The Collusion Hit a Soft Landing: A Currency Manipulation of the South African Rand Through Spot Market Trading

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Abstract

The foreign exchange (FX) spot market plays a pivotal role in global currency trading, offering a platform for speculative transactions. Unlike most FX instruments, such as derivatives, which are subject to regulatory oversight, the spot market remains largely unregulated by central banks. This regulatory gap creates fertile ground for currency manipulation, particularly affecting developing economies. Although currency manipulation is not a new phenomenon, recent cases involving global banks and the hedge fund, Glen Point, underscore the urgent need for transnational regulatory intervention. Despite longstanding academic discourse on the subject, legal scholars have yet to reach a consensus on how to regulate the spot market, largely due to the complexity of cross-border transactions and the nature of spot contracts. This article argues that the spot market's lack of regulation enables manipulation that disproportionately affects developing economies such as South Africa. This article proposes a two-pronged regulatory framework to address the issue that employs both national and transnational mechanisms. It thereby adds to the existing body of knowledge on FX markets and spot market regulation, including transnational law, while fostering a discourse on the spot markets' transnational regulation.

Keywords

Spot market regulation; global banks; FX market; corporate crime; transnational regulation; hedge fund; FX market regulation.

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1 Introduction

The foreign exchange (FX) market plays a significant role in facilitating international trade, as evidenced by the substantial daily volume of funds transferred. The Bank of International Settlement (BIS)[1] estimates that more than US$7 trillion is transferred daily worldwide. Globally, the FX market is essential for merchants to procure goods and services.[2] Settlement Banks provide various over-the-counter (OTC) products to clients including *inter alia* hedge funds and large corporations.[3] A prominent product they offer is the FX spot market (spot market), which benefits from access to a wide range of global currencies, rendering it effective for speculative trading.[4]

Most FX products are subject to regulation by the central banks; however, the spot market remains unregulated, and this has implications for potential currency manipulation.[5] Discussions surrounding the regulation of the spot market have appeared in commercial legal literature for several years, yet a consensus among legal scholars has not been achieved.[6] This disagreement is predominantly influenced by the nature of the spot market contracts and the substantial daily volume of funds transferred.[7] In the light of the recent currency manipulation of the US Dollar (USD) and the South African Rand (ZAR) perpetrated by global banks (GBs) and the hedge fund, Glen Point,[8] spot market regulation has become urgently necessary, particularly given the potential repercussions for developing economies like that of South Africa (SA).[9]

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1 BIS 2022 https://www.bis.org/statistics/rpfx22_fx.pdf.

2 Markham 2015 *U Pa J Bus L* 790.

3 *Commodity Futures Trading Commission v Glen Point Capital Advisors Lp* No 22 Civ 10589 (NRB) (DNY 7 March 2023) (hereafter *Commodity Futures Trading Commission v Glen Point*) para 39.

4 Powers 2016 *Fordham Urb LJ* 139.

5 Kang 2019 *LFMR* 235.

6 See Kang 2019 *LFMR* 235-237.

7 Bloom 2019 *NC Banking Inst* 28-30.

8 Banks involved in the manipulation of USD and ZAR currencies, particularly those that are non-South African, maintained settlement accounts in the United States (designated as Settlement Banks). These banks, along with South African banks that are also involved, operate across various jurisdictions. For the purposes of this paper, they will be referred to as global banks (GBs). Also see *Competition Commission of South Africa v Bank of America Merrill Lynch International* (215/CAC/APR23) [2024] ZACAC 1 (8 January 2025) (hereafter *Competition Commission of South Africa v Bank of America*) para 12.

9 The SA currency has failed to recover since was manipulated in 2003. See Sovereign Africa Ratings 2023 https://saratings.com/media/issuer_commentary/Issuer_Commentary_-_Rand_Manipulation_J96DsX4.pdf.

From the aforementioned perspective, this article contends that the lack of regulation in the spot market creates opportunities for manipulation which poses significant risks to developing economies, with particular emphasis on SA.[10] To address this issue, it is vital to implement robust transnational regulations aimed at mitigating currency manipulation and ensuring the effective prosecution of offenders. The author advocates the adoption of a two-pronged approach that encompasses both transnational and national regulations to combat such practices effectively.

This article contributes to the debate about FX market and spot market regulation, including transnational law knowledge bodies, while it fosters a discourse on the spot markets' transnational regulation. Accordingly, this article is structured into six parts, including this introduction. Part 2 delineates currency manipulation and its background. Part 3 discusses the fundamentals and benchmark methodology of the spot market. Part 4 analyses case studies of SA currency manipulation through the spot market by GBs and by Glen Point. Part 5 investigates the regulatory shortcomings within the spot market and suggests potential remedies to address these challenges. Finally, Part 6 concludes the article.

2 The delineation and evolution of currency manipulation

2.1 The delineation of currency manipulation

Currency manipulation has been practised for numerous years by various countries, and more recently by certain financial institutions.[11] Currency manipulation can be categorised into two forms: controlled and uncontrolled. For example, nations engage in controlled currency manipulation to gain a competitive advantage in international trade.[12] This practice is generally considered legal, although it remains contentious.[13] Conversely, unauthorised

10 This paper primarily focusses on SA while also incorporating key jurisdictions, including the United States (US), the United Kingdom (UK), and the European Union (EU). This multidimensional approach recognises these regions' substantial influence on the spot market and the role of GBs in the manipulation of the ZAR, which predominantly occurred within these jurisdictions. Also see *Competition Commission of South Africa v Bank of America*.

11 Fletcher 2020 *LCP* 123-130.

12 Kaushal and Ahmad 2016 *GNLU JL Dev & Pol* 101-105.

13 The International Monetary Fund (IMF) is the sole international organisation equipped to address currency manipulations in international trade. Historically it has not fulfilled its oversight role. In this context the US is the only nation actively endeavouring to deter other countries from employing manipulative tactics and prepared to suggest that it should be considered illegal. See Crociata 2021 *Penn St JL & Int'l Aff* 275-300; Dominguez 2020 *IMF Econ Rev* 693-701; Also see CRS 2024 https://crsreports.congress.gov/product/pdf/IF/IF10049 1-10.

currency manipulation is frequently practised within markets by banks and other foreign exchange traders and is considered illegal.[14]

Consequently, the aforementioned aspects influence the delineation of currency manipulation, which is characterised by significant contestation. One perspective maintains that currency manipulation should be defined from a controlled manipulation perspective.[15] Proponents of this view assert that uncontrolled currency manipulation by foreign exchange traders is artificial, typically temporary, and does not constitute manipulation.[16] In contrast, the alternative perspective posits that both viewpoints warrant consideration, provided that there is an induced currency fluctuation by the state or foreign exchange traders.[17] Remarkably, both perspectives, including those of the courts, converge on the consensus that currency manipulation necessitates two elements: (a) the intent to influence the currency to deviate from the market direction or currency value set by the benchmark agencies, and (b) the purposeful and systematic execution of the intent.[18]

Therefore, this article defines currency manipulation as the exertion of a deliberate and systematic influence on currency value that deviates from market direction.[19] This manipulation can be executed by state entities or FX traders.[20] The state's actions aim to gain a competitive advantage in international trade.[21] The actions of FX traders are intended to maximise profits through deceptive strategies, such as media campaigns or online trading, a method that has shown its potency in recent years.[22] To comprehend the currency manipulation, it is imperative to examine its evolution within the markets.

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14 The US and the EU imposed sanctions on GBs due to currency manipulation. See e.g., *Commodity Futures Trading v HSBC Bank plc* No 15-07 (CFTC 2014) 10; also see *European Commission AT40135—FOREX C/2021/8613* (2 December 2021) (hereafter *AT40135*). Currency manipulation was tested as a civil matter. Nevertheless, it encompasses criminal elements. Whether they should be subject to criminal prosecution remains a subject of debate. Also see Powers 2016 *Fordham Urb LJ* 139-142.

15 Kang 2019 *LFMR* 235-243; Chitimira 2016 *Journal of Corporate and Commercial Law and Practice* 36-40.

16 Fletcher 2020 *LCP* 123-132.

17 Fox, Glosten and Rauterberg 2018 *Yale J on Reg* 69-86.

18 See Powers 2016 *Fordham Urb LJ* 143-146; also see *Contant v Bank of America* Corp 385 F Supp 3d 284 (SDNY 2019) (hereafter *Contant v Bank of America*) paras 28, 34, 36, 68; *In Re Foreign Exchange Benchmark Rates Antitrust Litigation* No 1:13-cv-07789-LGS (Dist Court 29 November 2021) paras 243, 368, 418, 431.

19 Kang 2019 *LFMR* 235-243.

20 Fox, Glosten and Rauterberg 2018 *Yale J on Reg* 80-95.

21 Crociata 2021 *Penn St JL & Int'l Aff* 275-300.

22 Kang 2019 *LFMR* 235-243; Chitimira 2015 *JLS* 192-193.

2.2 Currency manipulation evolution within the markets

The precise chronology of the evolution of currency manipulation remains indeterminate.[23] Nevertheless, current research suggests that this is a long-standing practice.[24] Following the demise of the barter system, traders across nations conducted transactions using money and other commodities such as gold and silver during the Greek Empire.[25] Although no formal stock exchange existed to establish rates, moneychangers served as the primary point of currency exchange. They issued certificates for traders to use as quasi-cheques to settle transactions with merchants.[26] This practice also resulted in significant currency manipulation, prompting some jurisdictions across Europe, including the UK, to implement regulations to control currency exchange manipulation.[27]

The evolution of currency manipulation in South Africa can largely be traced back to the emergence of gold mining activities in the mid-1800s,[28] a topic that has not been thoroughly examined within the commercial law literature. Current scholarly discussion tends to focus on the regulation of market manipulation,[29] which has led to a significant gap in the literature regarding the historical context of currency manipulation. To develop a more comprehensive understanding of the evolution of currency manipulation in markets, the analysis in this subsection is bifurcated: a) the evolution of currency manipulation in South Africa, and b) the evolution of currency manipulation in the US and the UK.

2.2.1 The evolution of currency manipulation in South Africa

The latter part of the 1800s marked a crucial chapter in South Africa's economic development, particularly with the emergence of the Transvaal goldfields.[30] Between 1894 and 1896 a significant disconnect became evident between the actual realities of gold mining production and the speculative

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23 See Berle 1938 *Colum L Rev* 394-400.

24 See e.g., Wang and Zhang 2025 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5125326; Ikeda 2021 *Manchester Journal of International Economic Law* 238.

25 See Crociata 2021 *Penn St JL & Int'l Aff* 285-310

26 See Markham 2015 *U Pa J Bus L* 795-799.

27 Due to the extent of the moneychangers' malpractice in the market, the English Crown, through the Royal Exchange, banned currency exchange by the money changers, to establish a formal point of currency exchange. See Markham 2015 *U Pa J Bus L* 795-799.

28 Graham 1996 https://ora.ox.ac.uk/objects/uuid:1caefd09-a7e4-4003-8f6d-4fc081ab4491/files/s8910jv15k 1-11.

29 See e.g., Chitimira 2014 *PELJ*; Cassim 2008 *SA Merc LJ* 34-49; Osode 2000 *J Afr L* 240-256.

30 Turrell 1982 *Journal of Imperial and Commonwealth History* 311-315.

fervour that engulfed both the Johannesburg and London stock markets.[31] This phenomenon was not coincidental; it arose primarily from intentional market manipulation orchestrated by a select group of financiers known as the "Randlords".[32]

The Randlords, which included notable figures such as Wernher, Beit, Eckstein, Rhodes, and Barnato, wielded considerable influence over the mining sector, shaping its public perception.[33] While traditional history often emphasises their contributions to streamlining mining operations and pursuing long-term profitability,[34] Graham[35] argues that their primary motivation during this period was largely focussed on making speculative gains from artificially inflated share prices. As a result, mining companies frequently became overvalued in relation to their actual earnings, leading to a market characterised by asymmetric information and the deliberate propagation of misinformation.[36]

The manipulation by the Randlords was further enabled by their control over financial institutions and the media.[37] By selectively releasing optimistic forecasts and suppressing unfavourable information, they cultivated investor confidence and artificially inflated share prices.[38] The flotation of deep-level mining companies, often based on unverified reserves, emerged as a vehicle for speculative profit rather than as a reflection of substantial industrial progress.[39] This speculative bubble peaked in 1895 but ultimately collapsed following the failed Jameson Raid, which revealed the market's inherent fragility and highlighted the disconnect between share valuations and the actual performance of the underlying assets.[40] These deceptive practices bore a striking resemblance to events that occurred in the US and the UK during the 1800s and early 1900s, as discussed below.

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31 Graham 1996 https://ora.ox.ac.uk/objects/uuid:1caefd09-a7e4-4003-8f6d-4fc081ab4491/files/s8910jv15k 6-10.

32 Lukasiewicz "Introduction: Colonial South Africa, Mineral Revolutions and Finance" 1-11.

33 Turrell 1982 *Journal of Imperial and Commonwealth History* 313-320.

34 Lukasiewicz "Introduction" 1-11; Stevenson *Old Masters and Aspirations* 1-11.

35 Graham 1996 https://ora.ox.ac.uk/objects/uuid:1caefd09-a7e4-4003-8f6d-4fc081ab4491/files/s8910jv15k 6-20.

36 Lukasiewicz "Between Johannesburg, London and Paris" 109-112.

37 Graham 1996 https://ora.ox.ac.uk/objects/uuid:1caefd09-a7e4-4003-8f6d-4fc081ab4491/files/s8910jv15k 6-20.

38 Lukasiewicz "Between Johannesburg, London and Paris" 115-130.

39 Turrell 1982 *Journal of Imperial and Commonwealth History* 315-322.

40 Lukasiewicz "Between Johannesburg, London and Paris" 115-141.

2.2.2 The currency manipulation evolution in the US and the UK

The court records demonstrate that currency manipulation in the UK evolved in the 1800s,[41] while in the US it evolved in the 1900s.[42] Since then banks and brokerage firms in the UK and US have been driving currency manipulation practices in the markets.[43] Bank employees, specifically traders, have purchased large quantities of stocks to create artificial demand in the market and influence currency appreciation.[44] Subsequently, they have divested these stocks to realise their profits, a practice that has been similarly employed by brokerage firms.[45] Moreover, these firms have exploited unsophisticated clients through deceptive practices and used funds from their clients' accounts to acquire shares through multiple daily transactions.[46] They have retained shares for brief periods (between two and five days) while artificially inflating the value of stocks to generate profits.[47] Brokers have retained most of these profits by distributing minimal returns to their clients.[48] To implement manipulative practices, brokers have used various media strategies to propagate deceptive information regarding specific firms. This dissemination of misleading narratives has been strategically employed to influence market perceptions and behaviours.[49]

It is noteworthy that the deceptive practices in SA, the UK and the US respectively did not directly manipulate currency but possessed the potential to do so if implemented on a larger scale.[50] The currency manipulation methods employed by brokers in the UK and the US are similar to those used by GBs to manipulate the ZAR and USD pair through spot market trading,[51] as discussed below. Nonetheless, it is essential to elucidate the fundamentals of spot-market trading and benchmark methodology before examining the ZAR manipulation cases.

41 See *R v De Berenger* (1814) (1814) 3 M and S 67 105 ER 536.
42 See *FW Woolworth Co v United States* 115 F 2d 348 (CCPA 1940).
43 Moore and Wiseman 1934 *U Chi L Rev* 47-55.
44 Committee on Banking and Currency *Money Trust Investigation* 46-52.
45 Messrs Brown, Doering, and McNab, who were members of the London Stock Exchange and employed by the brokerage firm Steam Loop Company Ltd, engaged in fraudulent activities that compromised the financial interests of their clients. See *Scott v Brown, Doering, McNab & Co* [1892] 2 QB 724 (hereafter *Scott v Brown*).
46 See *Scott v Brown* 725-728.
47 Also see *Norris Hirshberg, Inc v SEC* 177 F2d 228 (DC Cir 1949) 232-233.
48 See *Scott v Brown* 4-6.
49 *R v De Berenger* (1814) (1814) 3 M and S 67 105 ER 536.
50 See *Scott v Brown* 4-8.
51 See *Contant v Bank of America.*

3 The fundamentals of the spot market and benchmark methodology

3.1 The fundamentals of FX spot market trading

Legal studies have not devoted substantial attention to the spot market. Consequently, there is a paucity of legal definitions, with one of the few being found in *AT40135*, defined as follows:

> an agreement between two parties to exchange two currencies, that is to buy a certain amount (the notional amount) of one currency against selling the equivalent notional amount of another currency at the current value at the moment of the agreement (the exchange rate), for settlement on the spot date.

Typically, spot market transactions require settlement within two days.[52] It is essential to note that currency fluctuations do not affect the contracted price during this period; specifically, even when currency value changes, the contracted price remains constant.[53] Should traders fail to settle a transaction within the stipulated two-day period, they must amend the contract for goods or services to be delivered at the new predetermined date.[54] This modification results in the transformation of the contract into forward trading.[55] In this scenario the contract is linked to the value of the currency on the date on which traders finalise the transaction.[56]

Primarily, the spot market facilitates international transactions that influence trade between two nations.[57] Therefore, the transactions are typically offered as OTC options by Settlement Banks (including GBs) for individuals or larger institutions, including corporations, hedge funds and pension funds.[58] Settlement Banks facilitate spot market transactions through a central exchange on behalf of their clients, which can settle transactions in multiple currencies.[59] Market participants provide substantial funds to Settlement Banks in exchange for another currency equivalent to the contracted value.[60]

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52 Kang 2019 *LFMR* 235-243.

53 See *In Re Foreign Exchange Benchmark Rates Antitrust* 407 F Supp 3d 422 (Dist Court 2019) paras 2-3.

54 Kang 2019 *LFMR* 235-243.

55 See Kang 2019 *LFMR* 235-243.

56 See FSB *Final Report on Foreign Exchange Benchmarks* 1-2.

57 Stenfors and Muchimba "Financial Crime in OTC Markets" 205-210.

58 Stenfors and Muchimba "Financial Crime in OTC Markets" 205-210.

59 Stenfors "Manipulative and Collusive Practices in FX Markets" 181-199.

60 To articulate the Settlement Bank operations: Firms that choose to use the Settlement Bank to settle their currency trades are referred to as "settlement members". Settlement members each have a multicurrency account with the Settlement Bank. Following an FX transaction, settlement members submit the details of the trade and payment instructions to the Settlement Bank. Members may submit instructions relating to their own FX transactions as well as the transactions of their third-party customers directly to the Settlement Bank. These instructions are authenticated and matched by the Settlement Bank. See *Commodity Futures Trading Commission v Glen Point* para 41.

It is important to note that these transactions are not necessarily processed by central banks but rather between two banks across the two nations involved.[61]

In recent years most spot market trading has been used as a quasi-investment vehicle.[62] This phenomenon is further substantiated by the cases of GBs and Glen Point, which employed a quasi-derivative approach.[63] Derivatives are financial instruments whose value is primarily underpinned by principal assets or benchmarks. These instruments are employed in various complex trading strategies such as hedging, speculating and facilitating entry into other markets or assets.[64] In this context the trader allocates a substantial sum of assets to maximise profits, but the timeframe and currency volatility are among the factors that contribute to risk.[65] Consequently, traders aim to engage in short-term trading by capitalising on market volatility.[66]

In addition, the primary factors influencing markets are demand and supply.[67] Currencies are similarly affected by many variables which may precipitate market demand or resistance.[68] These variables include national elections, geopolitical conflicts, inflation, monetary policies, technological advancements and interest rates.[69] Correspondingly these factors may engender a complex environment that can be exacerbated by the perceptions of media organisations and global rating agencies.[70] These factors may create a favourable or adverse market climate for certain currencies. Notably, some of these factors have been identified as principal elements that facilitated the manipulation of the ZAR.[71]

When the environment is favourable to one or more countries, traders may purchase one currency or multiple currencies in substantial quantities. This creates artificial demand in the market.[72] Subsequently, the currencies in question appreciate in value. While the relative value of a currency is significantly high, traders may sell assets and make considerable profits.[73]

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61 Munoz 2016 *ECFR* 159-163.

62 Kang 2019 *LFMR* 235-243.

63 *Commodity Futures Trading Commission v Glen Point*; *AT40135*; *Competition Commission of South Africa v Bank of America*.

64 See Braithwaite 2012 *MLR* 780; also see Awrey 2016 *NYU L Rev* 1105-1108.

65 Powers 2016 *Fordham Urb LJ* 146-158.

66 Kang 2019 *LFMR* 235-243.

67 Stenfors "Manipulative and Collusive Practices in FX Markets" 190-199.

68 Munoz 2016 *ECFR* 159-163.

69 O'Brien 2017 *LFMR* 83.

70 Munoz 2016 *ECFR* 165-170.

71 See e.g., *United States v Phillips* No 690 F Supp 3d 268 (District Court 2023) 1-3 (hereafter *Phillips)*.

72 Powers 2016 *Fordham Urb LJ* 155-170.

73 Neil Phillips, the Chief Investment Officer and co-founder of Glen Point, instructed a trader for the bank to sell additional US dollars against the South African rand. The trader advised Neil Phillips against this action, as it was deemed irrational and was likely

Once the manipulative trading activities cease the purchased currency depreciates, and devaluation continues until the currency returns to its original value.[74] Such practices thus engender a transient, artificial currency disparity, instigating a decline in the value of the currency manipulated and ultimately culminating in its depreciation.[75] It is crucial to emphasise that such a situation may adversely affect a country and its economy.

Furthermore, the spot market manifests in two forms: the spot and e-spot market. The spot market necessitates the manual intervention of traders, who conduct transactions based on the currency value of the day provided by benchmark agencies, including the WM/Reuters FX benchmarks (WM/Reuters), London Interbank Offered Rate (LIBOR) and the European Central Bank (ECB).[76] Conversely, the e-spot market operates automatically without traders' intervention, utilising algorithms to calculate the currency value against the set value.[77] Owing to the reduced trader intervention, the probability of manipulation may be diminished. Nonetheless, this does not preclude the possibility of currency manipulation, which may present a significant challenge for regulators to investigate because of its complexity.[78] Notably, the WM/Reuters benchmarks have dominated the spot market trading, with over US$ 5 trillion in daily trade.[79] Hence, the WM/Reuters benchmark warrants considerable attention.

3.2 The WM/Reuters benchmarks methodology

The WM/Reuters was established in 1994 by the World Markets Company, which is primarily situated in London.[80] Consequently, its benchmark issuance occurred at 16:00 and was associated with the London time zone. The objective of WM/Reuters was "to provide a clear single independent reference rate for the FX market."[81] Following the currency manipulation scandals the International Organisation of Securities Commissions (IOSCO) established benchmark principles "to protect the integrity of the Benchmark [sic] determination process and to address conflicts of interest."[82] Subsequently,

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to induce other traders to sell their US dollars due to the resultant currency weakness. See *Commodity Futures Trading Commission v Glen Point* paras 90-91.

74 Stenfors and Muchimba "Financial Crime in OTC Markets" 209-215.

75 Fox, Glosten and Rauterberg 2018 *Yale J on Reg* 69-86.

76 Munoz 2016 *ECFR* 169-180.

77 See *AT40135* para 7 footnote.

78 Stenfors and Muchimba "Financial Crime in OTC Markets" 208-220.

79 Vaughan, Finch and Choudhury 2013 https://www.bloomberg.com/news/articles/2013-06-11/traders-said-to-rig-currency-rates-to-profit-off-clients.

80 Thomson Reuters acquired WM/Reuters from the World Market in 2016. See Thomson Reuters 2016 https://www.thomsonreuters.com/en/press-releases/2016/april/thomson-reuters-acquires-wmreuters-foreign-exchange-benchmarks-from-state-street-corporation.html.

81 FSB *Final Report on Foreign Exchange Benchmarks* 1-5.

82 IOSCO 2013 https://www.iosco.org/library/pubdocs/pdf/IOSCOPD415.pdf 9-10.

the Financial Stability Board (FSB)[83] developed benchmark computation guidelines. Yet these principles and guidelines are soft laws and have no legal effect.[84] Accountability relies on the benchmark agencies for self-regulation.[85] Although IOSCO's principles are not mandatory, benchmark agencies should adhere to the principles of good governance and ethical practices in benchmark computations.[86]

WM/Reuters sourced primary data from previously executed trades and orders involving 21 currencies to compute its benchmarks.[87] Seventeen of these currencies were selected for sampling. The primary data for trades and orders were collected and computed separately, supplemented by secondary data for validation purposes.[88] The computation follows a rigorous methodology, wherein "61 single snapshots of trade and order rates are taken over the minute from 30 seconds before to 30 seconds after the fix time."[89] These snapshots aim to match the current and/or the last trader and orders. The data will be captured, and automated computation will be performed for further validation. This process is replicated for individual currencies.[90] Additionally, in cases of there being insufficient data for a specific currency, various computational methods are explored.[91] Notably, the ultimate determination of the appropriate rate for an individual currency is the responsibility of WM/Reuters.[92] Although WM/Reuters benchmarks were considered robust by some regulatory bodies and industry participants, recent currency manipulation scandals have demonstrated otherwise.[93]

Indeed, the manipulation was facilitated by the 60-second window period, between 15:59 and 16:00, which is known as the fix time.[94] The WM/Reuters

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83 FSB *Final Report on Foreign Exchange Benchmarks* 2-3.

84 See Ferrarini, Siri and Zhu 2024 *EBOR* 361-370; Hill 2017 *Temp L Rev* 683-694.

85 See FSB *Final Report on Foreign Exchange Benchmarks* 8-15.

86 See Bloom 2019 *NC Banking Inst* 28-35. Ethical practices refers to practices that involve decision-making which not only align with regulations or ethical codes but also consider the impact of such decisions on stakeholders at large, including the nation's economy. See e.g., Cheffins 2015 *Theol Inq L* 2-25; Caulfield and Laufer 2019 *Geo JL & Pub Pol'y* 953-961. Additionally, in this case stakeholders can include clients, shareholders, regulators and society as a whole, *inter alia*. Also see Bebchuk and Tallarita 2022 *Vand L Rev* 1032-1038.

87 The primary data of trades and orders were collected from various currencies including, *inter alia,* G10 countries' currencies, the SA Rand, the Russian Ruble and the Singapore Dollar. See *Commodity Futures Trading v Citibank* No 15-03 4-5 (CFTC 2014).

88 FSB *Final Report on Foreign Exchange Benchmarks* 7-10.

89 See FSB *Final Report on Foreign Exchange Benchmarks* 7-10.

90 A report further illustrates the trade currency methodology, which is validated through automated computation. See FSB *Final Report on Foreign Exchange Benchmarks* 10-11.

91 See FSB *Final Report on Foreign Exchange Benchmarks* 15-16.

92 Guan 2020 *Md L Rev* 1-30.

93 See FSB *Final Report on Foreign Exchange Benchmarks* 15-16; IOSCO 2013 https://www.iosco.org/library/pubdocs/pdf/IOSCOPD415.pdf 24, 32.

94 Bloom 2019 *NC Banking Inst* 28-45.

benchmarks were released at approximately 16:00 with a 60-second time window before the new benchmarks were issued.[95] This 60-second window was susceptible to manipulation, primarily because of its methodology and a lack of regulatory oversight in its operations.[96]

Accordingly, IOSCO[97] further stated that the WM/Reuters methodology lacked formality. Specifically, they adhered to market trends without considering precipitative currency fluctuations. Consequently, it can be reasonably inferred that when the manipulation occurred and influenced currency imbalance, there was a high probability of WM/Reuters collecting erroneous data due to manipulative trades. This could have inadvertently benefitted manipulators (traders) who continued trading for six years, yielding positive results.[98] Concurrently, corporate crime literature posits that once criminogenic activities commence and prove profitable, perpetrators will opt to continue with the practices despite the potential consequences of apprehension and subsequent incarceration or reputational damage.[99] Admittedly, this necessitates an exploration of the ZAR manipulation by GBs and Glen Point.

4 The ZAR manipulation by GBs and Glen Point

The evolution of spot market trading in South Africa can be traced back to 1985, a pivotal year when the country faced sanctions that restricted its participation in international trade and FX markets.[100] As a result, South Africa lacked access to foreign currencies. The South African Reserve Bank (SARB) introduced forward trading to facilitate effective operations for corporations.[101] Once the sanctions were lifted in 1996, the SARB aimed to bolster its foreign reserves, particularly in USD, and attract foreign investment in its currency, leading to the introduction of the spot market.[102] Importantly, since its introduction there have been no documented instances of ZAR manipulation.[103] However, the recent manipulation of the ZAR through spot

95 OCC 2014 https://www.occ.treas.gov/news-issuances/news-releases/2014/nr-occ-2014-157a.pdf.

96 In response to the WM/Reuters benchmarks, some regulatory and quasi-regulatory bodies designed the benchmark methodology guidelines, and the principles to guide the benchmark agencies. See FSB *Final Report on Foreign Exchange Benchmarks* 23-26; IOSCO 2013 https://www.iosco.org/library/pubdocs/pdf/IOSCOPD415.pdf 32-33.

97 IOSCO 2013 https://www.iosco.org/library/pubdocs/pdf/IOSCOPD415.pdf 3-4.

98 Kang 2019 *LFMR* 235-243.

99 See Werle 2019 *Yale LJ* 1367-1370.

100 Mminele 2013 https://www.bis.org/publ/bppdf/bispap73x.pdf 317-323.

101 Van der Merwe 1996 https://www.resbank.co.za/content/dam/sarb/what-we-do/financial-markets/committees-and-working-groups/fx_global_code.pdf 5-6.

102 Van der Merwe 1996 https://www.resbank.co.za/content/dam/sarb/what-we-do/financial-markets/committees-and-working-groups/fx_global_code.pdf 2-12.

103 Mminele 2013 https://www.bis.org/publ/bppdf/bispap73x.pdf 317-323.

market trading marks a significant development.[104] This section analyses the manipulation of the ZAR by GBs and Glen Point.

4.1 The manipulation of the ZAR by GBs

In 2013 a currency manipulation scandal involving the ZAR and currencies from G10 countries was exposed.[105] The financial impropriety was disclosed by Bloomberg journalists, who reported that several GBs were implicated in the manipulation of the USD and ZAR.[106] These banks possessed access to multiple currencies from around the world, and some of them had subsidiaries in SA, while others used SA banks for funds clearance.[107] The GBs implicated in the scandal included *inter alia* the Bank of America, JP Morgan Chase, Nomura International PLC, Commerzbank, Australia-New Zealand Banking Group Limited and Credit Suisse. The SA accomplice banks included Nedbank and Absa.[108]

The GBs' currency manipulation practices were prevalent between 2007 and 2013, primarily utilising WM/Reuters benchmarks.[109] Traders focussed their efforts on the WM/Reuters fix time, a 60-second window from 15:59 to 16:00. As previously noted, this fixed time is vulnerable to manipulation. Traders participated in excessive trading to enhance their positions by purchasing ZAR against the USD. While the specific daily trade involving these currency pairs remains unclear, it encompassed US$5 trillion of the G10 currencies and the ZAR combined.[110] Through substantial ZAR purchases its value appreciated against the USD, enabling traders to maximise their leverage.[111] Notably, upon the cessation of the excessive trading the ZAR value depreciated. Moreover, on the subsequent day, as markets self-corrected, the ZAR reverted to its original value.[112]

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104 See *Competition Commission of South Africa v Bank of America* para 12.

105 The G10 currencies involved included the USD, the Canadian dollar, the Japanese yen, the Australian dollar, the New Zealand dollar, the British pound, the Euro, the Swiss franc, and the Swedish, Norwegian, and Danish kroner. See *Competition Commission of South Africa v Bank of America* para 12.

106 Vaughan, Finch and Choudhury 2013 https://www.bloomberg.com/news/articles/2013-06-11/traders-said-to-rig-currency-rates-to-profit-off-clients.

107 In its submission the Competition Commission used the terms local and pure peregrine. The local peregrine denotes the banks domiciled in SA, and the pure peregrine denotes the foreign banks. See *Competition Commission of South Africa v Bank of America* paras 10-12.

108 For a full list of the banks involved in the USD/ZAR and other G10 currency manipulation, see *AT40135* para 3; *Competition Commission of South Africa v Bank of America* para 12.

109 Powers 2016 *Fordham Urb LJ* 155-170.

110 See Kang 2019 *LFMR* 235-243.

111 See Kang 2019 *LFMR* 235-243.

112 The market auto-correction occurs naturally when the markets are not being manipulated. Also see *Commodity Futures Trading Commission v Glen Point* para 109.

To carry out their practices traders from GBs engaged in collaborative communication through Bloomberg Chatroom, exchanging messages that contained confidential client information.[113] Their coordinated efforts were expressed in coded language, as well as some explicit terms, to communicate their intentions regarding the manipulation of the USD/ZAR pair and other G10 currencies.[114] In doing so they revealed their clients' orders, which comprised sensitive information, and strategised to "coordinate their trading" activities.[115]

Traders were able to establish chatrooms on Instant Bloomberg (IB) and extended invitations to other traders to participate.[116] Those who did not receive invitations were excluded from participation.[117] Additionally, the information exchanged in these chatrooms was used to anticipate each other's market behaviour and potentially inform subsequent decisions, occasionally resulting in meticulously coordinated trading.[118] Notably, traders anticipated reciprocity when sharing information and expressed gratitude to one another for doing so.[119]

The traders' modus operandi involved receiving funds from their clients. However, their primary objective was to maximise profits for the GBs.[120] Consequently, as risk was inherent, "they adjusted their own positions knowing that their client's trade could move the market."[121] A deviation from this approach was likely to have a significant impact on the GBs, potentially resulting in substantial losses.[122] Despite the high risk, incurring losses was not considered an option. Hence there was a well-coordinated effort among traders. It is important to note that ZAR manipulation by GBs exacerbates its

113 See *Competition Commission of South Africa v Bank of America* paras 10-15.

114 *AT40135* para 56.

115 See *AT40135* para 48.

116 Bloomberg developed the Instant Bloomberg (IB). IB is used by foreign exchange market traders globally "to exchange ideas, research, trade inquiries, pricing, indications of interest, client insights, news, [and] data." Upon registration, users (traders) could join chatrooms through invitations or establish new chat groups and invite participants. Similarly, users in existing groups could create subgroups for diverse conversations. The system enabled users to generate a single message in response to multiple messages. Moreover, users were able to search for pertinent information from previous conversations. Additionally, it allowed users to design structured messages to respond effectively to or disseminate a high volume of information with fellow users. See Bloomberg Professional Services 2024 https://www.bloomberg.com/professional/products/bloomberg-terminal/collaboration-tools/instant-bloomberg/.

117 *Contant v Bank of America* paras 2-3.

118 See *AT40135* para 53.

119 See *AT40135* para 51.

120 Vaughan, Finch and Choudhury 2013 https://www.bloomberg.com/news/articles/2013-06-11/traders-said-to-rig-currency-rates-to-profit-off-clients.

121 Vaughan, Finch and Choudhury 2013 https://www.bloomberg.com/news/articles/2013-06-11/traders-said-to-rig-currency-rates-to-profit-off-clients.

122 See *AT40135* paras 10, 13, 53.

volatility.[123] This volatility created favourable conditions for other independent firms, such as Glen Point, to engage in further manipulation.[124]

4.2 The ZAR manipulation by Glen Point

Traditionally hedge funds have been associated with an aggressive approach to shareholder activism in listed corporations.[125] Nevertheless, in recent years there has been a significant shift from the conventional focus on equities to maximising profitability, a phenomenon often referred to as short-termism.[126] Glen Point was not exempt from this contemporary investment approach. The firm diversified into commodity trading, particularly spot market trading, and subsequently engaged in questionable practices to manipulate the USD/ZAR pair.[127]

Glen Point is a London-based hedge fund with operations in New York. Neil Phillips, its majority shareholder and co-chief investment officer (CIO), co-founded Glen Point Capital LLP (Glen Point) domiciled in London in 2015,[128] to establish and manage "certain private pooled investment vehicles".[129] In 2017 Glen Point Capital Advisors was established and domiciled in New York to trade derivatives. In the same year the Glen Point Master Fund Limited was founded and registered in New York "to solicit and manage commodity pools".[130] Additional subsidiaries were registered in the US and the Cayman Islands, both focussing on micro funds, which demonstrates a complex ownership structure.[131] These entities fall within the same principal company, Glen Point, and are collectively referred to as Glen Point.[132] Nonetheless, the context will be oriented towards the US, where Phillips was based during the ZAR manipulation.

Phillips, Glen Point's CIO, sought to use OTC options prior to their expiration. Glen Point initiated its first one-touch OTC options contract on October 30, 2017, which was scheduled for termination on January 2, 2018.[133] In a one-touch OTC option, the investor enters into a binary options contract with a predetermined amount and duration. Upon acquisition the investor speculates on the commodity value at the contract's termination. Leverage is achieved if

123 The ZAR never recovered from the time of manipulation. Instead it weakened further. See Sovereign Africa Ratings 2023 https://saratings.com/media/issuer_commentary/Issuer_Commentary_-_Rand_Manipulation_J96DsX4.pdf.
124 *Commodity Futures Trading Commission v Glen Point* para 2.
125 Christie 2019 *JCLS* 2-10.
126 Christie 2019 *JCLS* 15-20.
127 *Commodity Futures Trading Commission v Glen Point* para 2-3.
128 UK Government 2024 https://find-and-update.company-information.service.gov.uk/company/OC401536.
129 *Commodity Futures Trading Commission v Glen Point* para 46.
130 See *Commodity Futures Trading Commission v Glen Point* para 49.
131 See *Commodity Futures Trading Commission v Glen Point* para 23.
132 *Commodity Futures Trading Commission v Glen Point*.
133 See *Phillips* 1-2.

the currency value reaches the investors' speculated value.[134] Conversely, if the currency value does not attain the speculated value, the investor incurs a loss and the seller realises a profit.[135] Therefore, Glen Point would not be able to leverage any profit owing to the contract's proximity to termination.

Philips leveraged a significant profit of US$30 million in several separate transactions. He selected an opportune date for trading on December 25, 2017 for his initial trade, when market activity was reduced due to the Christmas holidays. Utilising Bloomberg chat services, Phillips contacted the Settlement Bank (bank) and initiated a spot market trade on his behalf.[136] On that day he intended to manipulate the USD/ZAR pair to "trigger a US$20 million payout".[137] Following Phillip's instructions a trader executed a series of transactions. These transactions were designed to strengthen the ZAR against the USD. At that time the ZAR was trading at R12.62 against US$1.00. Phillips initially instructed the trader to conduct a US$250 million transaction with the ZAR. On that day only a limited number of traders sold ZAR to USD, totalling approximately US$100 million.[138] Although other traders were engaging in significant transactions, Phillips needed to ensure that he achieved his objective of minimising losses. This scenario is referred to as the Barrier Event.[139]

To reach the Barrier Event, Phillips instructed the trader to sell over US$500 million for the ZAR, resulting in a total of US$725 million in transactions. This action caused the ZAR to strengthen further against the USD by R12.4975. He subsequently advised the trader to cease trading and requested a printout to confirm the desired outcome.[140] This process involved various participants, including brokers for fundraising and intermediary firms (swap dealers).[141]

After an hour of Phillips providing instructions to the trader, the ZAR was automatically adjusted to R12.55 against the USD. On the following day (December, 26 2017), ZAR depreciated to R12.62 against USD. Phillips directed one of his employees to withdraw funds.[142] Accordingly, Glen Point realised a profit of US$20 million. Under Phillips' leadership, Glen Point persisted in these deceptive practices by manipulating the USD/ZAR pair until November 2018, trading approximately US$20 million daily.[143] During this period, they generated a profit of US$10 million. However, the initial

134 Kang 2019 *LFMR* 235-243.
135 Also see *Commodity Futures Trading Commission v Glen Point* para 57.
136 See *Phillips* 2-4.
137 See *Commodity Futures Trading Commission v Glen Point* para 82.
138 See *Commodity Futures Trading Commission v Glen Point* paras 83-99.
139 *Phillips* 2-4.
140 See *Commodity Futures Trading Commission v Glen Point* paras 101-102.
141 See *Commodity Futures Trading Commission v Glen Point* paras 23-33.
142 See *Commodity Futures Trading Commission v Glen Point* paras 109-110.
143 See *Commodity Futures Trading Commission v Glen Point* para 105.

transaction on December 25, 2017 was the most significant, yielding the highest profit.[144] Notably, during the first transaction a trader cautioned Phillips regarding the implications of these deceptive practices. Nevertheless, this did not dissuade Phillips, as he was determined to avoid incurring a loss. This behaviour may be attributable to financial constraints and is potentially influenced by the lack of spot market regulation in the US, thus warranting further investigation.[145]

5 Examining the spot market regulation

5.1 The antipathy to spot market regulation

Legal scholars have engaged in discourse on spot market regulation since its inception.[146] Yet, to date, there has been considerable disagreement concerning such a regulatory framework.[147] Two distinct schools of thought have emerged regarding the regulation of spot markets. One perspective posits that spot market regulation is detrimental to the FX market, resulting in its inefficiency.[148] The opposing viewpoint contends that the significant volume of funds transferred daily to the FX market and its economic impact necessitate its regulation, as previously articulated.[149] The argument against regulation aligns with the four identified factors that influence the paucity of spot market regulation:

(a) **Bank governance and regulation:** GBs operate primarily in the spot market on behalf of their clients.[150] To maintain high standards, banks are subject to complex regulations and possess well-developed compliance systems.[151] Furthermore, they adhere to a stringent code of ethics, and each bank is required to develop policies to prevent criminogenic practices.[152] These factors have led some legal scholars to argue that spot market regulation is unnecessary, as banks are well-regulated and ethical.[153] Additionally, its regulation may impede the daily

144 See *Phillips* 1-5.
145 See *Commodity Futures Trading Commission v Glen Point* para 91.
146 Although the spot market became prominent in the 1990s, similar trends of the spot market have been recorded in the literature since the 1930s. See e.g. Rostow 1936 *Yale LJ* 624; Haugh 2019 *Ga L Rev* 130-157; from an economics perspective, also see Schabacker *Stock Market Theory and Practice* 570-572; Chaboud, Rime and Sushko "The Foreign Exchange Market" 253-260.
147 See e.g., Kang 2019 *LFMR* 235-243.
148 See Guan 2020 *Md L Rev* 1-30.
149 Also see Fletcher 2016 *Iowa L Rev* 1929-1943.
150 IOSCO 2013 https://www.iosco.org/library/pubdocs/pdf/IOSCOPD415.pdf.
151 Van Jaarsveld 2002 *SALJ* 71-80; Singh 2003 *JBR* 110.
152 Shichor and Heeren 2021 *Journal of White Collar and Corporate Crime* 97-101.
153 O'Brien 2017 *LFMR* 83-95.

flow of funds, owing to their high volume, and potentially render foreign exchange markets inefficient.[154]

(b) **The volume of funds:** The FX market encompasses diverse participants, including corporations, individuals, banks and market traders from various nations.[155] Consequently, the FX market exhibits a high volume of daily traded funds.[156] The Bank of International Settlement estimates daily trade to exceed US$7 trillion as of 2022.[157] The foreign exchange market requires efficiency. Proponents of spot market deregulation therefore argue that efficiency must be maintained and that its regulation may be detrimental to such efficiency.[158] While their argument is plausible, it does not, however, constitute a rejection of the necessity for spot market regulation, considering the market's impact and its susceptibility to manipulation,[159] as discussed further below.

(c) **The origins of the spot market and its nature:** The FX spot market initially emerged from commodity trading and served as a platform for the settlement of transactions. The spot market was not conceived as an investment vehicle.[160] As international trade evolved, most commodities became subject to individual regulation.[161] These factors contributed to a lack of impetus for its regulation.[162] However, current spot market trends indicate a departure from its archetypal function, rendering it an investment vehicle, as previously elucidated.[163] Moreover, spot market contracts are inherently designed for short-term trading across national boundaries. As a result, it has been determined that its regulation is impractical.[164]

(d) **Trust in the independence of the benchmark house:** The FX market benchmark institutions are relatively recent developments.[165] Historical records indicate that banks initially determined currency values.[166] Indeed, when WM/Reuters entered the market in 1999 it garnered

154 Munoz 2016 *ECFR* 159-168.
155 Guan 2020 *Md L Rev* 15-41.
156 See Guan 2020 *Md L Rev* 15-41.
157 BIS 2022 https://www.bis.org/statistics/rpfx22_fx.pdf.
158 Powers 2016 *Fordham Urb LJ* 165-180.
159 See Kang 2019 *LFMR* 235-243.
160 see Kang 2019 *LFMR* 235-243.
161 Powers 2016 *Fordham Urb LJ* 145-160.
162 Powers 2016 *Fordham Urb LJ* 145-160
163 See *Commodity Futures Trading Commission v Glen Point* paras 54, 114.
164 See Bloom 2019 *NC Banking Inst* 29-52.
165 FTSE Russell 2024 https://www.lseg.com/content/dam/ftse-russell/en_us/documents/methodology/wmr-methodology.pdf.
166 IOSCO 2013 https://www.iosco.org/library/pubdocs/pdf/IOSCOPD415.pdf 1-10; Van der Merwe 1996 https://www.resbank.co.za/content/dam/sarb/what-we-do/financial-markets/committees-and-working-groups/fx_global_code.pdf 2-8.

appreciation and a degree of trust.[167] This is attributed to its status as a private entity, perceived as independent, with robust methodologies for computing benchmarks.[168] Regulatory and certain quasi-regulatory international bodies have maintained a similar perspective regarding WM/Reuters' robust governance systems.[169] Nonetheless, recent currency manipulation incidents have demonstrated its vulnerability.

Anti-spot market regulation legal scholars have maintained their arguments based on the aforementioned factors,[170] yet they disregard other factors such as behavioural dynamics within banks, which have implications for currency manipulation.[171] Corporate crime literature demonstrates that corporations comprise individuals who embody unique characteristics.[172] Accordingly, in a complex environment such as the financial industry, which requires a certain level of sophistication, these individuals might be inclined to engage in unethical practices, cognisant of their ability to conceal their malfeasance.[173] This is further evidenced by GBs' and Glen Point's scandals of currency manipulation.[174] In response, regulatory and quasi-regulatory bodies have devised benchmark methodology guidelines and principles to address such behaviour.[175] This further demonstrates a regulatory vacuum and spot market susceptibility to manipulation, which may lead to turmoil in the system.

5.2 The spot market quandary

As previously discussed, the spot market operates through electronic trading platforms. The magnitude and volume of traded funds are substantial, exceeding US$7 trillion per day as of 2023.[176] Consequently, the absence of comprehensive spot market regulation exposes global currencies to significant risks of sustained manipulation, resulting in detrimental effects.[177] For instance, the SA currency depreciated against the USD by over 50%, severely impacting the economy.[178] Similarly, the ZAR's dependence on dominant

167 See FTSE Russell 2024 https://www.lseg.com/content/dam/ftse-russell/en_us/documents/methodology/wmr-methodology.pdf.

168 FSB *Final Report on Foreign Exchange Benchmarks* 20-22.

169 See FSB *Final Report on Foreign Exchange Benchmarks* 20-22; IOSCO 2013 https://www.iosco.org/library/pubdocs/pdf/IOSCOPD415.pdf 1-10.

170 See Powers 2016 *Fordham Urb LJ* 145-163; Markham 2015 *U Pa J Bus L* 790-840.

171 Shichor and Heeren 2021 *Journal of White Collar and Corporate Crime* 102-107.

172 Aßländer and Burkatzki "Financial Fraud of the German Fintech Company WireCard" 292-300.

173 See Bucy *et al* 2008 *John's L Rev* 401-410.

174 *Commodity Futures Trading Commission v Glen Point*.

175 IOSCO 2013 https://www.iosco.org/library/pubdocs/pdf/IOSCOPD415.pdf 1-15.

176 BIS 2022 https://www.bis.org/statistics/rpfx22_fx.pdf.

177 Stenfors and Muchimba "Financial Crime in OTC Markets" 220; Stenfors "Manipulative and Collusive Practices in FX Markets" 185-190.

178 Sovereign Africa Ratings 2023 https://saratings.com/media/issuer_commentary/Issuer_Commentary_-_Rand_Manipulation_J96DsX4.pdf.

currencies such as the USD further exacerbates its vulnerability.[179] Moreover, although the European Union (EU) implemented regulations for its benchmarks, these measures did not extend protection to other currencies susceptible to manipulation, such as the ZAR.[180] Instead, the current regulatory framework inadvertently safeguards perpetrators and other FX market traders in the EU and G10 countries against volatile currencies when they withdraw their assets.[181]

The WM/Reuters benchmarks are frequently used in spot market trading. Accordingly, there is a consensus among courts and regulatory bodies that WM/Reuters benchmarks are susceptible to manipulation due to their methodology.[182] This methodology incorporates numerous currencies of varying strengths, including the USD, the Euro and the ZAR.[183] As the spot market remains unregulated and WM/Reuters has not altered its methodology, its pervasive susceptibility persists. This situation may perpetuate currency manipulation, potentially exacerbated by technological advancements such as artificial intelligence (AI) and blockchain.[184] Furthermore, perpetrators may devise other sophisticated methods to manipulate currencies and conceal their detrimental practices.[185] Surely, currency manipulation adversely affects the economy, and should such manipulative activities persist unchecked, developing economies might remain susceptible to their ramifications.[186]

Similarly, the online nature of spot market trading may present challenges to prosecuting perpetrators due to jurisdictional complexities.[187] Therefore, regulatory frameworks require revision to facilitate the offenders' prosecution. Notably, the SA Competition Commission sought to address this issue through

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179 Tavuyanago 2024 *PELJ* 2-6.

180 *Regulation (EU) 2021/168 of the European Parliament and of the Council* OJ L 49 6 (2021).

181 See *Regulation (EU) 2021/168 of the European Parliament and of the Council* OJ L 49 6 (2021) 6-7.

182 See *AT40135* para 56; FSB *Final Report on Foreign Exchange Benchmarks* 24-25.

183 See *Commodity Futures Trading Commission v Glen Point*.

184 Lin 2019 *Fordham L Rev* 531-542.

185 Corporate crime evolves concomitantly with technological advancements. Individuals within corporations consistently devise sophisticated methods to engage in unethical practices. See Chan and Gibbs 2022 *Criminology* 326-329; Shichor and Heeren 2021 *Journal of White Collar and Corporate Crime* 97-107.

186 See Sovereign Africa Ratings 2023 https://saratings.com/media/issuer_commentary/Issuer_Commentary_-_Rand_Manipulation_J96DsX4.pdf.

187 The currency manipulation occurs online, and usually the perpetrators or a company involved might be domiciled in another country. Even when that is not the case, the legal system might make it challenging to prosecute the perpetrators due to a lack of jurisdiction, which can frustrate the case or prolong the prosecution. See *Competition Commission of South Africa v Standard Bank of South Africa Limited; Competition Commission of South Africa v Waco Africa (Pty) Limited* (CCT158/18; CCT179/18; CT218/18) [2020] ZACC 2 (20 February 2020); *Contant v Bank of America*; *Phillips* 2-7.

the Constitutional Court.[188] However, the extraterritorial domicile of certain banks may impede the enforcement of court-imposed sanctions. The courts' mandate is to reinforce the nation's legal systems.[189] Achieving this objective may be a protracted process because of the slow pace of judicial proceedings.[190] Furthermore, GBs and hedge funds possess the resources to use legal processes to impede or delay prosecution.[191]

As stated previously, currency manipulation is detrimental to a country's economic system and can threaten its security.[192] In this context developing economies are particularly vulnerable due to their volatile currencies, weaker economic structures and less developed judicial systems compared to those of developed countries.[193] Indeed, systematic currency manipulation poses a significant threat to the sovereignty and security of developing economies.[194] Conversely, countries and regions such as the US and the EU have successfully prosecuted currency manipulation perpetrators through collaboration among their regulatory agencies and the G10 member states.[195]

Spot market traders and transactions originate predominantly in developed economies. This phenomenon is largely attributable to their established markets and economic competitiveness.[196] These economies also possess robust legal systems and advanced expertise that enable them to effectively prosecute financial crimes, such as currency manipulation, stemming from their extensive exposure to such practices and other forms of corporate crimes.[197] This situation is further exacerbated by the EU benchmark regulation, which fails to provide adequate protection against the potential manipulation of the currencies of developing economies.[198] Conversely, currency volatility in developing economies renders them susceptible to exploitation.[199] Given the implications of currency manipulation and the complexities of the spot market, it is imperative to address regulatory disparity to safeguard developing economies.

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188 Competition Commission 2024 https://www.compcom.co.za/wp-content/uploads/2024/02/Commission-Appeals-CAC-Decision-on-Forex-Cartel-Case-06-February-2024.pdf.

189 See Diamantis and Thomas 2021 *J Corp L* 1000-1008.

190 See Diamantis and Laufer 2019 *Annu Rev Law Soc Sci* 460-472.

191 Girau *et al* 2021 *JFC* 624-631.

192 CRS 2024 https://crsreports.congress.gov/product/pdf/IF/IF10049.

193 Sovereign Africa Ratings 2023 https://saratings.com/media/issuer_commentary/Issuer_Commentary_-_Rand_Manipulation_J96DsX4.pdf.

194 See e.g., Hassan, Martens and Zhang 2023 *Review of Economic Studies* 880-903.

195 See *AT40135*; *Commodity Futures Trading v Citibank* No 15-03 4-5 (CFTC 2014).

196 Tavuyanago 2024 *PELJ* 6-15.

197 See *Contant v Bank of America* paras 2-4; FCA 2015 https://www.fca.org.uk/news/press-releases/fca-fines-barclays-%C2%A3284432000-forex-failings.

198 See *Regulation (EU) 2021/168* 49 6-7.

199 Sovereign Africa Ratings 2023 https://saratings.com/media/issuer_commentary/Issuer_Commentary_-_Rand_Manipulation_J96DsX4.pdf.

5.3 Bridging the gap in spot market regulation

Notwithstanding the concept of bank self-regulation, there is a global acknowledgement of the existence of substantial risk associated with the lack of regulation in the spot market.[200] This is primarily attributed to its liquidity, its capacity for global platform trading, and the immediacy of contracts or their validity for no more than two days.[201] Considering the long-term implications of currency manipulation and the vulnerability of developing economies, reliance on banks' self-regulation may prove ineffective, largely due to their inadequacy in preventing currency manipulation.[202] Although legal proceedings were initiated against Glen Point and Phillips, there is a notable conspicuous absence of commentary regarding the banks' complicity, as it falls within their purview to prevent such manipulative practices.[203] Undoubtedly, the Glen Point incident represents a recurrent manifestation of currency manipulation following approximately a decade of similar activities by GBs, further highlighting a deficiency in the regulatory framework and underscoring the necessity for spot market regulation.[204]

Notably, Powers[205] acknowledges the necessity for regulation in the spot market and its adverse effects; nonetheless, he maintains a reliance on bank regulations and ethical codes. He further posits that spot market regulations may result in inefficient foreign exchange transactions. Furthermore, Penn *et al*[206] contend that the spot market's contractual nature renders it impervious to regulation, as a contract is executed on an immediate basis. This assertion is valid from a narrow perspective, particularly when the spot market is viewed as a foreign exchange transaction settlement system. However, from a broader perspective the spot market also functions as an investment vehicle, as evidenced by the GBs and Glen Point cases, which employed a quasi-derivatives approach.[207] The propensity toward leverage and susceptibility to the manipulation of derivatives are minimal compared to those in the spot market, yet they are subject to regulation.[208] Indeed, the majority of regulated foreign exchange products have minimal economic detriments compared to

200 See Bloom 2019 *NC Banking Inst* 30-55.

201 The spot market exhibits 24-hour accessibility and substantial assets traded daily. See *Contant v Bank of America* paras 1-5; *Phillips* 1-4; Powers 2016 *Fordham Urb LJ* 140-151.

202 Kang 2019 *LFMR* 235-243.

203 *Commodity Futures Trading Commission v Glen Point*; *Phillips* 1-5.

204 Also see Kang 2019 *LFMR* 235-243.

205 Powers 2016 *Fordham Urb LJ* 145-160.

206 Penn *et al* 2018 *Banking LJ* 4-10.

207 See Kang 2019 *LFMR* 235-243.

208 Also see Kilian 2019 *SA Merc LJ* 356-363, for more detailed derivatives operations methodology.

those in the spot market.[209] Accordingly, it is imperative to recognise the necessity to regulate it.

The narrative of banks' self-regulation is refuted within the corporate crime literature. For instance, Diamantis and Thomas,[210] Chan and Gibs[211] and Braithwaite[212] argue that self-regulation is ineffective and serves as a mechanism through which corporations sustain unethical and criminogenic practices. This phenomenon has been observed in the pharmaceutical and aerospace industries.[213] For instance, Braithwaite's research revealed that pharmaceutical corporations exhibit the consequences of inadequate monitoring, which is partially attributable to the limited understanding of the industry and a lack of interest. Consequently, pharmaceutical corporations have been left to self-regulate, resulting in their engagement in unethical practices due to insufficient oversight.[214] Similarly, a recent Boeing scandal revealed the inadequacies of self-regulation.[215] Boeing managers falsified compliance reports submitted to regulators. Internally, they failed to adhere to regulations, and their quality control measures were substandard. This negligence led to fatal plane crashes resulting in significant loss of life.[216]

Correspondingly, the Lehman Brothers scandal occurred due to there being inadequate regulatory oversight.[217] This resulted in the fabrication of reports to present a misleading narrative to regulators. Conversely, internally the organisation failed to adhere to proper procedures for approving client mortgage applications. When clients defaulted on their mortgages, accounting techniques were employed to conceal the resultant losses.[218] This led to substantial financial losses, precipitating the 2008 global financial crisis.[219] The analysis addressed the deleterious effects of self-regulation merely superficially. Returning to the cases of currency manipulation, it is evident that self-regulation is ineffective. Admittedly, regulating the spot market may be a complex matter and may necessitate a multifaceted approach.[220] Therefore, this article proposes a two-pronged approach to its regulation.

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209 See Awrey 2016 *NYU L Rev* 1105-1115.
210 See Diamantis and Thomas 2021 *J Corp L* 1000-1008.
211 Chan and Gibbs 2022 *Criminology* 326-329.
212 Braithwaite *Corporate Crime in the Pharmaceutical Industry* 293-380.
213 McCarthy 2022-23 *St Louis U LJ* 245-265.
214 Braithwaite *Corporate Crime in the Pharmaceutical Industry* 293-380.
215 Shapira 2022 *J Corp L* 121.
216 US Department of Justice 2021 https://www.justice.gov/opa/pr/boeing-charged-737-max-fraud-conspiracy-and-agrees-pay-over-25-billion.
217 Committee on Oversight and Government Reform 2008 https://www.govinfo.gov/content/pkg/CHRG-110hhrg55766/pdf/CHRG-110hhrg55766.pdf 23-26.
218 Schapiro 2010 https://www.sec.gov/news/testimony/2010/ts042010mls.htm.
219 Cheffins 2015 *Theol Inq L* 9-30.
220 Bloom 2019 *NC Banking Inst* 35-56.

5.4 The two-pronged approach to spot market regulation

The spot market exhibits considerable complexity, and its regulatory deficiency exacerbates this issue. Notably, spot market contracts are inherently short-term, rendering them challenging to regulate,[221] as previously discussed. Recent studies have endeavoured to explore the regulation of the spot market, but they have concluded that such regulation would be arduous.[222] It is pertinent to consider whether this represents the conclusion of the inquiry. Should the spot market remain unregulated, it may perpetuate an inequitable transnational justice system. Surely, legal scholars may need to explore unconventional approaches to devise solutions to mitigate spot market manipulation. Kang states that:[223]

> Although a spot FX contract is not considered a financial instrument, it should be noted that only a fraction of currency trading today is directly related to the original purpose of facilitating cross-border trade, and the rest is speculative. Therefore, spot exchange markets should no longer be left in a blind spot of regulatory oversight and supervision.

In other words, the spot market should be incorporated into a market regulatory framework. However, the nature of the spot market presents challenges for effective regulation at the national level.[224] Consequently, transnational regulation is deemed optimal to facilitate the efficient exchange of knowledge between countries and to address potential currency manipulation activities. This article, therefore, proposes a two-pronged approach: (a) spot market regulation at the national level, and (b) spot market transnational regulation. Both proposed approaches are discussed forthwith.

At present no transnational regulatory body oversees the spot market. As previously discussed, numerous legal scholars have extensively examined the question of its regulation.[225] Primarily, most FX market products are regulated at the national level, which facilitates monitoring processes.[226] Furthermore, the code of ethics and supplementary regulations provide an additional layer of governance and rigour, constituting the foundation of the argument for proponents of spot market anti-regulation.[227] Conversely, recent scandals have exposed the risks associated with reliance on banks' regulations and codes of ethics for spot market ethical practices, particularly given that their original focus on international trade transactions has shifted to speculative trading.[228]

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221 Kang 2019 *LFMR* 235-243.
222 Penn *et al* 2018 *Banking LJ* 6-13.
223 Kang 2019 *LFMR* 235-243.
224 Powers 2016 *Fordham Urb LJ* 145-172.
225 See e.g., Powers 2016 *Fordham Urb LJ* 139; Kang 2019 *LFMR* 235.
226 O'Brien 2017 *LFMR* 86.
227 See O'Brien 2017 *LFMR* 86-88.
228 Kang 2019 *LFMR* 235-243.

The regulation of other foreign exchange market products deters fictitious practices, as participants who might engage in such practices can be prosecuted.[229] In contrast, spot market activities occur online, and traders may be located in different jurisdictions, rendering it challenging to detect any manipulative activities.[230] Furthermore, the currency volatility of some developing economies such as SA makes them susceptible to manipulation.[231] Consequently their ability to prosecute may be compromised by factors such as acquisition of inadequate information, the perpetrators' capacity to impede the prosecution process, and insufficient expertise.[232]

It is important to note that the spot market regulation may necessitate the involvement of an existing regulatory body for optimal efficiency. In this case, the BIS could potentially serve as an appropriate entity for transnational spot market regulation. The BIS has been actively engaged in the FX market for several years, providing valuable insights into FX market trends.[233] Furthermore, its existence and ownership are maintained by the member central banks of diverse nationalities.[234] This confers legitimacy upon the BIS in the context of FX markets, as its regulatory and governance systems are characterised by robustness and transparency.[235]

Principally, the jurisdiction of the BIS may be constrained, as is often the case with transnational laws, and this is further complicated by their inherent complexity.[236] To mitigate this complexity, regulations could be established and monitored by BIS member central banks with jurisdiction over their respective financial institutions. This would further enable central banks to develop mechanisms and models to ensure appropriate compliance with the spot market regulations.[237] Importantly, this approach might facilitate effective cooperation thorough investigation and knowledge dissemination among BIS member jurisdictions. Admittedly, this approach is not comprehensive, and thus this article should be considered as an attempt to stimulate further research and discourse on the transnational regulation of the spot market, considering its impact on economies, particularly of developing countries such as SA.

229 Penn *et al* 2018 *Banking LJ* 15-36.
230 *Phillips* 1-6.
231 Sovereign Africa Ratings 2023 https://saratings.com/media/issuer_commentary/Issuer_Commentary_-_Rand_Manipulation_J96DsX4.pdf.
232 See Diamantis and Laufer 2019 *Annu Rev Law Soc Sci* 453.
233 BIS 2005 https://www.bis.org/forum/research.htm.
234 BIS 2014 https://www.bis.org/about/member_cb.htm.
235 Chaboud, Rime and Sushko "The Foreign Exchange Market" 257-265.
236 Also see Braithwaite 2012 *MLR* 779-881.
237 Shichor and Heeren 2021 *Journal of White Collar and Corporate Crime* 97-107.

6 Conclusion

There is a consensus among legal scholars regarding the impact of systematic currency manipulation on the economy, particularly its potential to undermine a nation's economic foundations and sovereignty. Similarly, currency manipulation in the spot market by GBs and Glen Point has demonstrated comparable effects, as evidenced by the struggles of the South African Rand to recover since 2003. Indeed, the ZAR has depreciated by over 50% from the beginning of this manipulation in 2003 to 2023. The regulation of spot market activities is a point of contention among certain legal scholars, who reject the idea on various grounds such as the existence of stringent banking regulations, ethical codes, and the liquidity of the foreign exchange market due to the high daily transaction volumes, as well as the intrinsic nature of spot market contracts. While these arguments have some validity, they do not fully consider contemporary trends in the spot market (particularly speculative trading) and the detrimental effects of currency manipulation on economies, especially in developing nations such as SA, which exacerbates their currency volatility.

Currency manipulation can engender negative market sentiments towards specific currencies. The absence of comprehensive spot market regulation creates opportunities for currency manipulation. Both scenarios can have detrimental effects on the economy, particularly in developing economies such as that of SA. Therefore, it is imperative to establish transnational regulations to prevent currency manipulation and to ensure effective prosecution. Accordingly, the proposed two-pronged approach to regulation, namely transnational and national regulations, may prevent the occurrence of manipulative practices and facilitate efficient prosecution. Significantly, this article contributes to the debate about FX market and spot market regulation, including transnational law knowledge bodies, while initiating a discourse on spot market transnational regulation. Notwithstanding the valuable insights this article provides into spot market regulations, it has not examined the drivers of currency manipulation. Further research could be conducted to elucidate the driver of currency manipulation, which would be valuable in the process of devising strategies for mitigating currency manipulation via the spot market.

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List of Abbreviations

Annu Rev Law Soc Sci	Annual Review of Law and Social Science
Banking LJ	Banking Law Journal
BIS	Bank of International Settlement
CIO	Chief Investment Officer
Colum L Rev	Columbia Law Review
CRS	Congressional Research Service
ECFR	European Company and Financial Law Review
EU	European Union
EBOR	European Business Organization Law Review
FCA	Financial Conduct Authority
Fordham L Rev	Fordham Law Review
Fordham Urb LJ	Fordham Urban Law Journal
FSB	Financial Stability Board

FTSE Russel	Financial Times Stock Exchange Russel
FX	foreign exchange
Ga L Rev	Georgia Law Review
Geo JL & Pub Pol'y	Georgetown Journal of Law & Public Policy
GBs	global banks
GNLU JL Dev & Pol	Gujarat National Law University Journal of Law, Development and Politics
IB	Instant Bloomberg
IMF	International Monetary Fund
IMF Econ Rev	International Monetary Fund Economic Review
IOSCO	International Organisation for Securities Commissions
Iowa L Rev	Iowa Law Review
J Afr L	Journal of African Law
JBR	Journal of Banking Regulation
JCLS	Journal of Corporate Law Studies
J Corp L	Journal of Corporation Law
JFC	Journal of Financial Crime
J Int'l Banking Reg	Journal of International Banking Regulation
J Int'l Econ L	Journal of International Economic Law
JLS	Journal of Legal Studies
John's L Rev	John's Law Review
LCP	Law and Contemporary Problems
LFMR	Law and Financial Markets Review
Md L Rev	Maryland Law Review
MLR	Modern Law Review
NC Banking Inst	North Carolina Banking Institute
NYU L Rev	New York University Law Review
OCC	Office of the Comptroller of the Currency
OTC	over-the-counter
PELJ	Potchefstroom Electronic Law Journal
Penn St JL & Int'l Aff	Penn State Journal of Law and International Affairs
PR	Public Relations
SA	South Africa
SALJ	South African Law Journal
SA Merc LJ	South African Mercantile Law Journal
SARB	South African Reserve Bank
St Louis U LJ	Saint Louis University Law Journal
Temp L Rev	Temple Law Review
Theo Inq L	Theoretical Inquiries in Law

U Chi L Rev	University of Chicago Law Review
U Pa J Bus L	University of Pennsylvania Journal of Business Law
US	United States of America
USD	United States of America Dollar
UK	United Kingdom
Vand L Rev	Vanderbilt Law Review
WM/Reuters	World Market Reuters Benchmarks
Yale J on Reg	Yale Journal on Regulation
Yale LJ	Yale Law Journal
ZAR	South African Rand