which private governance represent an instrument of public power.

3. A Focus on Regulatory Intermediaries

Broadly conceptualized, regulatory intermediaries are regulatory actors with the capacity to affect, sometimes control, and sometimes monitor relations between rule-makers and rule-takers. They can do so because they are “intimates of the regime” therefore via their interpretations of standards and their role in the increasingly institutionalized processes of monitoring, verification, testing, auditing, and certification. They include a range of public and private actors serving as ad-hoc regulators such as vigilant civilians, consumers, and professionals voluntarily contributing to collective enforcement of societal rules, sounding “fire alarms,” and calling for regulatory action (see also, Busch, 2010). These actors are increasingly entrusted with ongoing regulation because of their intimate familiarity, often as expert professionals, with the processes of rule-making, rule-intermediaries, and rule-enforcement. They include lawyers, accountants, investment bankers, credit rating agencies, auditors, certifiers, testing companies, labs, and inspectors. Thus, banks have a duty to monitor and report money laundering. Credit card companies are pressured to minimize gambling transactions over the Internet. Internet Service Providers (ISPs) have to disclose the location and other private information of suspected offenders. Universities are required to act as intermediaries in the monitoring and enforcement of intellectual property and ethical codes in regards to their staff’s research. Some of these intermediaries are easy to recognize and this is their main function; others are not. Physicians, social workers, and teachers have duties to report abuse and neglect without direct evidence (Thompson, 2002). The mobilization of passengers and other drivers to the enforcement process for road safety by the creation of monitoring techniques, such as *How is my driving?* bumper stickers is a regulatory technique that is increasingly common around the world. In a similar arrangement, Qui Tam laws mobilize and rewards private individuals who assist prosecutors as whistleblowers, most often in white-collar crimes. Braithwaite (2012, 4) tells us corporate crime enforcement has a low success rate because of its poor record of getting insider testimony from corporations and organizations that are breaking the law. One of his solutions for a better regulatory compliance system is leveraging the moral, legal, and regulatory capacities of insiders to prevent fraud and other regulatory and compliance failures. Kraakman (1986) asks, from a legal point of view, when should we impose liability on intermediaries? The legal and terminological terrain includes such concepts as *third party*, *collateral liability*, and *secondary liability*. The legal, regulatory, and ethical obligations of the financial ratings agencies come to mind here (Sinclair, 2005). Their accountability should be assessed to evaluate the effectiveness and legitimacy of their regimes, especially given recent financial

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catastrophes from Enron to the Euro via the collapse of the housing market in the US in 2007.

Diverse in their form and function, these actors include for-profit companies, governmental and intergovernmental agencies, and other non-governmental organizations (NGOs). A new market of auditing, verification, certification, and accreditation is booming (cf. Reinecke, Manning, & von Hagen, 2012). The emergence of this market for intermediation can be analyzed in terms of its useful functions in economic, social, and political processes. Kearl (1983), for example, asserts that the dynamics of the regulatory process rests on consideration of responses to these costs. Rule intermediaries, he wrote, will emerge who serve a useful function in lowering the social costs of a given regulatory scheme. Still, these actors have their own interests and sometime are in a position more privileged than the rule makers and rule-takers. Take, for example, the case of the cartel of credit rating agencies. Their privileged power is grounded in a de facto monopoly over certification granted by the Securities and Exchange Commission (White, 2010). Or consider Quality Assurance International (QAI) that managed, along with others, to convince the U.S. Congress to create the Organic Foods Production Act of 1990. The act created an elaborate scheme to define the term *organic* and established a legal subcategory of intermediaries called "accredited certifiers" (Klonsky, 2000). Politics was found in this case as a root for a successful business model. Nonetheless, QAI did not receive the same monopoly status that was given so generously to the few credit rating agencies that dominate the financial world.

We are relatively familiar in public and scholarly forums such as GlobalG.A.P, the Fair Labor Association, the World Wide Fund for Nature, the Fair Wear Foundation, the Forest Stewardship Council, and the Marine Stewardship Council. We know much less about the organizations that monitor, audit, verify, and certify the rules these organizations created. These anonymous regulatory agents—often subcontracted third parties, tending to remain hidden from view, presumed to be credible regulatory agents by virtue of their purported independence from rule-making organizations (Starobin and Weinthal, 2010). Figure 1 presents types of regulatory intermediaries along with the distinction between state, business and society. The space is divided into seven zones. Zone 1, the zone of states, is exemplified by the monitoring bodies of the Council of Europe in the development of human rights, an elaborate system including various organs specializing in different types of human rights abuses. Inspectors of the nuclear non-proliferation regime can also be included here. They are organized in the Safeguards Department of the International Atomic Energy Agency (IAEA). Its role is to verify compliance with an extensive set of technical measures made by member states regarding their nuclear material and activities. Zone 2 includes organizations like RINA, UL Responsible Sourcing, and credit rating agencies, all for profit-intermediaries. Zone 3 includes NGOs such as the Worker Rights Consortium, which focusses on monitoring and regulation via public information. Zone 4 includes collaborative actions by states and business, while Zone 5 includes organizations with collaborative schemes between NGOs and states. Zone 6 includes intermediaries that are hybrids of civil society and business actors. Zone 7 includes intermediaries that are hybrid of the three actors under discussion. There is, for example, the case of the Independent Monitoring Association for Child Labor (IMAC), which was established in 2003 to monitor labor issues in the sporting goods industry in Sialkot, Pakistan (Nadvi, 2008). These seven zones allow us to focus analysis on various public roles \intermediaries take on when they verify for the regulatees, the regulators, and other stakeholders so production and supply chains meet required standards (cf. Meidinger, 2003)

Intermediaries embedded in the regulatory process in both second- and first-party regulation get full visibility in the third-party model. We can now explore more clearly both their independence from the rule-makers and the rule-takers and their interactions with these actors. Some of the questions that can be raised now include: whom do they serve?; who pays for their services?; what are the norms that guide their activities?, what are their legal obligations?; who are they accountable to and which kind of relations do they develop or should develop with rule-takers and rule makers?

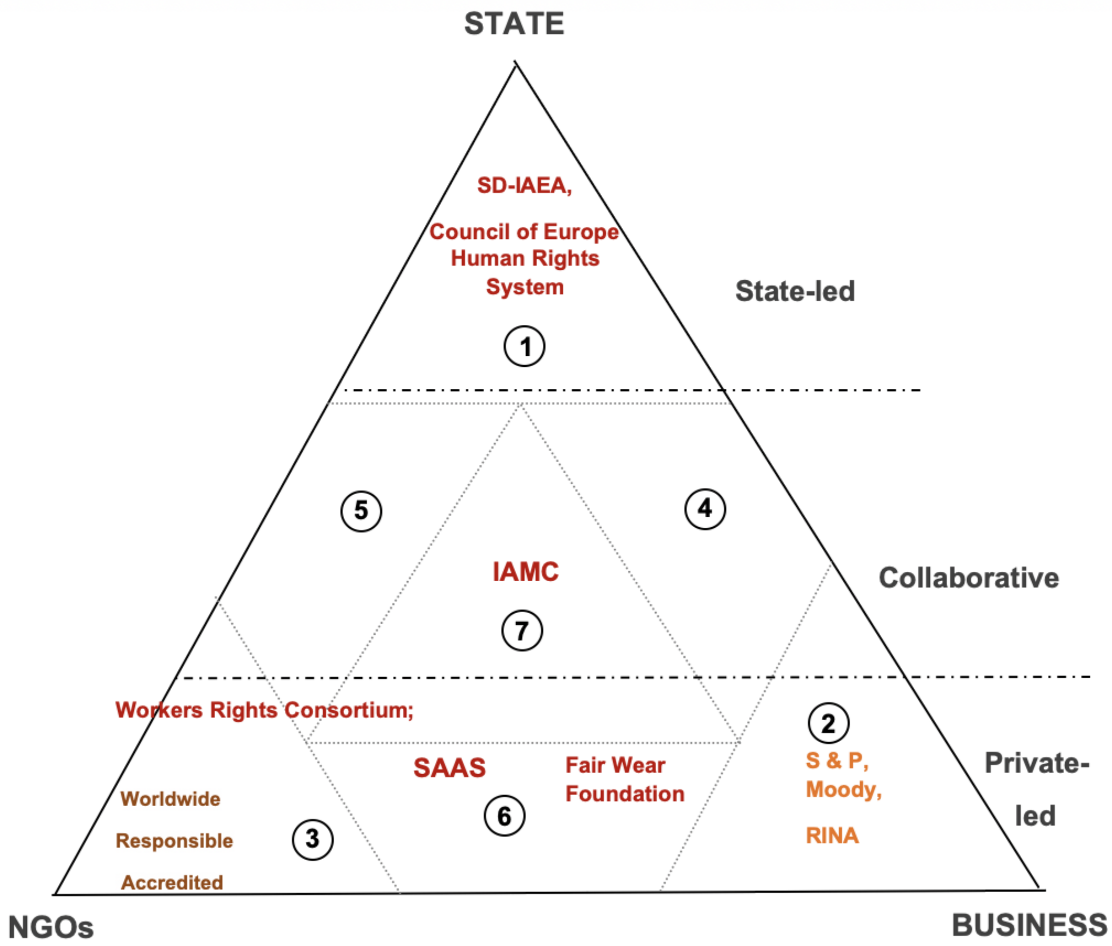

Figure1
The Regulatory Intermediaries Triangle

In first-party regulation, the regulator (a firm or any other player/actor) is not only a rule-maker but also a rule-taker and rule intermediary. They create the code and standard (RM); the firm is subjected to compliance with the standard (RT), and they are charged with auditing their own compliance with the standard, making some actors, group of actors, or sub-organizations within the firm responsible as RI. The intermediary here is an insider within the organization that regulates itself and enjoys privileged access to intra-organizational information on rule-making and compliance processes when compared to an external intermediary. In second-party regulation, the regulator and regulatee are two different actors; the regulatory intermediary here, as

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in the case of first-party regulation, is an insider within the rule-making organization and enjoys privileged access to intra-organizational information on rule-making when compared to an external intermediary. All other stakeholders in compliance relations place their trust in the regulator and in its intra-organizational intermediaries in achieving compliance. In third party regulation, regulators and regulatees manage their relations with the help of separate intermediaries that conduct functional and ceremonial auditing, verification, testing, and certification to achieve compliance by the regulatees. Rule-makers, rule monitors and rule intermediaries are independent from each other. The intermediary relations with the rule-makers and the rule-takers do not allow for privileged, iterative, and intimate access to intra-organizational rule-making and compliance processes. All other stakeholders in compliance are expected to place their trust in the regulator and in the intermediaries.

4. The Anti Money Laundering Regime: Origins and Development

One of the most powerful driving forces in shaping global regimes in the economic sphere are concerns about national security and crime control. This is not to say that crimes are being fought consistently or that national security concerns are objective. Still, some crime and some imagined or real security concerns are the most important elements behind the rise of the global anti-money laundering regime and the mobilization of banks as rule-intermediaries. As we will see soon, domestic settings and powerful interest condition – especially in the most powerful states – shape the timing and the strategies of crime control and perceives threats national security. History matter. Domestic arrangements, regulatory instruments and institutions are than uploaded to the regional and global level across decades. In the case of "money laundering" (a term that didn't practically or largely exist before the 1980s), the origins of the current global regime rests with regulatory coalitions of progressives and evangelists in the US all in the context of rapid industrialization, the birth of consumer society and the mass immigration. The 18th Amendment to the US Constitution which was ratified by the requisite number of state in 1919 prohibit the manufacture, transportation, and sale of alcoholic beverages. The prohibition gave a boost for a

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wide scale criminal activities by ‘bootleggers’ and the mafia. It is generally considered a failure and the prohibition was ended by 1933. Still it is said to be one of the drivers of the creation of big government. The large state apparatus that was created to monitor and enforce prohibition and the criminal activities that it draw upon was appropriated later to deal with other moral issues, mostly drugs (Szymanski, 1999; McGirr, 2015).

It is within the context of the war on alcohol that Al Capone, one of the most notorious alcohol smugglers and murders in the history of the American crime, became the target of the tax evasion charges by the Federal authorities who couldn’t prosecute him on “real crimes”. Eliot Ness the federal agent of that led the small team of the ‘untouchable” working for the IRS and the Treasury found enough evidences (mainly in the form of ledger) and witnesses to on tax evasion. Al Capone was found guilty on five counts of tax evasion and was sentenced to eleven years in prison. The enforcement strategy and the regulatory innovation of prosecuting suspected criminal on their tax evasion rather than on murders and lesser crime was much held at the time. A new regulatory tool in the fight of crime was discovered but the innovation was slow to be spread and apply. On the one hand the Prohibition period came to an end with the repeal of the 18th Amendment and the coalition and with it the coalition that promoted and sustained it. Attention was shifted to economic recovery and then to the 2nd world war efforts. Criminals and mobsters such as Meyer Lansky, found new ways to evade tax and conceal their fortune, turning the benefits of numbered and anonymous Swiss Bank account (Malkin & Elizur, 2001). Lansky even bought his own offshore bank in Switzerland so he could conceal his fortune. Perhaps because the money was concealed too well, when he died he left almost nothing to his family. The connection between Al Capone, Lanski and the Swiss bank secrecy laws became even more interesting after the Second War World. In this period the US government tried to put its hand on holocausts victims’ and survivors’ money that was deposited in Swiss and other banks. Still it took another “war” to make the link between avoiding tax to criminal activities and work, the “War on Drugs”. In the beginning of the 1970s it occurred to the Nixon Administration and to the growing legal and enforcement bureaucracies around drugs that they can follow the money rather or in addition to follow the original crimes. The US Bank Secret Act of 1970 which is also known as the Currency and Foreign Transaction Report Act which required financial institutions to report suspicious activity and to assist US government agencies in detecting and preventing the benefits of crimes. The California Banker Association appealed to the court and challenged its constitutionality. The court rejected the argument that the Act violates due process and rights to privacy. The case was heard then by the Supreme court which upheld the constitutionality of the reporting requirements. (Orr, 1986,1073). The Bank Secret Act [BSA] is now understood largely as the corner stone of the current global AML regime. At the time and for more than a decade, it was hardly enforced, and it is only in hindsight that its potential effects became well understood.

A sea change came with the Money Laundering Control Act (1986) and in the context of Clinton's administration war on drugs. Despite the criminalization of drug use in 1922 in the US, the results were less than poor. Drug trafficking and use expanded, and with them the failure of the American

Table 1: The Development of the US AML and FT Regime

	Requirement	Main Issue
The Bank Secrecy Act [BSA] (1970)	Know your Customer (KYC); Currency Transaction Reports; International Transportation of Currency or Monetary Instruments (e.g. $10,000 and more); Record keeping by banks: Report of Foreign Bank and Financial Accounts (with more than $10,000; FBAR form)	Tax evasion
The Money Laundering Control Act (1986)	Criminalizing money laundering; extending sanctions; extending civil and criminal forfeiture; Prohibited structuring; required banks to set procedures to ensure and monitor compliance.	Drugs
Amendment to the Bank Secrecy Act (1988)	A. Financial institutions cannot sell bank checks, cashiers checks, travelers' checks or money orders in amounts of $3000 unless they properly verity the purchasers and record certain facts about the transitions	Count decision

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	Authorization to target specific banks and to require them to maintain initial records and to submit additional reporting. Extended the scope of the law to include businesses such as real estate agents and car dealers	
Annunzio-Wylie AML ACT (1992)	An increase in the petalites; broadening the scope of BSA; An endowment of regulatory responsibility under the BSA to financial institutions; AML Program which will facilitate of internal policies; designate a compliance officer; training program; incorporate and independent audit function; Whistleblowers protections	BSCI Scandal
The Money Laundering Suppression Act (1994)	To review and enhance training and develop AML examination procedures; Required each Moneys Service Business (MSB) to registered by owner or controlling person No need for willful intention in to evade the BSA's reporting requirements;	Drugs
Treasury Department Regulation C.F.R. 103.18 (1996)	Suspicious Activity Reports	Drug related crimes
USA Patriot Act (2001)	Criminalized the financing of terrorism; strengthening customer identification procedures; Prohibited business with foreign shell banks; Due diligence procedures (and enhanced due diligence procedures for foreign correspondent and private banking accounts); Increased civil and criminal penalties for money laundering; Provided the Secretary of the Treasury with the authority to impose "special measures" on jurisdictions, institutions, or transactions that are of "primary money laundering concern"; Required federal banking agencies to consider a bank's AML record when reviewing bank mergers,	Terror And after the financial Crisis financial integrity and tax evasion

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	acquisitions, and other applications for business combinations	

Source: Morgan, 1997; https://www.fincen.gov/history-anti-money-laundering-laws

authority to effectively reduce its social and criminal affects. The BSA of 1970 made a little effect on its own. The administration has decided to follow the money again. If one could not get at drug dealers and eventually other criminals directly, then at least drug barons should be discouraged by the realization that they could not reap the monetary benefits of their acts (Unger, 2011). The ideational breakthrough came with the realization that one can criminalize financial behavior around concealment of the source of one's money and filtering 'dirty money' into the financial system. A new crime was defined and with it the scope and depth of the American state control over the financial system. Table 1 presents the main acts that provide the basis for the US AML regime and with it and upon it, also the pillars of the global regime. The Bank Secrecy Act (1970), the Money Laundering Control Act (1986), the Annunzio-Wylie Money Laundering Act (1992), the Money Laundering Suppression Act (1994), The Money Laundering and Financial Crimes Strategy Act (1998) and the USA Patriot Act (2001) provide tools for the Federal government to use the financial system as intermediary in the fight against drug, tax evasion, organized crime, and increasingly after September 11th 2001, terrorist finance.

The 1986 Money Laundering Control Act also signaled a growing attention of the US authorities to the international arena and the creation of international body of hard law directed at states and banks (Keesoony, 2016). The Administration promoted a series of international conventions starting with the 1988 UN Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the Vienna Drug Convention). The convention note that previous enforcement efforts have not stopped drug use. They suggested, inter alia, that the way forward is to confiscate proceeds from drug offenses and to allow courts to order that bank, financial, or commercial records be made available or seized. The Convention asserts also that a party may not decline to act on this provision on the ground of bank secrecy (Article 5 of the Convention). The convention was signed by 43 governments in 1988, took force in 1991 and as of 2019 is signed by over 190 parties. A failure to enact domestic legislation criminalizing efforts aimed at concealing or disguising money laundering proceeds constitutes non-compliance of the signatories (Gurule, 1998, 81).

The **United Nations Convention against Transnational Organized Crime** (2000), also known as the Palermo Convention suggests (Article 7) that Each State shall institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions in order to deter and detect all forms of money-laundering. This regime will create specified requirements for customer identification, record-keeping, and the reporting of suspicious transactions, as well as have the ability to cooperate and exchange information at the national and international level. Furthermore, each state shall consider establishing a financial intelligence unit to serve as a national center for the collection, analysis and dissemination of information regarding potential money laundering. In that, Article 7 of the Palermo convention hoped to drew a guideline for regional, interregional and multilateral initiatives working against money-laundering, as well as to develop and promote global, regional, and bilateral cooperation among judicial, law enforcement and financial regulatory authorities to combat money-laundering. Later on, Article 7 of the Palermo convention was adopted as part the 2003 United Nations Convention against Corruption and is legally enforced as of December 2005.

The legal framework of international law was accompanied by the creation of the Financial Action Task Force (FATF) in 1989 (Huelsse, 2009; Roberge, 2011). The initiative, pushed by the US authorities via the G7, intended to create a major body promoting AML in a global scale. Officially only a task force, the FATF is an intergovernmental organization with a small secretariat based within the Paris' OECD offices. The FATF's club-like character enabled FATF members to agree quickly on a set of common standards (Unger, 2011). By 1990 it elaborated recommendations which became the de-facto global standard for complying with the global AML regime. Thus, the recommendations set out essential measures that countries needs to put in place, such as the ability to identify risks, develop policies, and domestic coordination; pursue money laundering, terrorist financing and the financing of proliferation; apply preventive measures for the financial sector; establish powers and responsibilities for investigative, enforcement and supervisory authorities; enhance the transparency and

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availability of beneficial ownership information of legal persons and arrangements; and facilitate international cooperation. The recommendations, who are based on the experience and leadership of the US in this sphere, represent the globalization focus that characterizes the US AML regime. The FATF works closely with the Egmont Group designed to improve interaction among national Financial Intelligence Units in the areas of communications, information sharing, and training coordination. In accordance The World Bank provides 'technical assistance' for countries in order to institutionalize AML policies and regimes and develop a set of tools around the concept of "financial integrity". In similar fashion the issue of terrorist finance was later on added to related international institutions. The International Monetary Fund moved in the same direction and integrated AML/CFT to its own work program providing capacity building and using its soft power to encourage compliance with the FATF global standards (Unger, 2011).

The American drive to globalize the AML regime found the EU as a willing partner already back at the G7 committee initiative that formed the FATF. Thus at the 1990 Council of Europe committee that was dedicated to the topic, the countries agreed to criminalize the laundering of the proceeds of crime; promote the confiscation of instrumentalities of money laundering and proceeds (or property the value of which corresponds to such proceeds); promote European cooperation in investigations freezing of bank accounts, seizure of property to prevent its removal; and confiscation of the proceeds of crime. And as of 2005/6 was extended to include the financing of terrorists. Four Directives followed. This 1990 EU directive was the first established EU-wide regime against money laundering and set the various duties complying financial institutions to the FATF recommendations. The Second EU directive was adopted in 2001 and was also influenced by the FATF and its revised set of recommendations. It extended the scope of crimes targeted, intensified clients' identification duties, and most importantly the duties to report was extended to professions such as auditors, external accountants, tax advisers, agents and lawyers (Mitsilegas & Gilmore, 2007, 124). A Third EU directive was adopted in 2005 dealing with terrorist finance as well as special provisions on the operation of national Financial Intelligence Units and more demanding reporting duties on financial institutions. This third directive replaced the first and second directive. It also adopted a risk based approach, trying to calibrate policies and allowing discretion which transaction to report (Unger, 2011; van den Broek, 2011). The Fourth directive was adopted in 2015 and

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required member states to keep a central register of the beneficial or true owners of firms within their respective jurisdictions. It also broadened the definition of politically exposed persons (PEPs) to include domestic PEPs, meaning not just the details of foreigners, but also locally-based individuals with key public functions would need to be carefully checked. Sanctions include naming and shaming entities and individuals (senior management). There are also monetary penalties of up to 10 per cent of the annual gross turnover of the defaulting obliged entities and fines for individuals (senior management) up to EUR 5,000,000:00 or its equivalent in countries outside the eurozone. The 5th Anti-Money Laundering Directive, which amends the 4th was a approved in 2018 and will need to be transported by 2020. It sets public registers for companies, trusts and other legal arrangements; enhance the powers of the Financial Intelligence Units; limits anonymity of virtual currencies and financial technologies; enhance of information between anti-money laundering supervisors between them and between them and prudential supervisors and the European Central Bank. The Six Directive was published in late 2018 with a transposition date of the end of 2020. It introduces a maximum jail term of at least four years for money laundering activities. Courts may also impose more measures such as fines, exclusion from access to public funding or judicial winding-up. Other sanctions include a permanent ban from practicing commercial activities and confiscation of proceeds.

5. Intermediation and Responsibilization

Which tools are provided by the literature to better understand the origins and evolvement of the financial institutions into regulatory intermediaries? How should we understand the transformation of banks', and other financial institutions, from regulatory intermediaries to the real and the most direct rule-takers of the regime? Not only that the banks were required to abide to more and more demands from the AML, but they became the major rule-taker of the regime. The initial opposition via the legal challenge at the court in the mid-1970s was followed by what seems to be an outright contempt to the regulatory requirements. The 1977 case of *United States vs. Willi Beusch* was probably the first criminal liability case against a financial institution for money laundering (Orr, 1986, 1069). The defendant, Beusch, a vice president of a

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financial services firm was indicated and fine for $US 5000.[3] Although in compensation to the $11millon, representing 377 misdemeanor counts of failing to report currency transactions the fine seems minimal, the case also terminated the employment of Beusch. Alongside Beusch, Deak, the financial service firm in which he had worked, was also indicated and was fined $ 20000. Though a modest beginning, the *United States vs. Willi Beusch* trial led to more investigations and to more indictment or settlements with bigger firms.

A special task force of the Treasury begun investigation in Florida led to the indictment of criminals in in 1982, but also of The Great American Bank of Dade County -The bank entered a guilty plea in 1984 in connection with its part in a $94 million money laundering scheme and paid a criminal fine of $500,000. In July 1981, a federal grand jury in Los Angeles indicated the Garfield Bank. The former president of the bank was given a suspended prison sentence and ordered to end his affiliation with the bank. he also was ordered to pay a $100,000 fine and about $1.8 million in federal taxes he owed as a result of underestimating his 1975 and 1976 taxes. The bank agreed to pay a fine of $309,106.[4] Several other employees of the bank were also sentenced, and the US government collected about $3 million from the involved parties. Several other charges followed (e.g. Rockland Trust Company, Mass in 1984) by the one that made a headline was the prosecution of the Bank of Boston (Nichols, 1997). In February 1985, a grand jury indicated the bank for failing to report over $1.2 billion in transactions of domestic and foreign currencies[5]. A former bank teller indicated that the bank routinely accepted large amounts of cash from notorious organized crime family. The Bank of Boston eventually pled guilty and paid $500,000 fine (Orr, 1986, 1078; Morgan, 1997, 29).

Nevertheless, according to Joseph and Roth (2007) there were no serious actions for the failures of banks prior to 2002. The first civil penalty against a bank for failing to

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[3] https://timesmachine.nytimes.com/timesmachine/1978/04/13/110834497.html?pageNumber=79 Last retrieved on August 12, 2019
[4] https://www.upi.com/Archives/1981/12/15/Another-Garfield-Bank-executive-convicted-on-fraud/8829377240400/ Last accessed August 12th 2019
[5] https://timesmachine.nytimes.com/timesmachine/1985/02/08/013430.html?pageNumber=1 Last accessed on August 12th 2019

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file suspicious activity report was taken against Great Eastern Bank of Miami, Florida in September 2002. They further report that from the beginning of November 2002, the Department of Justice at the Federal Government has conducted a series of criminal investigations resulting in either criminal conviction or deferred prosecutions of banks. Banks begun from this date onward to fill the pressures of the Justice Department. Instead of voluntary intermediators they became both intermediators and rule-takers or regulatees against their wills. In the background stood of course the War on Terror. The first ever bank to be prosecuted for failing to file SARs was, in November 2002, the Broadway National Bank (Ibid, p. 55). The bank was used by several drug trafficking organizations to launder drug money. The bank, apparently knowingly, ignored its legal obligations to report. Cash money was deposited daily and transferred immediately overseas. Effectively the Bank was the bank of choice for illegal narcotics income. They pled guilty to the failure to file SRAs, CTRs and to have an effective AML program and was fined by $4 million. Other persecutions followed and usually the fines were minimal and the main sanction was forfeiture of laundered money and differed persecution (Jospeh & Roth, 2007).

The US administrative state continued to levy fine on the banks and gradually the fines increased to tens of millions and the biggest banks became a target for investigation and criminal prosecutions. Thus on the eve of the financial crisis ABM AMRO was fined $80 million (2006), which preceded by $25 million fine from Riggs Bank (2004), a $50 million fine from the AmSouth Bank (2004), and a $24 million charge from the Arab Bank (2005). Shortly after the financial crisis a new scale of fines was laid on banks on various faults, among them money laundering. The scale was now billions sometimes or hundreds of million rather than thousands, millions, or tens of millions as before. Some of the change can be seen in graphs 1 and 2, data is based on Financial Times data set.

Our data and analysis suggest that the regulators stepped up their demands and their fines. The banks in response developed compliance procedures and money laundering programs, trained people, developed tests and accepted external monitoring and more generally carried considerable compliance costs. Regulatory intermediation became one of their legitimate tasks in the eyes of the policy elite. From here the road to rule-takers – indeed one of the major rule takers – of the AML became short. Now there are at least three ways to think about the way banks became

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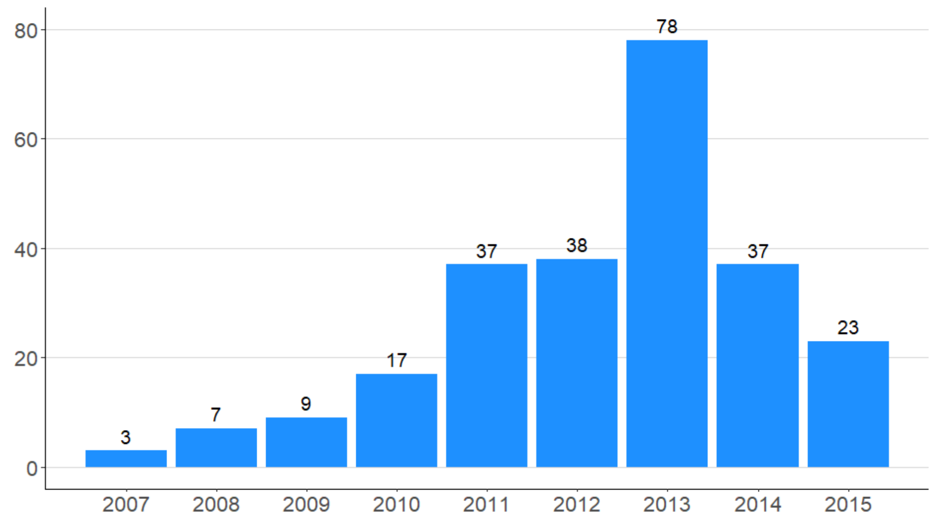
intermediaries and indeed rule-takers as such. One way is to think about the act of their constitution as an act of delegation, a second ways is that of orchestration and a third that will be developed here is that of responsibilization. Delegation and orchestration both describe indirect modes of governance, sometime via intermediaries (Abbot et al., 2015). Delegation is defined as “a conditional grant of authority from a principal to an agent that empower the later to act on behalf of the former” (Goodhart, 2010, 5). This definition suggests that the delegation act is contractual and formal and both definitions suggest focus on the functionality of the process. Rule-makers rely on intermediaries to perform functions such that require expertise; facilitation of collection decision making; to signal credible commitment and thus increase their credibility; to extend their reach vis-à-vis other actors; increase monitoring activities and to adjudicate (Abbott and Snidal, 1998, 18). Delegation is described as ‘hard control’ even if in practice there are agency loss, given the agents ability to peruse own interests and preferences. Orchestration by contrast is the mobilization of an intermediary by an orchestrator on a voluntary basis in pursuit of a joint governance goal? (Abbott et al., 2015, 4). The emphasize is on voluntary.

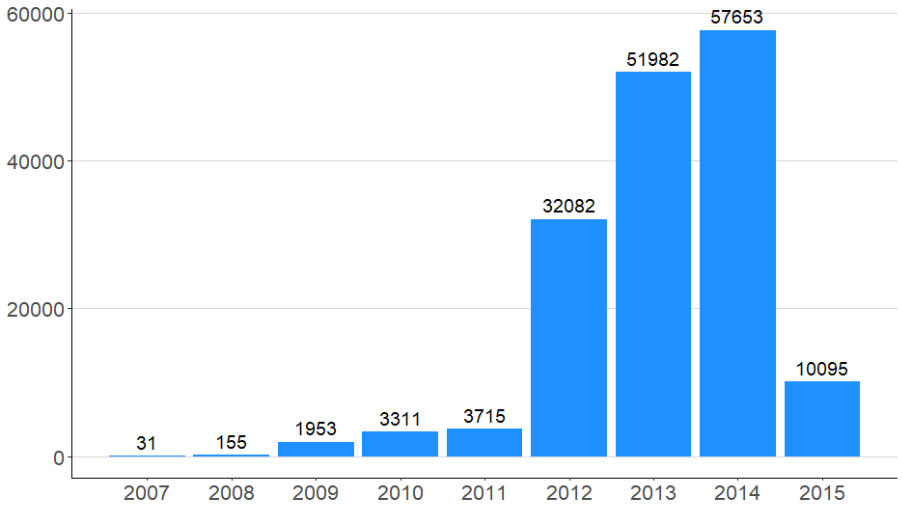
It should be clear by now that neither delectation nor orchestration capture the role of the banks in the antimony regimes. Finance was weaponized in the service of good governance and in consequently one can best describe them as responsibilized. Responsibilization of the bank can be defined as a process were the rule makers (in our case government, mainly the US government) coerce private entities (e.g., persons, corporations, organizations) to act as their monitor, enforcer and trustee.

Graph 1: Number of Fines During 2007-2015



(N=251, Source FT)

Graph 2: Amount of Fines on Banks by US Authorties During 2007-2015



(in $US Milions), Source: FT

6. Conclusions

A regulatory turn in the study of transnational governance is increasingly visible in the scholarly literature. It brings a fresh perspective and insights on regulatory governance to the fields of transnational sociology and international relations. Building on the general social sciences, regulation literature facilitates the study of the emergence, consolidation, and transformation of transnational regulatory regimes around an increasing number of issues and forms of control. This is a welcome development, not least because global governance is increasingly regulatory governance. This means that regulation is complementing fiscal (e.g., aid) and discretionary (power-centered, unilateral action by one or more actors) forms of power. Power is projected, accommodated, and interacting with rules and regulatory capacities rather than mainly other policy instruments. Most important, and as asserted here, we need to shift our attention from the rule-makers to those of the rule-intermediaries and in turn to the ways intermediation is constructed and responsibilized. Placing intermediaries in the

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center of the regulatory process allow us to open new set of questions around the way power and authority are institutionalized. Most important of these – from the point of view of this case study – how private authority is constructed for the benefit of rule makers, in our case the US authorities with coalition of justice and tax authorities in Europe and elsewhere.

Much of the literature about governance focus on indirect methods of control and regulatory design and with it also the rise of private actors (mainly business) in the global economy. The rise of private actors as regulators or policy actors more generally is said to reaffirm arguments on the decline or powerlessness of governments and states. The global anti money laundering regime does not attest to this idea of governance. Governance by proxy and ever stricter control of the states – especially the powerful one – transformed profit-oriented actors into regulatory intermediaries against their will. Under the pressure of increasing fines banks became increasingly agents of the state developing organizational and technological monitoring and reporting capacities that make them important pillar of the expansion of the surveillance mechanisms over citizens and corporations at the same time. The development of the AML regime at the global level is a fascinating tale of rapid and successful institutionalization of the US domestic regime at the global level. Its effectiveness and legitimacy is expected to be questioned in the future more than so far, not least because the US' success of using the financial global regime for its purpose may produce the delirium and folly that accompany success (Farrell & Newman, 2019).

The focus on intermediaries – banks in the global money laundering regime – allow us to open new door to the study of global governance as a process of intermediation and to distinguish delegation from orchestration and from responsibilization. The way forward in the study of global intermediaries is to raise questions about the role of regulatory intermediaries and in particular the following questions: How, why, and when do different regulatory intermediaries emerge and expand their role? When and to what extent do regulatory intermediaries gain autonomy from rule-makers and rule-takers? How do regulatory intermediaries help expand, limit, and shape transnational governance? To what extent do regulatory intermediaries serve to frame, extend, and limit collective goods when compared to rule-takers and rule-makers? What are the

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challenges and possible solutions for democratic regulatory control of regulatory intermediaries?

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Appendix 1: US' Institutions Involved in Fining Banks (2007-2015)

In Bold, Money Laundering Cases
Source: FT

1	State of California
2	Commodity Futures Trading Commission
3	Consumer Financial Protection Bureau
4	State of Delaware
5	Department of Housing and Urban Development
6	**Department of Justice**
7	**Department of Treasury**
8	Fannie Mae
9	**Federal Deposit Insurance Corporation**
10	Federal Energy Regulatory Commission
11	Federal Housing Finance Agency
12	**Federal Reserve**
13	Freddie Mac
14	Internal Revenue Service
15	State of Illinois
16	Massachusetts Attorney General
17	State of Massachusetts
18	Massachusetts Attorney General
19	Massachusetts Secretary of State
20	National Credit Union Administration
21	State of New York
22	New York Attorney General
23	**New York County District Attorney**
24	**New York Department of Financial Services**
25	NYS Department Financial Services
26	Office of the Comptroller of the Currency
27	**Office of the Controller of the Currency**
28	**Securities and Exchange Commission**
29	State Attorneys General
30	U.S. Southern District Court of New York

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