# WHO'S IN CHARGE OF GLOBAL FINANCE?

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ABSTRACT

*The global financial crisis caused widespread harm not just to the financial system, but also to millions of households and businesses and to the global economy. The crisis revealed substantive, fundamental weaknesses in global financial regulation and raised serious questions about whether national regulators and the international financial regulatory system could ever be up to the task of overseeing global finance. This Article analyzes post-crisis reforms with two questions in mind: First, how can we build an effective international financial architecture with more than one architect? Second, can we build a system that is legitimate and accountable? The Article suggests areas for further substantive and procedural reform.*

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## I. Introduction

The recent financial crisis, which roiled the globe beginning in September 2008, nearly decimated global financial markets and in fact devastated the real economy of the United States and Europe, with concomitant global harm. The worst crisis since the Great Depression, the 2008 crisis laid bare widespread, unchecked risk-taking by financial institutions and a nearly endemic, decade-long failure by domestic regulators. The consequences of this excess and complacency were dire: millions of households lost their jobs, homes, and savings; businesses shuttered globally; and entire economies lost years of growth. Even today, households continue to struggle, and post-crisis recessions continue to hamper the growth of major world economies.

An even deeper, more enduring crisis was averted only by the swift intervention of political leaders, central banks, and other regulators around the globe, and by significant injections of taxpayer funds into failing financial institutions. Six years later, it is worth reflecting on the procedural and substantive qualities of the pre-crisis regulatory order that permitted this recession to occur and asking whether the new system of global regulation that has emerged since 2008 will ultimately serve the global real economy any more effectively.

The 2008 crisis exposed fundamental weaknesses—both procedural and substantive—in the international financial regulatory architecture. The Bretton Woods institutions (the International Monetary Fund, World Bank, and World Trade Organization) were never really equipped to deal with the growing complexity, breadth, and size of the global financial system, and instead left rulemaking and supervision largely to the domestic arena. The cross-border rules that were developed—essentially by national regulators and the international standard-setting bodies that took root in this global institutional lacuna in the 1980s—proved woefully ineffective. Despite strategies to increase the accountability and legitimacy of these hybrid standard-setting bodies,[1] the rules failed substantively, and overwhelmingly. Global finance, and a "soft-law" architecture left unchecked by a decades-long regulatory race to the bottom, proved weak in the face of global financial institutions and crushed the real economy.

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1. *See generally* Michael S. Barr & Geoffrey P. Miller, *Global Administrative Law: The View from Basel*, 17 Eur. J. Int'l L. 15 (2006) (describing the Basel Committee on Banking Supervision as a nascent, albeit imperfect, template for more legitimate and accountable rulemaking by global regulatory networks).

The failure of the pre-crisis regulatory architecture to manage the financial system at a global level raises two fundamental questions: First, how can we best build a substantively more effective international financial architecture with more than one architect? And second, how can we foster a global regulatory architecture that is legitimate and accountable— one that reflects our most basic values?

The rubric of global administrative law (GAL) provides a useful framework for thinking about how to answer these questions.[2] Specifically, it provides a way of thinking about how we might embed in the international regulatory architecture procedural values that are consistent with the normative justifications for this architecture.[3] At the most basic level, we want global institutions that are effective—meaning that they establish norms that are treated by national actors as obligations, that there are systems in place to monitor compliance with these obligations, and that these obligations are enforced.[4] Effective global institutions will help produce rules and other mechanisms that work at a substantive level and that can prevent the significant harm the financial system can do to the real economy when it fails.[5] We also need global institutions that are legitimate, in the sense that the decision-making criteria and processes they use are seen as normatively correct, and in the sense that the outcomes these mechanisms produce substantively respond to the public's interests and values.[6] Finally, we ought to demand accountability. At its most basic level, the international system requires accountability of its organs to national govern-

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2. *See* Benedict Kingsbury et al., *Foreword: Global Governance as Administration—National and Transnational Approaches to Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 1, 5 (2005) (defining global administrative law as comprising "the legal mechanisms, principles, and practices, along with supporting social understandings, that promote or otherwise affect the *accountability* of global administrative bodies, in particular by ensuring these bodies meet adequate standards of transparency, consultation, participation, rationality, and legality, and by providing effective review of the rules and decisions these bodies make.").

3. *See* Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 44-52 (2005) (outlining several possible normative foundations for global administrative law and the different procedural values they might implicate).

4. *See* Michael Reisman, *The Concept and Functions of Soft Law in International Politics*, *in* 1 ESSAYS IN HONOUR OF JUDGE TASLIM OLAWALE ELIAS 135, 135 (Emmanuel G. Bello & Bola A. Ajibola eds., 1992).

5. *See* Barr & Miller, *supra* note 1, at 21-23 (making a substantive case for the Basel Committee's work on international capital standards as necessary to "coordinate supervision to avoid strategic games by multinational firms and races to the bottom on forbearance").

6. For a case study of how legitimization mechanisms might operate nationally and internationally, see generally *id.*

ments, but global administrative law suggests a deeper commitment to public accountability, as through, for example, transparency, public engagement in decision-making, and initiatives to embed global rule-making in national processes of public accountability, such as notice-and-comment rule-making.[7]

There is important interplay between these values. Even where an institution lacks formal accountability to nations through treaty authorization, for instance, robust GAL mechanisms (for example, strong forms of due process and review, or high levels of responsiveness to notice-and-comment rulemaking) nevertheless might foster a sense of legitimacy, increase the substantive efficacy of outputs, and encourage adoption by state or private-sector actors.[8] Conversely, an organization might represent an unusually broad set of interests but have difficulty producing effective rules widely adopted by national actors. An array of subsidiary values, such as transparency, can also contribute to institutional legitimacy and accountability.[9] On an institution-by-institution basis, the configuration of these values—the degree to which each value is embedded in the procedures and underlying structure of an international organization (IO)—is often highly variable, particularly when measured against institutional mission. Assessing the extent to which the international financial regulatory architecture "embodies" a set of democratic values thus requires an understanding of what the different institutional actors are designed to do, the sources of their authority, how they might relate to one another, and the type of lawmaking in which they are engaged.

This Article traces the evolution of the international financial regulatory architecture and evaluates each phase of this evolution in terms of institutional efficacy, legitimacy, and accountability. It begins with a brief analysis of two key pre-crisis phases in the development of our

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7. For a case study of how accountability mechanisms might operate nationally and internationally, see generally *id.*

8. Benedict Kingsbury & Lorenzo Casini, *Global Administrative Law Dimensions of International Organizations Law*, 6 INT'L ORGS. L. REV. 319, 354 (2009) ("Where the norm-generation or norm-acceptance is only shakily related to the will of states, a relevant factor for outsiders in deciding what weight to give to the norm may be the ways in which it was produced, that is adherence to standards of publicness and desiderata of GAL.").

9. Megan Donaldson & Benedict Kingsbury, *The Adoption of Transparency Policies in Global Governance Institutions: Justifications, Effects, and Implications*, 9 ANN. REV. L. & SOC. SCI. 119, 121 (2013) ("[T]he adoption and progressive modification and refinement of transparency policies exemplify, and contribute to, a broader evolution of public-regarding procedural norms within governance institutions.").

current global financial architecture: the birth of the Bretton Woods institutions and the rise of the so-called "networks"—the international standard-setting bodies (ISSBs), such as the Basel Committee on Banking Supervision and International Organization of Securities Commissions (IOSCO) that first began to develop cross-border rules in the 1980s.

The Article then examines the emerging post-crisis regulatory framework. In this third phase, contradictory trends have emerged: the international financial order is more political and more inclusive, and at the same time, its norms have hardened. Although this hardening means minimum standards have become more difficult to avoid, in some sense races to the top have replaced races to the bottom (at least for the moment), and nations have reasserted their authority to raise standards unilaterally within their own countries and to apply—aggressively—these standards extraterritorially. In this third phase, the Group of Twenty (G-20) nations take center stage as the world's economic and financial decision-makers, and the Financial Stability Board (FSB) becomes the platform through which the macrofinancial blueprints of the G-20 are implemented, in part by directing and coordinating the work of the standard-setting bodies. The Article then explores the interactions between these bodies and the older Bretton Woods and standard-setting institutions. Finally, the Article assesses the merits of the current regulatory order and identifies key reforms aimed at strengthening the efficacy, legitimacy, and accountability of this new system before concluding with some brief thoughts about the prospect for—and the necessity of—continued reforms over the next decade.

On a substantive level, global reform efforts to date have made the financial system safer, perhaps significantly so, but there remain real questions about whether the financial system is safe enough. Much of the reform agenda is still a work in progress, from capital standards to regulation of derivatives and other financial markets, to the mechanisms necessary to wind down immense cross-border firms that get into financial distress. Amnesia about the causes and consequences of the breakdown of the financial system may slow or even reverse reforms taken to date, just when we need to be pushing harder to complete the task. The next misunderstood financial innovation, asset boom, increase in leverage, or explosion in hot money may find the world still globally mis-coordinated and unprepared. That is why the stakes are so high for getting the international financial architecture right.

## II. The International Financial Regulatory Architecture Prior to the 2007-2008 Financial Crisis

### A. *Phase I: The Bretton Woods System*

Today's financial architecture is rooted in the post-World War II economic order, one embodied in the three principal institutions that emerged from the Bretton Woods conference in 1944:[10] the International Monetary Fund (IMF),[11] the International Bank for Reconstruction and Development (now part of the World Bank Group),[12] and the General Agreement on Tariffs and Trade (GATT; now administered by the World Trade Organization (WTO)),[13] as well as (although much less central in practice) the United Nations Economic and Social Council (ECOSOC).[14] In many ways, the creation of these institutions was a reaction to the financial crises of the 1930s and the pre-war fragmentation of the global political and economic order.[15] In the pre-war decade, the Great Depression led many nations to turn inward, away from global trade, and to erect protectionist barriers in the hopes of reenergizing ailing domestic economies.[16]

The Bretton Woods attendees embraced a liberal world-trading ideal, one that received its intellectual force from the work of British economist John Maynard Keynes.[17] The agreements that resulted, largely shaped by the United States and Britain, identified several key objectives for these new liberal transnational bodies—stabilization, reconstruction, and investment-driven growth[18]—and forcefully pushed

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10. For a comprehensive account of the Bretton Woods institutions, see generally A.I. MacBean and P.N. Snowden, *International Institutions in Trade and Finance*, *in* 18 Studies in Economics (Charles Carter ed., 1987).

11. Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, 60 Stat. 1401, 2 U.N.T.S. 39, *available at* http://www.imf.org/external/pubs/ft/aa/pdf/aa.pdf [hereinafter IMF Articles of Agreement].

12. Articles of Agreement of the International Bank for Reconstruction and Development, Dec. 27, 1945, 60 Stat. 1440, 2 U.N.T.S. 134, *available at* http://www.jus.uio.no/english/services/library/treaties/14/14-01/reconstruction-bank.xml [hereinafter IBRD Articles of Agreement].

13. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, *available at* http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf [hereinafter GATT].

14. U.N. Charter art. 7, para. 1; *id.* arts. 61-72.

15. *See* W.M. Scammell, The International Economy Since 1945, at 9-14 (2d ed. 1983).

16. *See id.* at 39.

17. *See id.* at 13, 15.

18. *See id.* at 14; *see also* IMF Articles of Agreement, *supra* note 11; IBRD Articles of Agreement, *supra* note 12; GATT, *supra* note 13; Joseph E. Stiglitz, *The World Bank at the Millenium*, 109 Econ. J. F577, F577 (1999) (describing the narrow missions of each Bretton Woods institution).

against the protectionist policies of the pre-war decade that had curtailed growth and promoted economic fragmentation.[19] In the immediate post-war era, the IMF and the World Bank set about implementing this liberal world-trading ideal, working to develop a level global playing field by rebuilding European economies devastated by years of turmoil and to jumpstart those less developed economies newly emerging from long periods of colonization.[20]

Despite the initial promise of these new institutions, their flaws—both procedural and substantive—became apparent. First, both the IMF and World Bank (and later the WTO) reflected a significant bias toward the large economies of the West and away from smaller, developing, or middle-income nations—a bias with important ramifications for transnational accountability and legitimacy. Second, the immediate objectives of the Bretton Woods institutions, although ambitiously focused on post-war economic stabilization and growth, did not yet include the regulation or supervision of financial markets and institutions across borders.

The Bretton Woods institutions were designed for efficacy and their legitimacy was taken for granted—at least in the West and at least initially. They were rooted in hard-law treaty regimes,[21] and they bore the imprimatur and authority of the major Western economies that had emerged victorious from war. For these nations, at the zenith of their power in the post-war era, the IMF and World Bank were paragons of accountability and legitimacy. Via their disproportionate funding contributions and global influence, Western nations could exert direct and decisive control over the operations of the World Bank, IMF, and liberal trading order. For smaller, less-developed nations, the nesting of these institutions within the fabric of the United Nations held out at least the promise for accountability.

Yet a crisis of legitimacy came to the fore as the decades passed. The IMF and World Bank in theory "each represent 184 countries who

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19. *See* SCAMMELL, *supra* note 15, at 14.

20. The persistence of this ideal remains evident even decades later in the World Trade Organization (WTO), created in 1995, and the ongoing proliferation of regional and bilateral free trade agreements.

21. *See, e.g.*, IMF Articles of Agreement, *supra* note 11; IBRD Articles of Agreement, *supra* note 12; GATT, *supra* note 13; *see also* Joseph J. Norton, *NIFA-II or 'Bretton Woods-II'?: The G-20 (Leaders) Summit Process on Managing Global Financial Markets and the World Economy—Quo Vadis?*, 11 J. BANKING REG. 261, 263 (2010) (describing the Bretton Woods system as "a 'rule-based' post-War economic and monetary 'system' based on international treaties, formal international institutions and meaningful international collaboration").

collectively fund and run each organization."[22] In reality, however, "most of these countries have little say over either organization."[23] Instead, a "small number of economically powerful countries run the institutions."[24] Further exacerbating these national (and regional) discrepancies in institutional power are powerful special interests seeking contracts (in the case of the World Bank) or business-friendly "policies and interventions" (in the case of the IMF).[25] Even non-governmental organizations lobbying these institutions reveal a bias toward the interests of wealthy countries.[26] Taken together, these biases make it nearly impossible for smaller, less economically powerful nations to influence global economic, fiscal, and monetary policy[27]—an accountability deficit that redounds to even graver concerns about institutional legitimacy on a transnational basis.

These concerns were compounded by the initial narrow scope of the Bretton Woods institutions. At least until the 1970s and 1980s, the World Bank and IMF offered the only real framework for thinking about financial regulation on a global basis—and yet financial regulation, particularly on a global, cross-border basis, occupied an ancillary position to the more central stabilization and development objectives of these multinational institutions.[28] Otherwise, financial regulation

22. NGAIRE WOODS, THE GLOBALIZERS 190 (2006).

23. *Id.*

24. *Id.* For an account of why these procedural inequities exist, see Edward S. Mason and Robert E. Asher, THE WORLD BANK SINCE BRETTON WOODS 3-5 (1973), arguing that "neither the Bretton Woods delegates nor anyone else foresaw how rapidly the colonial world would disintegrate and what this disintegration would do to the organization of the Fund and the Bank and their relations with their membership." *Id.* at 3. Furthermore, "insofar as the Bretton Woods delegates considered the question specifically, they saw no reason to distinguish those policies relating to trade, payments, and capital flows that were considered to be favorable to the growth and prosperity of the developed countries." *Id.* at 4. Overall, Mason and Asher argue, "[T]he distinction between developed and less developed and between north and south . . . had scarcely swum into the ken of postwar planners." *Id.*

25. *See* WOODS, *supra* note 22, at 190-91 (describing how, behind the powerful countries, "line up powerful companies who stand to gain or lose from decisions"); *see also* Stiglitz, *supra* note 18, at F582-F585 (documenting the disproportionate role special interests play in shaping the agendas of the World Bank).

26. WOODS, *supra* note 22, at 191.

27. *Id.* (describing the procedural hurdles a country like Rwanda would need to overcome in order to successfully press a hypothetical concern about debt relief at the IMF).

28. International dialogue on banking regulation, for instance, only emerged informally in the 1950s, with central bankers using the Bank for International Settlements (BIS) as a platform for cross-border harmonization. *See* SCAMMELL, *supra* note 15, at 114. Higher-level dialogue did not emerge until the 1960s, largely coincidentally and in the shadow of more formalized participation in IMF operations by what would become the Group of Ten (G-10) nations. *See* Norton, *supra*

was relegated to the domestic arena.

Although the liberal economic ideals of Bretton Woods were embraced at the national level with zeal in the post-war decades, primarily through national treatment regimes that lowered entry barriers so that foreign and domestic firms could compete on even ground, many countries also enacted some form of special-dispensation and special-control regimes.[29] Even without these deviations from national treatment, domestic regimes on their own could not create level playing fields internationally. Thus, even as individual nations embraced economic liberalization, the global financial regulatory order remained fragmented.

The IMF and World Bank, meanwhile, did (and could do) little to contend with this persistent regulatory atomization, focused as they were on catalyzing domestic fiscal and monetary reforms, and not on creating global rules of the game on a cross-border basis. In the 1970s, the traditional macroeconomic, fiscal, and monetary functions of this post-war order also experienced massive upheaval, with the United States shifting away from the gold standard in 1971, the subsequent collapse of the Bretton Woods system of fixed exchange in 1973, and the transition to a system of floating exchange rates thereafter.[30] At least partly in response to this turmoil, the privatization of the global economic system increased dramatically in the subsequent decades, as did global financial integration, with banks significantly expanding their international financing role (and balance sheets) relative to the public sector.[31]

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note 21, at 265-66 (tracing the G-10 and the cross-border conversations on banking regulation it subsequently facilitated to the oversight by G-10 finance ministers and central bankers of the IMF's General Arrangement on Borrowing).

29. Although the Bretton Woods era was one marked by the fragmentation of global prudential regulation, some commentators trace the roots of 'global administrative law' to the national treatment and mutual recognition strategies developed by domestic regulators struggling with the absence of uniform, cross-border rules. *See* Kingsbury et al., *supra* note 3, at 21 (characterizing as a form of global administrative law the development by national regulators, "on a bilateral basis, [of] arrangements for mutual recognition of national regulatory standards or conformity procedures and other forms of regulatory coordination, such as regulatory equivalence determinations").

30. *See generally* David T. Llewellyn, *The International Monetary System Since 1972: Structural Change and Financial Innovation*, *in* PROBLEMS OF INTERNATIONAL MONEY, 1972-85, at 14 (Michael Posner ed., 1985) (describing the reasons for the collapse of the Bretton Woods system in the early 1970s and the policy reforms undertaken in response to this crisis).

31. *See id.* at 31-34 (describing the privatization and financial integration of the global economic system after the "collapse" of the Bretton Woods system in 1972, both of which trends resulted in widespread pressure for new financial regulatory bodies).

As a consequence of these shifting roles and responsibilities in the international economic system, a sense emerged in the early 1980s, first in the banking sector and then elsewhere, that the Bretton Woods framework was insufficient to the task of modern, global finance.[32] In particular, national regulators began to worry that continued regulatory fragmentation left the global financial system susceptible to cross-border races to the bottom and widespread regulatory arbitrage.[33] To guard against these concerns, a new consensus took shape—one aimed at the development of substantive global regulatory frameworks and uniform cross-border rules.

### B. *Phase II: Rise of the Networks*

The growing pressure for cross-border financial rules in the 1970s and 1980s did not result in an expansion of the Bretton Woods institutions to include a treaty-based "World Financial Organization."[34] Instead, the Bretton Woods institutions largely shifted their focus to macroeconomic and monetary policy in the developing world,[35] leaving national regulators and private market participants to develop an array of informal global networks aimed at the creation of common cross-border rules for discrete aspects of the global financial system.[36] These networks ranged from private bodies, like the International Swaps and Derivatives Association (ISDA)[37] and International Accounting Standards Board (IASB),[38] to more procedurally complex, government-affiliated bodies staffed by national regulators, such as the Basel Committee on Banking Supervision (BCBS or Basel Committee),[39]

32. *Id.*

33. *See* Barr & Miller, *supra* note 1, at 21-23.

34. The General Agreement on Trade in Services (GATS), for instance, contained a carve out that left the prudential regulation of financial institutions to national authorities. *See* General Agreement on Trade in Services, Annex on Financial Services § 2(a), Apr. 15, 1994, 1869 U.N.T.S. 183, *available at* http://www.worldtradelaw.net/uragreements/gats.pdf.

35. *See* SCAMMELL, *supra* note 15, at 165-78.

36. *See* CHRIS BRUMMER, MINILATERALISM 99-102 (2014) (detailing the origins of the soft law system of informal global financial regulatory networks).

37. *About ISDA*, ISDA, http://www2.isda.org/about-isda/ (last visited Apr. 28, 2014).

38. IFRS FOUND. & INT'L ACCOUNTING STANDARDS BD., WHO WE ARE AND WHAT WE DO (2014), *available at* http://www.ifrs.org/The-organisation/Documents/WhoWeAre_JAN-2014_ENG.PDF.

39. BASEL COMM. ON BANKING SUPERVISION, BANK FOR INT'L SETTLEMENTS, A BRIEF HISTORY OF THE BASEL COMMITTEE (2013), *available at* http://www.bis.org/bcbs/history.pdf.

IOSCO,[40] and the International Association of Insurance Supervisors (IAIS).[41]

On one end of the spectrum, global networks were driven by private interests but given a measure of authority and the patina of legitimacy by public bodies. ISDA, for instance, developed an entirely private contractual regime for over-the-counter (OTC) derivatives transactions via its master agreement and credit-support annex. ISDA agreements are ubiquitous in OTC transactions, and thus represent a significant and critical dimension of cross-border financial regulation.[42] IASB, meanwhile, is a private body comprised of industry accounting experts and developed to oversee the design and promulgation of international financial-reporting standards. These standards are then enshrined by the European Union in its financial regulatory infrastructure[43] and are also now acceptable to the United States for certain cross-border transactions.[44]

Further along the spectrum, networks like BCBS, IOSCO, and IAIS emerged as hybrid bodies that assembled central bank, securities, and insurance regulators, respectively, to develop industry standards on a global, cross-border basis.[45] Largely speaking, they reflect the persistent and dominant role of national authorities in directing financial rulemaking,[46] while permitting the informal development of common regulatory approaches, standards, and principles on a transnational level.[47] In part because of the continued role of national authorities in setting financial regulatory policy, these networks are predominantly

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40. *About IOSCO*, IOSCO, http://www.iosco.org/about/ (last visited Apr. 28, 2014).

41. *About the IAIS,* IAIS, http://www.iaisweb.org/About-the-IAIS-28 (last visited Apr. 28, 2014).

42. It is estimated that the ISDA Master Agreement is "one of the most used forms . . . of financial contract in the world." CLIFFORD CHANCE, THE ISDA MASTER AGREEMENT 1 (2012), *available at* http://www.cliffordchance.com/publicationviews/publications/2012/04/the_isda_master_agreementfromheretoeternity.html.

43. *See* EUR. FIN. REPORTING ADVISORY GRP., THE EU ENDORSEMENT STATUS REPORT (2014), *available at* http://www.efrag.org/WebSites/UploadFolder/1/CMS/Files/Endorsement%20status%20report/EFRAG_Endorsement_Status_Report_12_March_2014.pdf.

44. For an overview of Europe's embrace of IASB standards, see *IFRS in Europe—Background Information*, DELOITTE, http://www.iasplus.com/en/resources/ifrs-topics/europe (last visited May 11, 2014).

45. *See* Barr & Miller, *supra* note 1, at 16-17. For an alternative account of Basel II, see DANIEL K. TARULLO, BANKING ON BASEL (2008) (arguing that a "simpler and more eclectic international arrangement would be preferable to Basel II.").

46. Barr & Miller, *supra* note 1, at 21-23.

47. *See id.* at 17.

"soft-law"[48] bodies—they lack legal personality, issue largely non-binding standards,[49] and permit significant variations in implementation across jurisdictions.[50] Nevertheless, because these bodies bear the imprimatur of national authority, there is at least some expectation that member nations will implement some version of the standards they promulgate.[51]

Although these hybrid, standard-setting networks represented an important evolution beyond the Bretton Woods system, they also raised significant concerns about their own accountability and legitimacy. Among other things, they were criticized for technocratic cultures that were unresponsive to domestic constituencies;[52] for organizational secretiveness and lack of transparency;[53] for limited memberships that excluded many less-developed nations and reinforced the economic hegemony of developed Western nations;[54] for distorting domestic policy;[55] and for privileging industry insiders and experts over average

48. *See* Reisman, *supra* note 4, at 135 (defining soft law functionally as law that is soft along one or more of the three axes integral to lawmaking: "policy statements couched in the normative mood, expectations of authority, and communications of control intention").

49. *See id.* (defining lawmaking expansively to include soft law and those "processes in which expectations of authority and communications about intentions of control are generated and mobilized to sustain certain policy formulations that are designed to affect human behaviour").

50. *See* CHRIS BRUMMER, SOFT LAW AND THE GLOBAL FINANCIAL SYSTEM 63-64 (2012).

51. *See* Barr & Miller, *supra* note 1, at 21-23; *see also* Kingsbury et al., *supra* note 3, at 21 ("[The Basel Committee is an example of] transnational networks [that are] characterized by the absence of a binding formal decisionmaking structure and the dominance of informal cooperation among state regulators . . . The agreements [produced by Basel] are non-binding in legal form but can be highly effective.").

52. *See* Anne-Marie Slaughter, *Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks*, 39 GOV'T & OPPOSITION 159, 164 (2004) (warning of "unelected regulators . . . who share a common functional outlook on the world but who do not respond to the social, economic and political concerns of ordinary citizens").

53. *See* David Zaring, *Informal Procedure, Hard and Soft, in International Administration*, 5 CHI. J. INT'L L. 547, 569-72 (2005) (noting that, at least early on, the hybrid networks largely kept their internal deliberations secret).

54. *See* Slaughter, *supra* note 52, at 169 ("A final problem is the way in which government networks either replicate or even magnify asymmetries of power in the existing international system.").

55. *See id.* at 166-67 (describing the "[h]armonization" agendas of many global financial networks and the ways in which they supplant national policy with "uniform global standards"). *But see* Zaring, *supra* note 53 at 600-02 (questioning the traditional account of U.S. hegemony within the hybrid networks, and arguing that, while there may not be adequate representation for developing nations, nor is there U.S. "unilateralism" in any meaningful way).

global citizens in their decision-making processes.[56]

In response to these concerns, the networks responded with varying degrees of success. Their efforts to improve legitimacy and accountability at both the domestic and international levels represented important first steps in the nascent development of a global administrative law.[57]

To improve accountability and legitimacy with respect to non-Western nations, most of the hybrid networks broadened their membership and enhanced consultation with non-Western nations and regions. IAIS and IOSCO, for instance, adopted more universal membership models,[58] expanding their representation well beyond the cloistered set of Western economies responsible for their formation.[59] Whereas IOSCO was narrowly "trans-American" at its founding in 1983, representing only eleven member states,[60] its membership now includes securities regulators from more than 100 nations, with a largely representative board.[61] Similarly, IAIS has expanded since its formation in 1994 to a membership of more than 300, including more than 100 national insurance regulators as well as other IOs, ranging from the European Commission to the World Bank.[62] Like IOSCO, IAIS's executive committee is also regionally representative.[63]

Unfortunately, this broader membership helped limit the effectiveness of these bodies. In the decades leading up to the financial crisis—with enormous failures in investment banks like Lehman Brothers and insurance conglomerates like the American International Group—IOSCO and IAIS were largely confined to hortatory pronouncements and relatively feeble measures aimed at standardized disclosures.[64]

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56. Slaughter, *supra* note 52, at 169 (noting that the result of opaque decision-making processes "is to advantage 'experts and enthusiasts', the two groups outside government that have the greatest incentives and desire to participate in governance processes but who are not representative of the larger polity").

57. *See generally* Barr & Miller, *supra* note 1 (describing BCBS as a nascent, albeit imperfect, template for more legitimate and accountable global regulatory networks).

58. Although some of the membership expansion for IOSCO and IAIS occurred post-crisis, at the prompting of the G-20 leadership, both organizations also undertook membership expansions of some sort in the pre-crisis era.

59. *See* PABLO IGLESIAS-RODRIGUEZ, THE ACCOUNTABILITY OF FINANCIAL REGULATORS 322-27 (2013) (detailing the formation, membership policies, and growth of IOSCO and IAIS).

60. *Id.* at 322.

61. *Id.* at 332.

62. *Id.* at 325-26.

63. *Id.* at 334-35.

64. *See* BRUMMER, *supra* note 50, at 78-79 (describing the "modest" and "meager" legislative track records of IOSCO and IAIS, respectively); *see also* Emilie M. Hafner-Burton et al., *Political*

The Basel Committee, meanwhile, largely eschewed expansion of its membership, which was traditionally "limited to the governors of the central banks of the Group of Ten (G-10) countries and Switzerland."[65] Not until after the financial crisis of 2007-2008 did BCBS invite other nations to join, and even now "its membership remains . . . limited, with only 27 members."[66] Instead, the committee relied on other mechanisms to promote accountability and legitimacy beyond the G-10 nations, implementing consultations with non-G-10 regional and central bankers and generally working to increase participation in BCBS decision-making by other developed countries.[67] For instance, "[c]entral bankers formed regional groups to share information about supervision and to coordinate in providing input into the formation of global capital standards," and representatives from developing countries participated in the creation of core supervisory principles in 1997 and in the development of the new Basel Accord in 1999.[68]

Of all the hybrid networks, the Basel Committee also adopted the most procedurally sophisticated mechanisms for international notice-and-comment decision-making.[69] For instance, its Basel II capital standards went through multiple consultative iterations prior to finalization, with the committee receiving hundreds of comment letters at each procedural juncture, largely from industry groups, governments, academics, and other IOs.[70] The committee also "issued background papers to inform the public about its thinking on key issues, and held workshops with banks and other firms."[71] From start to finish, this deliberative process lasted five years and included two full rounds of consultation.[72] Ultimately, these deliberations were relatively "responsive to suggestions made during the notice-and-comment process. There were real changes in the proposed standards relating to a wide variety of areas . . . ."[73]

Despite these efforts to address the accountability and legitimacy of the hybrid networks at an international level, concerns still remained,

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*Science Research on International Law: The State of the Field*, 106 AM. J. INT'L L. 47, 78-79 (2012) (describing the tradeoffs of more universal memberships—particularly as to enforcement).

65. IGLESIAS-RODRIGUEZ, *supra* note 59, at 320.

66. *Id.* at 321.

67. *See* Barr & Miller, *supra* note 1, at 27-28.

68. *Id.* at 27.

69. *Id.* at 24-27.

70. *Id.*

71. *Id.* at 24.

72. *Id.* at 24-27.

73. *Id.* at 26.

both about the discrepancy in memberships across the networks and the disproportionate organizational influence still wielded by the developed Western nations.[74] Furthermore, to the extent that the notice-and-comment process employed by BCBS in the development of the Basel II framework increased organizational transparency, critics worried about a concomitant increase in susceptibility to capture by industry elites.[75]

To address accountability and legitimacy concerns at the national level, regulators tethered the standards promulgated by the hybrid networks to domestic procedures, including notice-and-comment rulemaking.[76] In the case of the Basel II framework, this tethering permitted G-10 economies such as the United States and Europe to carefully tailor the capital rules promulgated by BCBS to their own domestic-banking landscape, while preserving a significant degree of commonality across jurisdictions.[77] Even in emerging economies such as China and India, where national regulators opted not to adopt the Basel II standards, national processes still facilitated an important balance between the need for common cross-border rules and domestic policy preferences.[78] Both India and China, for instance, continued to abide by Basel I rules with a commitment to gradually move toward implementation of Basel II's Pillar II.[79] Sometimes the nesting of Basel capital standards (whether tacit or explicit) in the accession agreements, lending conditions, and policy prescriptions of the WTO, IMF,

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74. *See* Eric Helleiner & Tony Porter, *Making Transnational Networks More Accountable*, *in* RE-DEFINING THE GLOBAL ECONOMY 14, 17 (Dialogue on Globalization ed., 2009) ("The uneven geographical expansion across the different standard setters is striking. So too is the fact that membership has generally been expanded to include only the largest or most systematically significant countries . . . More voice within the networks needs to be given to them to ensure that there is no longer such a stark division between insiders and outsiders, between rule-makers and ruler-takers."). *But see* Zaring, *supra* note 53, at 597-600 (challenging the "democracy deficit" view of the hybrid networks).

75. *See* Slaughter, *supra* note 52, at 165 ("[T]ransparency can make the network even more accessible to sectoral interest pressures, leading to 'over-politicization' in the form of distorted representation of specific domestic or international preferences.").

76. For a detailed description of this tethering process in the United States, see Barr & Miller, *supra* note 1, at 28-35 (describing Basel II notice-and-comment rulemaking by U.S. banking regulators, the important national deviations from the accord that this process produced, important disagreements among regulators within the United States, and the involvement of Congress in shaping Basel II outcomes domestically). For a description of tethering in Europe, see *id.* at 35-39. For the same in the developing world, see *id.* at 39-41.

77. *Id.* at 28-39.

78. *Id.* at 39-41.

79. *Id.*

and World Bank made adoption difficult to resist—thus raising important legitimacy concerns in countries not involved in development of the rules. Nevertheless, this "coerced" adoption represented a significant improvement in the accountability and legitimacy of domestic banking regulations in nondemocratic nations (or in countries where reformers had long battled entrenched financial interests).[80]

Taken together, these national efforts to tether global networks to existing domestic processes represented important steps to improve the accountability of hybrid bodies like BCBS, IOSCO, and IAIS. Although these procedures could not fully eliminate important concerns about the legitimacy of these global standard-setting institutions, they at least began to align global process more closely with the set of expectations we might have for domestic democratic institutions.

In the wake of the Asian financial crisis of the 1990s, and partly in response to persistent concerns about the legitimacy, accountability, and continued atomization of the hybrid networks, the Group of Seven (G-7) nations moved to create a new international financial architecture, including the Financial Stability Forum (FSF).[81] The FSF was envisioned as a platform for coordinating the largely decentralized work of the hybrid networks, including the Basel Committee, IOSCO, IASB, and IAIS, and for enhancing integration between these bodies and the IMF, World Bank, and OECD, as well as G-7 finance ministers, central bankers, and financial regulatory authorities.[82]

The design of the FSF reflected concerns about the persistent atomization of international financial regulation despite increasingly integrated global financial markets. Significant authority for the development of financial rules still rested with national regulators, and the mandates of the various international standard-setting bodies, as described above, were limited to discrete, narrow components of the global financial system (for example, bank capital standards or securities activity). By bringing together all of the G-7 organizations and

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80. *Id.* at 43 ("While not without significant concerns about legitimacy, the Basel process can serve as a counterweight to domestic deficits in accountability and legitimacy . . . The charge of a 'democracy deficit' among international institutions . . . rests on an assumption that domestic institutions can better protect the interests of citizens; however, in many countries this is simply not the case. If there is no domestic democracy to defer to, international institutions may enhance democratic reforms.").

81. For an analysis of the Asian crisis and an early proposal for global institutional reform, see generally BARRY EICHENGREEN, TOWARD A NEW INTERNATIONAL FINANCIAL ARCHITECTURE (1999). For a brief history of the FSF, see G.A. Walker, *International Financial Instability and the Financial Stability Board*, 47 INT'L. LAW. 1, 2-5 (2013).

82. *Id.*

authorities with a stake in the development of a more consistent and integrated set of cross-border rules, both nationally and internationally, it was hoped that the FSF could overcome the perils of decentralization that marked the rise of the networks and rendered a swift, coordinated global response to crisis nearly impossible.[83]

With these broader concerns in mind, the G-7 tasked the FSF with the development of international prudential "best practices."[84] These best practices were culled from existing regulatory practices by G-7 nations. National adoption of these best practices, primarily by those countries excluded from FSF membership, was to be promoted on a global basis. Because these non-G-7 countries also suffered under-representation in the international bodies assembled by the FSF, as described above, this extraterritorial mission raised significant concerns for global legitimacy and accountability.[85]

The narrow membership of the FSF was by design, however, and represented a purposeful balancing of legitimacy and accountability concerns against the need for efficacy. A smaller group of relatively similar nations, the G-7 thought, could better promulgate and enforce a common set of global rules.[86] Indeed, the formation of the FSF by the G-7 reflected a conscious rejection of a broader, more inclusive framework for global financial coordination put forth by the Group of Twenty-Two (G-22) nations in 1998.[87] This G-22-led body, the Financial Sector Policy Forum, would have included key emerging economies in its membership but otherwise would have advanced the same mission of coordination as the FSF.[88] Over time, a handful of non-G-7 economies were invited to join the FSF, including Australia, Hong Kong, the Netherlands, and Singapore, and the FSF frequently consulted with non-member developing nations, but its membership otherwise excluded larger, emerging economies like China, India, Brazil, and South Africa.[89]

Ultimately, the creation of the FSF did little to impose order on the international financial system or to strengthen the work of the international standard-setting bodies, with its mission in part hobbled by lack

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83. *Id.*

84. *Id.*

85. *Id.*

86. *See* DOMENICO LOMBARDI, BROOKINGS INST., THE GOVERNANCE OF THE FINANCIAL STABILITY BOARD 4-5 (2011).

87. *See id.* at 4.

88. *Id.*

89. *Id.*

of long-term U.S. support.[90] Thus, oversight of the global financial system still rested primarily with the networks and their nascent efforts to enhance legitimacy and accountability. But as the 2008 financial crisis laid bare, accountability and legitimacy matter little if global regulatory bodies cannot also produce substantively effective regulatory outputs. The crisis revealed a system that, whatever its procedural merits, had permitted too little capital and too much risky activity, and allowed too many systemically important institutions to escape its reach or capacity altogether. Not only were financial institutions unable to absorb or withstand the crisis when it hit, but the global networks were revealed as woefully inadequate supervisors, almost entirely unable to monitor, prevent, or respond to the decade-long build up of the unsafe systemic risk and leverage levels that catalyzed the crisis.[91]

Reforms were swift in the making. The crisis almost immediately provoked a systematic, substantive rethinking of the rules governing global finance—as well as a significant procedural rethinking of the overarching global regulatory architecture.

## III. Post-Crisis Reforms

Shortly after the financial crisis hit full bore in the United States, global leaders convened in Washington, D.C., in November 2008 to discuss substantive and procedural reforms necessary to stabilize the global financial system. In a symbolic and significant break with history, and largely at the urging of the United States and Timothy Geithner, who would soon become its Treasury Secretary, this global response was coordinated by the political leadership of the G-20 nations, and not by the technocratic, independent central bankers of the narrower group of Western clubs that had overseen the global economic and monetary order in the pre-crisis decades (the G-7 and the Group of Eight (G-8) nations). The development of the FSB, coupled with the increased role of the G-20 in establishing minimum global financial policy, has led to a global regulatory environment quite different from the decentralized, informal world of the hybrid, standard-setting bodies. Procedurally, the development of these twin institutions has effected important shifts in the accountability, legitimacy, and efficacy

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90. *See* Andrew Baker, *Mandate, Accountability and Decision-Making Issues to Be Faced by the Financial Stability Board, in* The Financial Stability Board 19, 19 (Stephany Griffith-Jones, Eric Helleiner & Ngaire Woods eds., 2010).

91. *See* Brummer, *supra* note 50, at 213-33 (detailing the gaps and lapses in the international financial regulatory architecture that contributed to the global financial crisis).

of the international financial architecture—and these shifts have, in turn, shaped the development of new, more muscular substantive rules of the game.

### A. *The G-20*

The post-crisis elevation of the G-20 as the primary agenda-setting body for international financial and economic policy represents a significant national expansion of the global financial architecture beyond the pre-crisis era and a much stronger recognition of the growing role of emerging economies in the international financial order, as well as the increased linkages between these economies and the developed world.[92] Formed in the wake of the Asian financial collapse of 1999 and the coordinated, cross-border response demanded by that crisis, the G-20 membership includes most of the world's major emerging economies (Brazil, India, and China, along with Argentina, Australia, Indonesia, Mexico, Saudi Arabia, South Korea, Turkey, and the European Union).[93] All told, its membership "represents more than 60 percent of the world's population," and accounts for "more than 80 percent" of global GDP—a remarkable, if still imperfect expansion of institutional legitimacy beyond the G-7 and G-8.[94]

In another break with the pre-crisis order, the G-20 nations were represented in Washington, D.C., by their political leadership, with independent central bankers in some respects having to share the global stage, for the first time, with higher-profile, politically accountable finance ministers and heads of state.[95] This politicization immediately vested the G-20 with more national legitimacy and accountability than its predecessors, composed as they were of central bankers from the G-7 and G-8, in addition to substantially enhancing its global authority. Consistent with this increase in legitimacy, accountability, and authority, however, the stakes were also much higher: the quality and effectiveness of the G-20's new cross-border architecture—both substantively and procedurally—would inevitably be measured against the credibility of the global political leadership.

Meeting in Washington, D.C., the G-20 nations quickly agreed on a

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92. *See id.* at 70-72.

93. *Id.*

94. Edwin M. Truman, *The G-20 and International Financial Institution Governance* 2 (Peterson Inst. for Int'l Econ., Working Paper No. 10-13, 2010).

95. *See* BRUMMER, *supra* note 50, at 193.

blueprint for reform designed to dramatically strengthen cross-border financial rules, close critical gaps in the pre-crisis architecture, and significantly enhance global regulatory cooperation.[96] Substantively, the G-20 leadership agreed to focus on broad areas of reform: mitigating the procyclicality in financial regulation; realigning global accounting standards; strengthening derivatives markets; reviewing executive-compensation practices; and developing more effective regulatory strategies for systemically important institutions.[97] Procedurally, the reforms in Washington, D.C. included a reworking of the Bretton Woods institutions to reflect better the shifting weight of the financial system toward emerging nations and a plan to revitalize the FSF as the coordinating body for these reform efforts.[98]

At its next summit, in London in 2009, the G-20 announced the result of these procedural commitments: not a mere broadening of the FSF, but its wholesale transformation into a more formal international body with the capacity to develop, coordinate, and implement the G-20's substantive blueprint for reform: the FSB.[99] At the time, U.S. Secretary of the Treasury Timothy Geithner championed the FSB as a "fourth pillar" of the global economic order, indicating an ambition to place the FSB alongside the IMF, World Bank, and WTO as a hard-law institution with a strong, formal mandate backed by the full political authority of its member states.[100] By the Pittsburgh summit in September 2009, the impact of the FSB was evident in the announcement of a much more detailed substantive reform agenda, including specific global approaches to OTC derivatives, capital, and systemically important financial institutions (SIFIs).[101] In Pittsburgh, the G-20 also announced that it would become the primary platform for international economic policy, thus officially replacing the G-8 in this role.[102]

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96. *See* Statement, G-20 Leaders, Washington, D.C. Summit—Leaders' Statement (Nov. 15, 2008), *available at* http://www.nytimes.com/2008/11/16/washington/summit-text.html?pagewanted=all.

97. *Id.*

98. *Id.*

99. *See* Statement, G-20 Leaders, London Summit—Leaders' Statement (Apr. 2, 2009), *available at* http://www.imf.org/external/np/sec/pr/2009/pdf/g20_040209.pdf.

100. Timothy Geithner, U.S. Treasury Secretary, Press Briefing on the G-20 Meetings (Sept. 24, 2009), http://www.whitehouse.gov/the_press_office/Press-Briefing-by-Treasury-Secretary-Geithner-on-the-G20-Meetings.

101. *See* Statement, G-20 Leaders, Pittsburgh Summit—Leaders' Statement (Sept. 25, 2009), *available at* http://www.treasury.gov/resource-center/international/g7-g20/Documents/pittsburgh_summit_leaders_statement_250909.pdf.

102. *Id.*

By the Toronto summit in June 2010, the focus of the G-20 had shifted to long-term recovery, but the leadership nevertheless reached an important agreement on the principle that the costs of failure should be recovered from financial institutions (although the precise mechanism for such recovery—including proposals for a tax on financial institutions—was left unresolved).[103] At both the Seoul and Cannes summits (in November 2010 and 2011, respectively), the leadership emphasized the need for more robust surveillance mechanisms globally to better monitor the implementation of reform and identified the need for a firmer institutional foundation for the FSB.[104] These recommendations were also addressed at the Los Cabos summit in June of 2012, with the leadership agreeing that the FSB should become a Swiss association and enter a multiyear funding arrangement with the Bank for International Settlements (BIS).[105] At the most recent summit, in Russia in 2013, focus has remained primarily on encouraging economic growth and maintaining the pace of ongoing financial-sector reforms.[106]

### B. *The Financial Stability Board*

A decade after the formation of the FSF, in the midst of an even more severe financial crisis that affected the core of the financial system in the United States and Europe, G-20 leaders meeting in Washington, D.C. began to rethink the global financial architecture, a rethinking that included a continuing leadership role for the FSF, but insisted that its membership be expanded to include representatives from key emerging and middle-income economies.[107] The 2009 creation of the FSB delivered on this demand, with the remaining G-20 members, Spain, and the European Commission added to the existing member-

103. *See* Statement, G-20 Leaders, Toronto Summit—Leaders' Statement (June 27, 2010), *available at* http://www.oecd.org/g20/meetings/toronto/g20-declaration.pdf.

104. *See* Statement, G-20 Leaders, Seoul Summit—Leaders' Statement (Nov. 12, 2010), *available at* http://online.wsj.com/public/resources/documents/G20COMMUN1110.pdf; Statement, G-20 Leaders, Cannes Summit—Leaders' Statement (Nov. 4, 2011) [hereinafter Cannes Statement], *available at* http://www.g20.utoronto.ca/2011/2011-cannes-declaration-111104-en.html.

105. *See* Statement, G-20 Leaders, Los Cabos Summit—Leaders' Statement (June 19, 2012), *available at* http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/131069.pdf.

106. *See* Statement, G-20 Leaders, St. Petersburg Summit—Leaders' Statement (Sept. 6, 2013), *available at* http://www.g20.utoronto.ca/2013/Saint_Petersburg_Declaration_ENG.pdf.

107. *See* Statement, *supra* note 96.

ship of the FSF.[108] At the same time, the G-20 insisted that the international standard-setting bodies also expand their membership, a mandate with which most bodies swiftly complied.[109]

In addition to this expanded membership, the FSB was also given a broader mandate than the FSF. Beyond merely coordinating the work of the international standard-setting bodies, as did the FSF, it was tasked with the development, implementation, and oversight of supervisory and regulatory policies for the global financial system—precisely the mandate that the Bretton Woods institutions lacked and that the hybrid networks advanced only nominally.[110]

The FSB is designed to advance this mission of global financial stability through five principal mechanisms.[111] First, the FSB prepares independent reports on issues of global importance as identified by the G-20.[112] Second, the FSB oversees the policy-development functions of the international standard-setting bodies.[113] This oversight mechanism is designed to improve overall institutional accountability, with the Basel Committee, IOSCO, and others required to periodically report to the FSB,[114] and the FSB is empowered to conduct so-called "joint strategic reviews" of the work undertaken by these bodies.[115] Third, the FSB is responsible for ensuring global compliance with international financial standards—particularly as to offshore, nonconforming jurisdictions.[116] Fourth, the FSB undertakes peer reviews on a country-by-country and regional basis as part of a more centralized and formal effort to monitor regulatory compliance and implementation on a transnational basis.[117] Finally, in conjunction with the IMF, the FSB is charged with the detection of emerging financial turmoil and the

108. *See* Statement, *supra* note 99; *see also* Press Release, Fin. Stability Forum, Financial Stability Forum re-established as the Financial Stability Board (Apr. 2, 2009), *available at* https://www.financialstabilityboard.org/press/pr_090402b.pdf. For a detailed overview of FSB governance, see Stavros Gadinis, *The Financial Stability Board: The New Politics of International Financial Regulation*, 48 TEX. INT'L L. J. 157, 164-68 (2013); *see also* LOMBARDI, *supra* note 86.

109. *See* Leaders' Statement, *supra* note 99; *see also supra* Part II.B.

110. Financial Stability Board Charter art. 1 (2012) [hereinafter FSB Charter].

111. *See* FSB Charter art. 2; *see also* LOMBARDI, *supra* note 86 at 5-8 (comprehensively summarizing these mechanisms).

112. *Id.* art. 2.

113. *Id.* art. 2.

114. *Id.* art. 5(2).

115. *Id.* art. 2(1)(e).

116. *Id.* Annex B (identifying the Expert Group on Non-cooperative Jurisdictions as a key ad-hoc working group); *see also* LOMBARDI, *supra* note 86, at 7-8.

117. *See* FSB Charter art. 2.

provision of "early warnings" to global leaders, with the FSB largely taking responsibility for financial indicators and the IMF asserting responsibility over economic and monetary movements.[118]

The work of the FSB is governed by its plenary, "the central organ of the FSB and the one in which political appointees . . . have the most distinct presence."[119] The plenary consists of the senior-most officials from each represented nation's financial regulatory agencies, central bank, and finance ministries, along with the chairs of each member international standard-setting body (for example, IOSCO, IASB) and international organization (for example, IMF, World Bank).[120] The plenary oversees the work of the FSB and is responsible for adopting reports and recommendations generated by the organization performing its mission.[121] The plenary also "decides on the membership; appoints the chairperson; and decides on Charter amendments and on any other matter."[122]

Seats on the plenary are allocated according to, among other things, the "size of the national economy [and] financial market activity,"[123] such that the largest countries, such as China and the United States are each allocated three seats, with medium-sized countries like Australia and Mexico each allocated two seats, and smaller countries, including Argentina and Saudi Arabia, each allocated one seat.[124] Plenary decision-making occurs on a consensus basis,[125] a rather arduous and complex process given that the current membership of the FSB stands at sixty-four bodies.[126]

The Plenary also establishes standing committees and working groups as necessary to support the ongoing work of the FSB.[127] Current committees (as of spring 2014) include the Standing Committee on Assessment of Vulnerabilities (chaired by Agustín Carstens Carstens, governor of the Bank of Mexico), the Standing Committee on Standards Implementation (chaired by Ravi Menon, managing director of

118. *Id.* art. 2(1)(h).

119. Gadinis, *supra* note 108, at 166.

120. FSB Charter art. 8(1).

121. *Id.* art. 7.

122. LOMBARDI, *supra* note 86, at 9; *see also* FSB Charter art. 7.

123. FSB Charter art. 10.

124. *See* LOMBARDI, *supra* note 86, at 10.

125. FSB Charter art. 7(2).

126. *See FSB Member Institutions*, FIN. STABILITY BD., https://www.financialstabilityboard.org/about/fsb_members.htm (last visited Apr. 25, 2014).

127. FSB Charter art. 11.

the Monetary Authority of Singapore), the Standing Committee on Supervisory and Regulatory Cooperation (chaired by Daniel Tarullo, chairman of the Federal Reserve Board of Governors), and the Standing Committee on Budget and Resources (chaired by Jens Weidmann, chairman of Germany's central bank).[128] Article 11 of the Charter requires that the plenary consider the need for "balanced representation" in the composition of these committees.[129]

In addition, the plenary selects the membership of the steering committee,[130] which oversees operations between plenary meetings[131] (at least two of which must occur annually).[132] Because of this ongoing operational role, the steering committee wields important influence over FSB decision-making, particularly as FSB membership has expanded and plenary decision-making becomes more unwieldy (although the steering committee also undertakes decisions by consensus).[133]

Meetings of the plenary and the steering committee are convened by the FSB chair.[134] The chair—elected by the plenary for three-year terms and limited to two terms[135]—also oversees the FSB's secretariat (only a few dozen bureaucrats, most seconded from other IOs) and secretary general,[136] serves as the organization's public representative,[137] and "take[s] all decisions and act[s] as necessary to achieve the objectives of the FSB in accordance with the directions given by the Plenary."[138] In this capacity, "the chair fulfills a fundamental strategic role and shapes much of the organization."[139] The current chair is the formidable Mark Carney, governor of the Bank of England and former governor of the Bank of Canada.

128. *See FSB Plenary, Committees and Regional Consultative Groups (RCGs) Membership*, FIN. STABILITY BD., https://www.financialstabilityboard.org/about/pac.htm (last visited Apr. 25, 2014).

129. FSB Charter art. 11(3).

130. *Id.* art. 12.

131. *Id.* art. 13.

132. *Id.* art. 9.

133. *See* LOMBARDI, *supra* note 86, at 10-13.

134. FSB Charter art. 14(3).

135. *Id.* art. 14(1).

136. *Id.* art. 14(3).

137. *Id.* art. 14(4).

138. *Id.*

139. *See* LOMBARDI, *supra* note 86, at 13.

### C. *Procedural Reforms*

In the wake of the financial crisis, the international financial architecture changed in four key ways. First, its "soft" law mandates and institutions became harder, and more formal. Second, global leaders developed a clearer hierarchy among institutions assigned tasks in the regulatory system in order to drive reform. Third, international financial regulation became more political, with greater involvement by heads of state and finance ministries. Fourth, peer review became a more important mechanism for enhancing compliance.

#### 1. More Formality

First, the post-crisis institutional reforms hardened the international regulatory architecture, imbuing it with more formality. Initially, the FSB lacked independent legal personality and was governed by a non-binding Charter. However, the G-20 leaders acted quickly to strengthen the FSB: following the 2011 Cannes summit, the FSB convened a high-level working group to recommend reforms that would put it on "enduring organizational footing."[140] Although this group considered the transformation of the FSB into a multilateral treaty-based organization, this option was ultimately discarded. Instead, the working group recommended that the FSB incorporate as a Swiss association and take steps to increase its financial resources. These recommendations were adopted first by the FSB Plenary[141] and then by the G-20 itself at the 2012 Los Cabos summit.[142] In January 2013, the FSB formally registered as a Swiss association, based in Basel.[143]

Despite these institutional reforms, however, the FSB falls short of a binding, treaty-based regime. Indeed, the FSB's articles of association specify that its non-binding Charter still governs all of the organization's policymaking activities.[144] The articles also take pains to note:

> These activities, including any decisions reached in their context, shall not be binding or give rise to any legal rights or

140. Cannes Statement, *supra* note 104.

141. FIN. STABILITY BD., REPORT TO THE G20 LOS CABOS SUMMIT ON STRENGTHENING FSB CAPACITY, RESOURCES AND GOVERNANCE (2012), *available at* http://www.financialstabilityboard.org/publications/r_120619c.pdf.

142. *See* Statement, *supra* note 105.

143. *See* FIN. STABILITY BD., ARTICLES OF ASSOCIATION (2013) [hereinafter FSB ARTICLES OF ASSOCIATION], *available at:* http://www.financialstabilityboard.org/publications/r_130128aoa.pdf.

144. *Id.* art. 10.

> obligations under the present Articles. Members can recuse themselves at any time from these activities or decision-making where such activities or decision-making are not consistent with their legal or policy frameworks.[145]

Compliance with the articles of association and the Charter thus remains a "matter of political commitment."[146] Although national commitment to reform remains at a historical zenith, the possibility of waning commitment—particularly by the largest financial economies—remains an area of concern, especially as the FSB has not yet developed effective mechanisms for the self-censure of its members.[147]

Furthermore, because the plenary undertakes decision-making by consensus, it effectively grants large players willing to stand up to an emerging consensus a kind of veto power over FSB policy.[148] Although in most instances the FSB has nevertheless been able to reach consensus on policy, consensus building can lead to lower standards. Moreover, were FSB peer reviews to reveal national or regional regulatory deficiencies, it is foreseeable that national resistance to a robust FSB mandate could increase;[149] the resulting recalcitrance of any one G-20 member could torpedo the FSB supervisory and regulatory agenda.

Even aside from concerns about the impact of waning political commitment on its organizational efficacy, the FSB is hobbled by its unwieldy decision-making structure. Not only are decisions undertaken by consensus, but the plenary currently consists of representatives from

145. *Id.*

146. Shawn Donnelly, *Institutional Change at the Top: From the Financial Stability Forum to the Financial Stability Board*, *in* CRISIS AND CONTROL 261, 265 (Renate Mayntz ed., 2012).

147. *See* Bessma Momani, *The IMF and the FSB: Intractable Political Reality and Organizational Mismatch*, *in* THE FINANCIAL STABILITY BOARD, *supra* note 90, at 36, 37 (warning of what will happen when the "G20 honeymoon ends and the skirting of responsibilities returns to the fore," and suggesting that "free-rider" problems will persist until the IMF and the FSB clarify how they will "deal with the intractable problem of self-censure of members"); *see also* Donnelly, *supra* note 146, at 263 (noting that "the unwillingness of the United States to undergo . . . a review of its own practices" was one of the primary obstacles to improved global financial regulation under the FSF).

148. *See* Baker, *supra* note 90, at 22 (suggesting that the FSB consider revising its consensus-based decision-making process to prevent single actors from wielding veto power over global financial policymaking—particularly to the extent that the FSB voices politically unpopular recommendations).

149. *See id.* at 21-22 (arguing that the FSB should call out global financial risks but suggesting that this role may be limited by political pressure from G-20 leaders should the FSB's peer reviews reveal national or regional regulatory or market deficiencies).

sixty-four members.[150] Furthermore, the FSB is supported by a limited secretariat of only several dozen bureaucrats (primarily economists) and must rely on the BIS for funding.[151] In addition to constraining the institutional capacity of the FSB, these limitations pose potential concerns for global legitimacy by favoring those nations able to finance domestic cadres of technical and policy advisors and disadvantaging developing nations with more limited internal capabilities, and thus less ability to participate in the FSB's working groups.

These specific operational critiques aside, however, there are good reasons to be wary of further institutional formality and hardening while the international regulatory architecture (and the national implementation of substantive reforms) remains in flux.[152] By preserving a soft-law approach, the G-20 has created in the FSB a body that might be more flexible and better able to manage the continuing tensions between national implementation and cross-border rule development that are playing out on a global level.[153] A continuing soft-law approach might also better accommodate the ongoing refinement of relationships among institutions within the global financial regulatory architecture, with the G-20 preserving the authority to further formalize the FSB should the long-term governance of the global financial system so demand.[154]

### 2. A Clearer Hierarchy

Second, the post-crisis reforms created a clearer hierarchy of power within the international financial regulatory architecture. Wielding the imprimatur of its member nations' political leadership, the G-20 func-

150. *See* FIN. STABILITY BD., MEMBERS OF THE FINANCIAL STABILITY BOARD (2014), *available at* https://www.financialstabilityboard.org/about/plenary.pdf.

151. FSB ARTICLES OF ASSOCIATION art. 7.

152. *See* Hafner-Burton et al., *supra* note 64, at 73 ("The choice of soft law does not necessarily reflect a failure to agree on hard law. Rather, states often favor soft law because it is less costly to negotiate, more adaptive in the face of uncertainty, and more readily adjusted to facilitate compromise between actors with differing interests and degrees of power."); *see also* C.M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law,* 38 INT'L & COMP. L.Q. 850 (1989); Reisman, *supra* note 4, at 139 ("One function of soft law in international law, then, is to provide negotiators and lawmakers with an alternative tool which supplies a commonly accepted level of normative guidance yet allows adjustments through time by unilateral initiation . . . It is appropriate and necessary, given the nature of the international political system. Not every situation calls for soft law, but some international situations require it.").

153. *See infra* Part IV.B.

154. Some commentators argue that the G-20 should also resist institutionalization in order to preserve its operational flexibility. *See* Truman, *supra* note 94, at 17-18.

tions as an apex agency, announcing strategy at a global level and charging the FSB with implementation and monitoring.[155] The FSB, in turn, coordinates with the ISSBs, directing their policy work—at least in theory—and monitoring national implementation of global regulatory standards.[156]

In this way, the increasing role of the G-20, coupled with the unique development of the FSB as a transnetwork body,[157] marks an important shift from the loosely knit, decentralized network of standard-setting bodies that presided over the global financial regulatory architecture in the decades immediately preceding the crisis. Theoretically, this architecture is now more complete. With a single body now responsible for coordination, policymaking is less atomized and it is harder for concerns to fall between the cracks of narrowly focused standard-setting bodies.[158]

Despite the development of a clearer institutional taxonomy, however, concerns about the relationships between various IOs remain. For instance, some critics argue that the post-crisis hierarchy begins and ends with the G-20, which can mandate action by both the FSB and the standard-setting bodies, while the FSB remains rather limited in its authority over the Basel Committee, IOSCO, IAIS, IASB, and others.[159]

At the very least, the relationship between the FSB and these standard-setting bodies could benefit from more clarity. The FSB is authorized to review the policymaking work of the ISSBs; similarly, these bodies must report their activities to the FSB. Nonetheless, the Charter states somewhat ambiguously that this "process should not undermine the independence of the standard-setting process but strengthen support for strong standard-setting by providing a broader accountability framework." Many commentators note that the FSB functions less as a centralized authority directing the cluster of regulatory networks it

155. *See* Gadinis, *supra* note 108, at 169-75 (describing the policymaking relationship between the G-20 and the FSB).

156. *See id.* at 163-64.

157. *See* LOMBARDI, *supra* note 86, at 19.

158. *Id.* (arguing that the FSB's "multidimensional membership" could "enable it to potentially bridge the gaps resulting from the national and sectoral fragmentation of financial regulation").

159. *See, e.g.*, Donnelly, *supra* note 146, at 268 ("A hierarchical relationship between the Board and the [Basel] Committee . . . is only theoretical. Instructions for Basel . . . come directly from the G20, and the Basel Committee's institutional identity, strength and cohesion are robust. IOSCO . . . also seems to have a free hand to pursue rule-making and standard development in ways of its choosing." (internal citations omitted)).

ostensibly oversees, and more as an "arena" for coordination[160] or a "membrane" through which its constituents collectively diagnose "systemic financial threats."[161]

Even as a "membrane," however, the FSB directs more activity by the ISSBs than these critiques allow. Importantly, for instance, these critiques overlook the role that the FSB plays in informing the specific regulatory agenda of the G-20. At the Pittsburgh summit in September 2009, the first summit after the establishment of the FSB, the G-20 Leader's Statement reflected a far more sophisticated substantive agenda for reform, with detailed principles for derivatives reform (the centralized clearing and exchange-based trading of OTC derivatives), capital standards (new liquidity and leverage ratios), and cross-border resolution mechanisms.[162] Thus, even in the absence of clear, direct relationships between the FSB and the other standard-setting bodies, the FSB shapes the policy-making work of these subsidiary bodies via its influence on the G-20's reform agenda.[163]

Moreover, because of the significant representation by national finance ministers within the FSB's plenary, many of whom also provide national representation within the G-20, there are significant interlocks in authority between the FSB and the G-20 such that any recalcitrance by the standard-setting bodies can be authoritatively resolved. The efficacy of the FSB in directing and shaping the work of the standard-setting bodies is reflected in the board's success in developing recommendations for the regulation of global systemically important financial institutions (G-SIFIs), compensation practices, resolution mechanisms, shadow banking, and OTC derivatives.[164] In the case of G-SIFIs and OTC derivatives, the FSB composed working groups staffed in part by ISSB representatives and solicited feedback and recommendations from the ISSBs directly.[165] The FSB has also demonstrated its effectiveness in monitoring policymaking work by the ISSBs, success-

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160. *See id.* ("The Board remains in this sense focused on communication, consensus-building, coordination and puzzling about the right way to prevent another global crisis, not about handing out instructions to the ISSBs . . . The FSB is the arena in which this takes place, rather than a central authority per se.").

161. LOMBARDI, *supra* note 86, at 19.

162. Statement, *supra* note 101.

163. *See* Gadinis, *supra* note 108, at 169-75 (describing the various ways in which the FSB and G-20 interact).

164. *See* Walker, *supra* note 81, at 11-28 (providing a comprehensive overview of the FSB's reform agenda, including its extensive work with the ISSBs); *see also* Gadinis, *supra* note 108, at 171-73.

165. Gadinis, *supra* note 108, at 171-73.

fully overseeing, for instance, IASB and FASB's efforts to develop convergent, less pro-cyclical accounting standards and reporting any hiccups in this effort in detailed reports to the G-20.[166]

Some commentators have suggested that concerns about the continued murkiness of the global regulatory hierarchy might also infect the horizontal relationship between the FSB and the three other pillars of the global economic order, especially the IMF. The relationship between the FSB and these other pillars of the global economic order is so critical in part because of a return by the Bretton Woods institutions to the task of macroeconomic, monetary, and financial policy in the developed world—both in managing Europe's sovereign debt crisis and conducting peer reviews of national financial sectors in the West as part of the IMF and World Bank's Financial Sector Assessment Program (FSAP).

Those worried about the relationship between the FSB and the Bretton Woods institutions point to the substantial organizational mismatch between the FSB and a more institutionalized body like the IMF, not only in terms of size and capacity[167] but also as to international legal status. The Centre for International Governance Innovation has also suggested that "animosity" exists between the IMF and the FSB as to the joint early-warning exercises both organizations use to assess emerging risks to the global economy.[168] For instance, the IMF and FSB report the findings from these exercises separately despite the underlying aim of producing an integrated view of the global economy across financial, monetary, and macroeconomic indicia.[169] Several commentators have also noted the similarity between the FSB's peer review mechanisms and FSAP and suggest that these similarities might result in mission overlap or operational redundancy.[170] They argue

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166. *Id.* at 171 ("This reporting suggests that IASB and FASB do not operate in an institutional vacuum, as was the case before, but rather under the watchful eye of political actors, who are eager to see results from these rulemakers.").

167. *See* Momani, *supra* note 147, at 36 (noting the problematic mismatch in size and organizational capacity between the IMF and the FSB).

168. Tristan Carlyle, *FSB and IMF 'Animosity' Claim Rejected*, CENTRALBANKING.COM (Apr. 8, 2013), http://www.centralbanking.com/central-banking/news/2262603/fsb-and-imf-animosity-claim-rejected.

169. *Id.*

170. *See* Donnelly, *supra* note 146, at 271; *see also* Louis W. Pauly, *The Financial Stability Board in Context*, *in* THE FINANCIAL STABILITY BOARD, *supra* note 90, at 13, 17 ("But surely the idea behind these less-than-binding [peer review] procedures bears a family resemblance to the commitment already embodied in the IMF, namely mutual accountability for national contributions to systemic risk. The difference, of course, lies in the legal obligation underpinning Fund surveillance in both

that this potential for interorganizational tension is concerning because a strong partnership with the IMF and World Bank is one of the principal mechanisms by which the FSB can cultivate influence and legitimacy.[171]

But these criticisms overlook the structural value of jurisdictional overlap and competing missions, and the ways in which the FSB can act as an important informational counterweight to the IMF. For instance, joint reporting might actually provide a more textured, balanced view of the global economic order and avoid the groupthink that characterized global regulation in the lead up to the most recent financial crisis. A similar counterweight structure marks the national regulatory landscape in the United States, with the Office of Financial Research acting as the informational counterweight to the domestic prudential regulators, many of which overlooked key systemic risk indicia prior to the crisis.[172] Furthermore, because much of the global regulatory architecture remains in flux, with the G-20 still occupying a crisis-management role, jurisdictional overlap between the IMF and FSB might actually help surface important institutional tensions that can inform the development of a more refined, long-term regulatory architecture.

### 3. More Political Involvement

Third, the post-crisis regulatory architecture reflects more robust involvement by the political leadership of the G-20 nations. Whereas Ben Bernanke and his international counterparts at major central banks oversaw the development of cross-border regulatory frameworks in the pre-crisis era, now President Obama, his fellow heads of state, and their finance ministers are involved alongside the independent central bankers in directing the global regulatory agenda. At the most basic level, this direct political involvement lends the international financial architecture more national legitimacy, rooting it directly in domestic democratic processes. It also bolsters regulatory accountability by shifting authority from insulated bureaucrats to elected political

its national and multilateral settings, in the number of states involved, and in the nature of the preparatory staff work that would amount to more than just technical advice to a 'process.'").

171. *See* Donnelly, *supra* note 146, at 271 ("Indeed, while all FSB members are expected to undertake peer reviews, the Board sees the IMF in particular as crucial for ensuring standard implementation in non-FSB-member countries. This [in] turn is viewed as crucial to managing emergent crises in the future.") (internal citations omitted).

172. For an early vision of an entity similar to the OFR being able to serve as a counterweight to the regulatory agencies, see Ross Levine, *The Sentinel: Improving the Governance of Financial Regulation* (Nat'l Bureau of Econ. Research, 2009).

officials directly responsive (in theory) to the will of their domestic constituencies.

The increased role of the political leadership in the international financial regulatory architecture, however, has not come at the expense of independent agencies, with enhanced authority granted to central banks (and other independent domestic regulators) in the United Kingdom, United States, and the European Union.[173] Thus, while the political leadership *does* exercise more significant authority over the global policymaking agenda, independent agencies have retained or enhanced their important policymaking roles, too. In the United States, for instance, Treasury serves as Chair of the Financial Stability Oversight Council (FSOC),[174] but the Federal Reserve Board of Governors has been given significant supervisory and regulatory authority over the largest bank and non-bank financial institutions.[175] At a global level, the division of responsibility across these two functions, although uncertain, helps mediate accountability concerns, as well as the long-held value of independence in financial regulation. Indeed, to the extent accountability is vital to domestic and global administrative law, independence has, historically, been seen as equally vital to domestic and international financial regulation. There is, of course, tension between these two values, but at least in the current state of uncertainty, this tension has produced strong regulatory outcomes both nationally and internationally.[176]

It is not yet clear, however, that the magnified role of the G-20 political leadership in the global regulatory sphere addresses concerns related to global legitimacy. For instance, because at least part of the FSB's mission is extraterritorial (that is, fostering compliance among non-cooperating, non-member jurisdictions),[177] it may be necessary to broaden the board's membership even further (although the FSB has already established six regional consultative groups to facilitate outreach among underrepresented and non-member countries).[178] Even

173. In the United Kingdom, for instance, significant regulatory authority has been given back to the Bank of England, *see* Financial Services Act, 2012, c. 21 (Eng.), while in Europe, the European Central Bank has played a leading role in the development of a new, post-crisis regulatory framework, *see* Consolidated Version of the Treaty on the Functioning of the European Union art. 127(6), Oct. 26, 2012, 2012 O.J. (C 326) 103.

174. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 § 111 (2010).

175. *See, e.g.*, *id.* §§ 604, 605, 606, 616.

176. *See infra* Part IV.B.

177. FSB Charter, Annex B; *see also* LOMBARDI, *supra* note 86, at 7-8.

178. *See* LOMBARDI, *supra* note 86, at 16-17.

as the FSB's membership expands, moreover, concerns might still remain about whether all of the voices within this expanded membership are heard.[179] This concern is particularly acute given the geographic bias of the FSB toward Western developed nations. All of the major international financial organizations are headquartered in Europe or the United States, making the relative cost of doing business much higher for non-Western nations, many of which already lack strong representation at these organizations.

Commentators have also raised concerns about institutional capture. For instance, FSB's Charter only provides for consultation with private sector parties (in addition to non-member authorities), although in the parlance of international law, private sector may encompass civil society organizations as well.[180] The increased role of the G-20 political leadership might also increase opportunities for capture at the national level to the extent that political leaders are less insulated from domestic political pressures than their central banker and bureaucratic counterparts. Some of these concerns can be addressed via consultations with civil society groups, formal notice-and-comment processes, and the promulgation (perhaps) of less complex standards,[181] although concerns about capture will naturally intensify as the FSB continues to gain global legitimacy and influence.

#### 4. Stronger Peer Review

Finally, the post-crisis financial architecture reflects a new approach to efficacy in cross-border rulemaking. Former U.S. Treasury Secretary Timothy Geithner described the basic premise underlying this new approach at the G-20's Pittsburgh Summit in 2009:

> [T]he basic strategy is a simple strategy. You get countries to agree to raise the standards, to commit to a level playing field, and then you have a huge interest in all countries in holding each other accountable to hold their institutions to that same standard, because they all know that if anybody tries to compete

179. *See* Eric Helleiner, *Governance Issues Relating to the FSB and International Standards*, *in* THE FINANCIAL STABILITY BOARD, *supra* note 90, at 28 ("[T]he inclusion of new countries at the decision making table needs to be followed by measures that allow these countries to make their voices count within the FSB.").

180. FSB Charter art. 3 ("In the development of the FSB's medium- and long-term strategic plans, principles, standards and guidance, the FSB will consult widely amongst its Members and with other stakeholders including private sector and non-member authorities.").

181. *See* Helleiner, *supra* note 179, at 30-31.

> by lowering those standards, it would be adverse to their interests.[182]

The principal mechanism by which a level playing field and intergovernmental accountability are achieved is peer review—a process that "produces social pressures, which in turn shapes judgments as to whether or not to conform to a given standard."[183]

For instance, the FSB conditions membership on assent to regular peer reviews. The FSB has developed comprehensive peer review mechanisms, including for both thematic and country peer reviews. Thematic reviews examine the implementation of standards across the FSB membership and are designed to promote stronger cross-border uniformity and efficacy. FSB country reviews, meanwhile, evaluate compliance with IMF-World Bank FSAP and Reports on the Observance of Standards and Codes (ROSC) recommendations, as well as any other supervisory and prudential concerns relevant to the FSB's core mission.

The IMF-World Bank FSAP process has itself become more robust, particularly with the United States agreeing to peer review in 2009 for the first time after years of refusal. Indeed, the role of the IMF and World Bank has changed significantly in the post-crisis era, with these institutions now playing a much more substantial role in the developed world. The IMF and World Bank have played crucial roles both in the sovereign debt crises roiling across the European continent, including in Italy, Greece, Cyprus, and Ireland, and—via FSAP and ROSC—conducting more peer reviews of the major Western economies.[184] In another important step toward increased efficacy, peer review mechanisms now also increasingly focus on institutions and not just on nations or other international bodies, such as in the case of U.S.-E.U. exercises on the comparability of risk-based capital requirements[185] and European Central Bank (ECB) stress tests.[186] Thus, even in the absence of a hard-law, treaty-based regime, peer review mechanisms can enhance the efficacy of the global financial architecture by increas-

182. Geithner, *supra* note 100.

183. LOMBARDI, *supra* note 86, at 6.

184. *See The IMF and Europe,* IMF, http://www.imf.org/external/np/exr/facts/europe.htm (last visited May 11, 2014).

185. *See* BASEL COMM. ON BANKING SUPERVISION, REGULATORY CONSISTENCY ASSESSMENT PROGRAMME (RCAP) (2013), *available at* http://www.bis.org/publ/bcbs256.pdf.

186. *See Comprehensive Assessment*, EUROPEAN CENTRAL BANK, http://www.ecb.europa.eu/ssm/assessment/html/index.en.html (last visited May 11, 2014).

ing transnational social pressure and giving more weight to the obligations promulgated by the FSB and the ISSBs.

### D. *Substantive Outcomes*

Concerns about accountability and legitimacy aside, the post-crisis reforms to the global financial regulatory architecture represent a significant procedural improvement over the prior era of decentralized, hybrid networks. Furthermore, this new, "harder," more political, more hierarchical regulatory architecture has also achieved some early substantive successes, producing rules far more stringent than those produced in the pre-crisis climate of global races to the bottom and cross-border regulatory arbitrage.[187] Capital rules are stronger. Derivatives regulation is tougher. Structural reforms are being put in place. Yet the project is incomplete, and significant risks remain in the system.

#### 1. Global Capital Rules

Almost immediately in the wake of the crisis, the political leadership began to address the pre-crisis weaknesses in the global bank capital rules. Basel II.5, which targeted risks from off-balance sheet assets and market risks, was developed early in 2009 and quickly adopted by the major economies.[188] By the G-20 summit in Pittsburgh in September 2009, U.S. Treasury Secretary Timothy Geithner had assembled a consensus in favor of higher capital standards. By late 2010, the Basel Committee promulgated its Basel III capital standards,[189] which are

187. For a comprehensive overview of post-crisis international reforms, see generally *Financial Regulation and U.S. Competitiveness Before the H. Comm. on Financial Services, Sub. Comm. on Oversights and Investigations* (Mar. 5, 2014) (statement of Michael S. Barr); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-261, INTERNATIONAL FINANCIAL REFORMS (2014). For a critique of the focus by commentators and academics on the procedural dimensions of reform versus its substantive outcomes, see Truman, *supra* note 94, at 15 ("[Many] criticisms of the G-20 focus on form over substance, which is unfortunate. For the restoration of health and subsequent vitality of the global economy and financial system, substance is what matters.").

188. BASEL COMM. ON BANKING SUPERVISION, BANK FOR INT'L SETTLEMENTS, ENHANCEMENTS TO THE BASEL II FRAMEWORK (2009), *available at* http://www.bis.org/publ/bcbs157.pdf; BASEL COMM. ON BANKING SUPERVISION, BANK FOR INT'L SETTLEMENTS, GUIDELINES FOR COMPUTING CAPITAL FOR INCREMENTAL RISK IN THE TRADING BOOK (2009), *available at* http://www.bis.org/publ/bcbs159.pdf.

189. BASEL COMM. ON BANKING SUPERVISION, BASEL III: A GLOBAL REGULATORY FRAMEWORK FOR MORE RESILIENT BANKS AND BANKING SYSTEMS para. 2 (rev. 2011) [hereinafter BASEL III CAPITAL PROPOSAL], *available at* http://www.bis.org/publ/bcbs189.pdf. The first draft of the proposal was released in December 2010. Press Release, Basel Comm. on Banking Supervision, Basel III Rules Text and Results of the Quantitative Impact Study Issued by the Basel Committee (Dec. 16, 2010), *available at* http://www.bis.org/press/p101216.htm.

being implemented gradually across all Basel Committee member jurisdictions with the deadline for full implementation set for January 1, 2019.[190]

Basel III requires financial institutions to hold much higher-quality capital than its predecessor: the minimum total regulatory capital ratio remains at 8% of risk-weighted assets,[191] but the revised rules require banks to hold Tier 1 capital in an amount no less than 6% of risk-weighted assets.[192] Basel III also introduces a new Common Equity Tier 1 requirement, under which banks must hold at least 4.5% of risk-weighted assets in common equity.[193] Basel III also reduces the ability of banks to rely on riskier, less-absorbent forms of regulatory capital[194] and bars banks from including lower-quality Tier 3 instruments in regulatory capital.[195] The Basel III changes further require all firms to hold a countercyclical "capital conservation buffer," with dividends, share buybacks, or bonuses limited if Common Equity Tier I levels are within 2.5 percentage points of the minimum 4.5% Common Equity Tier 1 level.[196]

Critically, Basel III also imposes a global non-risk-based leverage ratio. The leverage ratio requires banks to hold Tier 1 capital equal to 3% of their total exposures[197] and is intended to supplement Basel's risk-weighted rules. Finally, firms posing the greatest risk to the financial system are required to hold even higher levels of capital—a "SIFI surcharge." All global systemically important banks (G-SIBs) will bear this surcharge,[198] with the most systemically important G-SIBs required to hold more capital (an additional 2.5% of risk-weighted assets) than those with less systemic importance.[199]

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190. BASEL III CAPITAL PROPOSAL, *supra* note 189, Annex 4.

191. *Compare* BASEL COMM. ON BANKING SUPERVISION, BANK FOR INT'L SETTLEMENTS, INTERNATIONAL CONVERGENCE OF CAPITAL MEASUREMENT AND CAPITAL STANDARDS para. 40 (consolidated ver. rev. 2006) [hereinafter BASEL II CAPITAL FRAMEWORK], *available at* http://www.bis.org/publ/bcbs128.pdf, *with* BASEL III CAPITAL PROPOSAL, *supra* note 189, para. 50.

192. BASEL III CAPITAL PROPOSAL, *supra* note 189, para. 50.

193. *Id.* paras. 48, 50.

194. *Id.* paras. 87-88.

195. *Id.* para. 9.

196. *Id.* paras. 129-32.

197. BASEL COMM. ON BANKING SUPERVISION, BANK FOR INT'L SETTLEMENTS, BASEL III LEVERAGE RATIO FRAMEWORK AND DISCLOSURE REQUIREMENTS (2014), *available at* http://www.bis.org/publ/bcbs270.pdf.

198. BASEL COMM. ON BANKING SUPERVISION, BANK FOR INT'L SETTLEMENTS, GLOBAL SYSTEMICALLY IMPORTANT BANKS (2011), *available at* http://www.bis.org/publ/bcbs207.pdf.

199. *Id.*

Even as some jurisdictions rightly adopt more stringent capital rules than those required under the Basel III approach,[200] however, more work is still needed to strengthen the global capital framework, at least for the largest firms. Risk-based capital requirements need to be made more transparent and comparable on a cross-border and institution-by-institution basis, and better substitutes need to be developed for both the discredited credit rating agencies and the internal models of the regulated institutions. Additionally, both the global leverage ratio and the SIFI surcharge are simply too low, if either is to serve as an effective buffer against asset implosions or liquidity runs or weigh effectively against any "too big to fail" subsidies. Moreover, as the countercyclical capital buffer is left to national economic circumstances and discretion, national regulators should commit to economic triggers that would increase capital requirements and use other methods to reduce leverage under specified circumstances. Furthermore, stress testing, which has served a critical role in bolstering capital oversight in the United States, is in need of further refinement, more transparency, and greater predictability. In Europe, stress testing has not worked to date, with the European Central Bank's new stress tests an essential signal of whether the Bank will have credibility as the eurozone's bank supervisor.

2. Derivatives and Wholesale Funding Markets

At the 2009 Pittsburgh Summit, G-20 leaders also committed to significant reforms in the OTC derivatives market, with all standardized OTC derivatives to be moved onto exchange-trading platforms and centrally cleared, and non-cleared derivatives to be penalized with higher capital and margin requirements.[201] The leaders also agreed that all OTC derivative trades—including those that remained purely bilateral—should be reported to trade information repositories.[202] In 2011, the G-20 further agreed that non-cleared derivatives contracts should be subject to margin requirements.[203] In key FSB member jurisdictions, the statutory regimes for central clearing, exchange-based trading, and trade reporting are now in place, with the frameworks for margin requirements lagging behind.[204] Regulatory imple-

200. *See infra* Part III.C.

201. *See* Statement, *supra* note 101.

202. *Id.*

203. *See* Cannes Statement, *supra* note 104.

204. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 187, at 27-30.

mentation has lagged significantly behind legislation, however, with rules still not even proposed in most jurisdictions as of April 2014, particularly in Asia.[205] In addition, persistent technical, liability, and jurisdictional problems with trade reporting and trade repositories have compromised the necessity of these functions in providing regulators and market participants with a comprehensive informational view of global derivatives markets.[206]

Furthermore, global rules for repo and other short-term funding markets remain far less developed, with most jurisdictions only in the earliest phases of proposing rules. More regulatory attention is needed on the issue of hot money, which continues to pose significant risks to systemic stability, to address weaknesses in foreign currency markets, and to restore trust and confidence to benchmark global rates like LIBOR. In sum, much of the plumbing of the financial system is still in need of reform.[207]

### 3. Structural Reform and Resolution

Globally, much work remains to be done in the area of structural reform and resolution. The United States, United Kingdom, and European Union have all embraced the need for ringfencing and stronger horizontal buffers between retail deposit banks and other, riskier financial functions.[208] All three jurisdictions are moving toward some form of a model that embraces restrictions on transactions between banks and non-bank affiliates, independent capital for non-bank functions, and caps on counterparty credit exposures.[209] In the Volcker Rule,[210] the United States has adopted the strongest version of

205. *Id.*

206. *See, e.g.*, Fiona Maxwell, *Majority of Emir Derivatives Reports Cannot Be Matched, Say Repositories*, RISK (Mar. 24, 2014), http://www.risk.net/risk-magazine/news/2335669/majority-of-emir-derivatives-reports-cannot-be-matched-say-repositories.

207. *See* Darrell Duffie, *Replumbing Our Financial System: Uneven Progress*, 9 INT'L J. OF CENTRAL BANKING 251 (2013).

208. For a high-level visual summary of the structural reforms proposed in the United States, versus those originally proposed in the United Kingdom (Vickers) and E.U. (Liikanen), see JOSÉ VIÑALS ET AL., IMF DISCUSSION NOTE, CREATING A SAFER FINANCIAL SYSTEM 15 (2013). For an overview of the more recent structural reform proposal in the E.U., see European Commission, Structural Reform of the EU Banking Sector (Press Release IP/14/85, Jan. 29, 2014).

209. *Id.*

210. Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds, 12 C.F.R. §§ 44, 248, 351, 17 CFR § 255 (2014), *available at* http://www.fdic.gov/news/board/2013/2013-12-10_notice_dis-a_fr.pdf (implementing Dodd-Frank Act § 619).

these reforms, but significant work still remains to be done in all three jurisdictions as to implementation. It is particularly important, too, that ringfencing not be viewed as a panacea; structural reform will only prove effective to the extent it is integrated with broader changes in supervision, capital, and resolution mechanisms.

Progress on structural reform is also important because of the linkages between clearer, less risky structures for financial conglomerates and ease of resolution. "Living will" requirements, such as those adopted in the United States,[211] can help ease the process of cross-border resolution by clarifying lines of authority and aligning business risk with organizational form, but ultimately, a cross-border mechanism for the resolution of highly complex firms is still necessary.

The United States has developed a "single point of entry" model (the Orderly Liquidation Authority) that will facilitate the resolution of the largest financial conglomerates by empowering the Federal Deposit Insurance Corporation to act as receiver for the top-tier parent holding company,[212] and in April 2014, Europe officially adopted its Single Resolution Mechanism,[213] which will be administered by the ECB as part of its new supervisory authority over the continent's largest banks and will be funded via contributions from eligible banks, with national assessments assimilated into a community-wide fund within eight years. The establishment of a European resolution and funding mechanism will help break the link between a national government's fiscal position and the health of domestic financial institutions—a link that exacerbated Europe's sovereign debt crisis. The crisis found many euro zone countries unable to support troubled banks, either because the size of the bank exceeded national GDP, or because public finances proved too unstable to provide any assistance.[214]

National implementation of more effective resolution mechanisms has also been bolstered by the work of the FSB, which in 2011 released a set of best practices it considers "necessary for an effective resolution

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211. *See* Federal Reserve and FDIC, Resolution Plans Required, 76 Fed. Reg. 67323 (Nov. 1, 2011); FDIC, Resolution Plans Required for Insured Depository Institutions With $50 Billion or More in Total Assets, 76 Fed. Reg. 58379 (Sept. 21, 2011).

212. Dodd-Frank Act, *supra* note 174, tit. II.

213. James Kanter, *European Parliament Approves Laws on Banking Overhaul*, N.Y. TIMES, Apr. 16, 2014, at B8, *available at* http://www.nytimes.com/2014/04/16/business/international/european-parliament-approves-laws-on-banking-overhaul.html.

214. Andrew Palmer, *Show Me the Money*, ECONOMIST (Nov. 18, 2013), http://www.economist.com/news/21589070-european-central-bank-becomes-euro-zones-single-banking-supervisor-show-me-money.

regime."[215] The FSB is also developing a Resolvability Assessment Process that will be used to evaluate the feasibility and credibility of national resolution mechanisms in the event of a G-SIFI failure.[216] Despite these significant regulatory advances, however, the orderly resolution of systemically important, highly complex cross-border firms will not be feasible without more global cooperation and a comprehensive transnational approach. Fortunately, the G-20 has recognized the important relationship between structure and resolvability. At the 2013 summit in St. Petersburg the G-20 leadership instructed the FSB, IMF, and OECD to collaborate in assessing "cross-border consistencies and global financial stability implications [of structural reforms], taking into account country-specific circumstances," and all three bodies are expected to report on this work at the 2014 summit in Brisbane, Australia.[217]

Overall, the substantive global rules developed and implemented in the post-crisis era are far more robust than their pre-crisis counterparts and provide far fewer opportunities for regulatory arbitrage and evasion. Nonetheless, significant work remains, as does the underlying question of whether the current international financial regulatory architecture is sufficient to the task of a truly sound global financial system. Achieving more organizational simplicity and clarity in the financial sector may also require new approaches altogether. For example, the United States put in place a soft cap (10% of total financial liabilities) on the global liabilities of U.S. firms; once the cap is hit, these firms cannot merge with or acquire other financial institutions. A tax on the wholesale liabilities of financial firms would further reinforce safety in the system. While the Obama administration proposed such a tax,[218] it never gained traction in the United States. The IMF endorsed the idea in 2010,[219] but it has received little attention since. A liability tax imposed by the major economies would both

215. FIN. STABILITY BD., KEY ATTRIBUTES OF EFFECTIVE RESOLUTION REGIMES FOR FINANCIAL INSTITUTIONS 1 (2011), *available at* https://www.financialstabilityboard.org/publications/r_111104cc.pdf.

216. FIN. STABILITY BD., ASSESSMENT METHODOLOGY FOR THE KEY ATTRIBUTES OF EFFECTIVE RESOLUTION REGIMES FOR FINANCIAL INSTITUTIONS 14 (2013), *available at* https://www.financialstabilityboard.org/publications/r_130828.pdf.

217. *See* Statement, *supra* note 106, para. 68.

218. *See* Jackie Calmes, *Taxing Banks for the Bailout*, N.Y. TIMES, Jan. 15, 2010, at B1, *available at* http://www.nytimes.com/2010/01/15/us/15tax.html?_r=0.

219. *See Squeezing the Piggy-banks*, ECONOMIST (Apr. 21, 2010), http://www.economist.com/node/15948811.

help constrain the size and complexity of financial conglomerates and perhaps help to offset the costs to society of future failures.

### E. *National Strategies*

Even as the post-crisis intervention of the G-20 in the global financial architecture has resulted in a harder, more formal system, with a clearer hierarchy, more political accountability, and a stronger framework for generating, implementing, and monitoring cross-border rulemaking, variations across domestic regulatory regimes have proliferated, with the leading economies engaged in an ambitious transnational strategy of regulatory competition. Unlike in the pre-crisis era, however, national variation and international regulatory competition to date have not resulted in widespread races to the bottom and cross-border regulatory arbitrage. Instead, the post-crisis national regulatory strategies have largely resulted in upward deviations from an already more robust global regulatory floor—a global race to the top.

This new financial architecture means that national variation alone (that is, the tailoring of global standards to individual domestic landscapes) can encourage global races to the top. It also rewards first movers on a national basis, particularly as to the extraterritorial application of domestic rules. One country can take the lead in developing more robust extraterritorial standards than those required on a global level, and by doing so can effectively push other countries into the adoption of similarly stringent rules.

For instance, opportunities for national variation have marked the ongoing development of new structural rules for insured depository institutions (IDIs).[220] The United States, European Union, and United Kingdom are all pursuing versions of structural reform. Part of structural reform involves ringfencing, whereby certain activity remains within a financial conglomerate, but is separated from the IDI by firewalls—of varying heights. The United Kingdom will likely ringfence the insured depository functions of a banking group and take a functional, flexible approach to the activities these ringfenced banks may still provide.[221] The European Union, meanwhile, will likely ringfence the riskier activity from other parts of the firm

220. For a high-level visual summary of the original structural reforms proposed in the United States, versus those proposed in the United Kingdom (Vickers) and E.U. (Liikanen), see JOSÉ VIÑALS ET AL., *supra* note 208, at 15.

221. INDEP. COMM'N ON BANKING, FINAL REPORT (2011) [hereinafter VICKERS REPORT].

and take a relatively flexible approach to activity restrictions.[222] In the United States, which placed relatively strict activity restrictions on IDIs but permitted them to affiliate broadly with non-bank financial firms before the crisis, two new regulatory frameworks, both authorized by the Dodd–Frank Act,[223] will further insulate IDIs from risky, non-banking activity. The Volcker Rule, unlike the European Union and United Kingdom's proposals, eschews firewalls in favor of total separation, with certain proprietary trading functions and significant hedge fund investments pushed outside of "banking entities" (financial conglomerates that include IDIs) entirely.[224] The Lincoln Swaps-Pushout Rule, meanwhile, is expected to erect firewalls between IDIs and specified derivatives activity.[225]

To date, the United States has pursued a more stringent approach to structural reform than have the United Kingdom and European Union. And, indeed, whereas the United States has already finalized the Volcker Rule, the passage of structural reform legislation in the United Kingdom and European Union remains delayed, suggesting that reforms in these two jurisdictions may grow weaker. Thus, one account of structural reform would suggest that a bold, muscular approach by U.S. regulators has failed to spark equivalent reforms overseas. In this telling, national variation is destructive to uniform, global rules and even if the race is still upwards, relatively speaking, it does not yet always arrive at consistent, higher ground.

But this account mistakes national variation for divergence.[226] Although the approaches employed by the United States, United Kingdom, and European Union differ in detail, "all accept that universal banking can be efficient but see the need for it to have structural safeguards."[227] Thus, even if none of the approaches represent a

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222. EUR. COMM'N, HIGH-LEVEL EXPERT GROUP ON REFORMING THE STRUCTURE OF THE EU BANKING SECTOR, FINAL REPORT (2012) [hereinafter LIIKANEN REPORT].

223. *See generally* Dodd-Frank Act, *supra* note 174.

224. Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds, 12 C.F.R. §§ 44, 248, 351, 17 CFR § 255 (2014), http://www.fdic.gov/news/board/2013/2013-12-10_notice_dis-a_fr.pdf (implementing Dodd-Frank Act § 619).

225. *See* Prohibition Against Federal Assistance to Swaps Entities (Regulation KK), 12 C.F.R. § 237 (2013), *available at* http://www.gpo.gov/fdsys/pkg/FR-2013-06-10/pdf/2013-13670.pdf (implementing Dodd-Frank Act § 716).

226. *See* Michael Barr & John Vickers, *Banks Need Far More Structural Reform to Be Safe*, FIN. TIMES (July 21, 2013), http://www.ft.com/intl/cms/s/0/e2bc9968-e3e6-11e2-91a3-00144feabdc0.html#axzz30KqHs81H.

227. *Id.*

perfect strategy, and while they may raise legitimate concerns about efficacy, there is still functional convergence, with each jurisdiction concerned with the same underlying set of prudential risks and each working toward a regulatory model that represents a significant strengthening of the pre-crisis order.[228]

Furthermore, in many other instances, the strategy of social pressure has resulted in clearer races to the top. In the case of global capital requirements, for instance, many countries are requiring firms to hold even more capital than the global minimum set by Basel III. In the United States, the supplemental leverage ratio for IDIs is set at 6%, double the Basel III-required leverage ratio, and at 5% at the bank-holding company level. Even Switzerland, not formally a G-20 nation and a traditional off-shore banking center, has set tougher requirements than required under Basel III standards. For larger banks, Switzerland set higher capital requirements, up to 19% for the two largest (UBS and Credit Suisse)—the so-called "Swiss Finish."[229]

In addition to regulatory variation across jurisdictions, some countries—most notably, the United States—have also adopted aggressive extraterritorial strategies designed to force reform upward on a global basis. For instance, the Federal Reserve Board of Governors has finalized new rules for foreign banking organizations (FBOs) operating in the United States.[230] Under these rules, large FBOs are required to place non-branch assets under a U.S. intermediate holding company structure subject to consolidated supervision by the Federal Reserve.[231] In many circumstances, FBOs will also now need to meet U.S. capital and liquidity rules and prudential standards with respect to their U.S. operations, in addition to the rules they must meet under their home country's laws.[232]

These rules are prudent measures to reduce systemic risk and improve the safety and soundness of the U.S. financial system. Strong capital and liquidity rules will make these firms more robust against failure and less subject to debilitating runs in a crisis. Moreover, they help to make supervision and resolution of foreign firms operating in the United States substantially more feasible, if such resolution is required. In many ways, the rules are consistent with (or better than)

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228. *Id.*

229. Jack Ewing, *2 Swiss Banks Facing Higher Capital Standards*, N.Y. TIMES, Oct. 5, 2010, at B9, *available at* http://www.nytimes.com/2010/10/05/business/global/05basel.html.

230. *See* FRB Enhanced Prudential Standards (Regulation YY), 12 C.F.R. § 252 (2014).

231. *See id.*

232. *See id.*

the principle of national treatment, putting large FBOs and domestic banking organizations on similar footing. Nevertheless, they have also engendered significant controversy because of their extraterritorial reach, the potential to reduce the efficiency of the capital and liquidity allocation of the consolidated firm on a global basis, and the significant structural reforms they require of firms operating in the United States that are headquartered beyond U.S. borders.[233] It remains to be seen what effect the aggressive approach embodied in these new rules will have on the regulatory positions of foreign jurisdictions; some fear "retaliation,"[234] but similar rulemaking by other jurisdictions would advance the aim of more effective regulation on a cross-border basis and should, ideally, contribute to an evolving global race to the top.

A similar strategy has transpired between the United States and European Union during the development of domestic cross-border derivative regimes. The United States moved first, with strong reforms under the Dodd-Frank Act, followed by the Commodity Futures Trading Commission (CFTC) releasing a muscular proposed set of rules with significant extraterritorial reach.[235] The rules drew significant criticism from foreign banking organizations, international swap dealers, and the European Commission, each of which understood the rules to effectively limit market participants trading with U.S. parties to U.S. exchanges, in the absence of real reforms elsewhere, thus triggering significant fears over market fragmentation.[236] As the CFTC considered these concerns and negotiated with the European Commission, it issued an exemptive order delaying the effective date of the rules for several months.[237] Not until the evening before this exemptive order

233. *See, e.g.*, Louise Bennetts & Arthur S. Long, *Fed's Final Foreign Bank Rule Increases Risk in Global Banking*, American Banker (Feb. 20, 2014), http://www.americanbanker.com/bankthink/feds-final-foreign-bank-rule-increases-risk-in-global-banking-1065719-1.html (arguing that the FBO rule is protectionist and interferes with the efficient allocation of capital on a transnational basis).

234. LOUISE C. BENNETTS & ARTHUR S. LONG, CATO INSTITUTE, THE NEW AUTARKY? HOW U.S. AND UK DOMESTIC AND FOREIGN BANKING PROPOSALS THREATEN GLOBAL GROWTH 6 (2013).

235. Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act, 17 C.F.R. ch. 1 (2012), *available at* http://www.gpo.gov/fdsys/pkg/FR-2012-07-12/pdf/2012-16496.pdf.

236. Douwe Miedema & John O'Donnell, *Europe, U.S. Strike Peace on Cross-Border Swap Rules*, REUTERS (July 11, 2013), http://uk.reuters.com/article/2013/07/11/uk-eu-derivatives-idUKBRE96A0G020130711.

237. Final Exemptive Order Regarding Compliance With Certain Swap Regulations, 78 Fed. Reg. 858 (Jan. 7, 2013), *available at* http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/federalregister122112.pdf.

lapsed were the CFTC and the European Commission able to agree on a "common path forward."[238]

This common-path agreement embraced "equivalence," whereby the United States will consider European market participants and exchanges in compliance with European rules also in compliance with U.S. rules.[239] Although the CFTC, led by then-Chair Gary Gensler, had resisted an equivalence regime, this agreement did not represent a U.S. capitulation. Instead, by releasing the stringent set of proposed rules far before the European Commission acted, the United States was able to push the European Union toward a similarly stringent regime.[240] By acting first and then leveraging its aggressive rules in transatlantic negotiations, the CFTC ensured that equivalence would be just that—actual regulatory parity, and not a code word for regulatory arbitrage, as it had too often been in the pre-crisis era. Indeed, since the common-path agreement was inked in July 2013, the CFTC has continued to interpret the agreement stringently, seeking strong, equivalent rules from European regulators. This suggests that, even as derivatives firms relocate to the United Kingdom, this relocation is not simply déjà vu. Instead, because the U.K. treatment of derivatives is governed by European regulation, even these relocated firms will not be able to engage in meaningful cross-border arbitrage—if the European regulators complete the job of reform.

Nevertheless, even as the CFTC's strategy of extraterritoriality has resulted in stronger European rules and reduced the potential for arbitrage, it has also increased transatlantic tensions. Ideally, implementation of extraterritorial rules would involve closer regulatory coordination between domestic and foreign jurisdictions—particularly where, as here, there is a high degree of parallelism between the European Union and the United States.[241] Although the tensions between the United States and the European Union over cross-border derivatives rules are not likely to scuttle cooperation over other dimensions of the global reform agenda, the possibility for transnational enmity and the need for cooperation will both grow as the global political commitment to reform wanes.

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238. Press Release, U.S. Commodity Futures Trading Comm'n, The European Commission and the CFTC Reach a Common Path Forward on Derivatives (July 11, 2013), *available at* http://www.cftc.gov/PressRoom/PressReleases/pr6640-13.

239. *Id.*

240. *Id.* (detailing the joint commitment of the CFTC and European Commission to enact functionally and substantively analogous rules).

241. *See* ATLANTIC COUNCIL, THE DANGER OF DIVERGENCE 14-15 (2010).

In this intermediate period of reform, however, with the G-20 not yet transitioned from crisis management to long-term governance, it may make sense for the global leadership to encourage—or at least not attempt to block—national variation and even national strategies of extraterritorial application.[242] The United States should be permitted to take an aggressive stance on derivatives, and the European Union should be permitted the same latitude on executive compensation and financial taxation. Indeed, the post-crisis experiences with national variation and extraterritorial strategy to date suggest that the G-20 should avoid the adoption and implementation of rigid, detailed rulemaking on a cross-border basis and should instead play the role of shepherd—working through the FSB to produce rigorous, robust prudential standards;[243] correcting downward national deviations but otherwise encouraging strong domestic regimes that exceed minimum standards; and intervening where necessary to minimize transnational tensions.

### F. *The Prospects for Further Institutional Reform*

It is too early to know whether and to what extent the post-crisis reforms to the global financial architecture will work. The international architecture remains an awkwardly constructed work in progress. Measured by its outputs, the modifications appear to be making the financial system safer, but there are, nonetheless, many structural and procedural tensions roiling beneath the surface.

On the one hand, for instance, the dominant role of the G-20 political leadership in setting an agenda for reform and the development of the FSB as an international institution with independent legal status represents a hardening of rulemaking at the global level. On the other, this political involvement facilitates national variation—variation that in some instances, as with Basel III implementation, may lead to global races to the top, and in others, as with derivatives implementation, may well provoke cross-border tension and complicate regulatory oversight unless further coordination is pursued.

242. For one account of the importance of national experimentation and flexibility in international financial regulation, see Roberta Romano, *For Diversity in the International Regulation of Financial Institutions: Critiquing and Rethinking the Basel Architecture* 35-38 (Yale Law & Econ. Research, Paper No. 452, 2013).

243. *See* Hafner-Burton et al., *supra* note 64, at 74 (noting that "imprecision, as with non-binding agreements, can lead to more cooperation . . . ."). For another account of the relationship between ambiguity (i.e. standards) and compliance, see generally Chinkin, *supra* note 152.

Although the commitment of the G-20 leadership to continued reforms remains strong, individual countries have pursued global reform with markedly different strategies. The United States, for instance, has largely pursued an "enact first, negotiate later" strategy to reform, issuing rules with significant extraterritorial reach in an effort to increase pressure on other, major economies and magnify its bargaining position on the global stage. Other actors, including the European Union, have lagged behind the United States by months and even years on some key elements of reform, while pursuing more aggressive strategies on executive compensation. Whether this transnational strategic variation will continue to erupt in cross-border tension and a reversion to national strategies, or instead will end up fostering stronger global rules, is unclear.

Either way, these tensions stem from an international regulatory system that lacks a single, authoritative architect. And while it may be perilous, given systemic flux and uncertainty, to propose new reforms, modest institutional refinements might nonetheless enhance the long-term efficacy, legitimacy, and accountability of the current international regulatory bodies—including the G-20, FSB, IMF, and standard-setting bodies.

For instance, further reforms are necessary to enhance the global legitimacy of the FSB, as well as its national legitimacy within non-member states. The Regional Consultative Groups (RCGs) represent an important step toward more robust global legitimacy but do not fully compensate for the explicitly extraterritorial mission of the FSB.[244] Even within the existing membership of the FSB, the United States and European Union tend to dominate, given the importance of these financial markets. Exacerbating these concerns is the relatively slow pace of post-crisis reform in Asia—particularly in China and India—where the effects of the financial crisis were less acute and domestic policymakers lack the sense of urgency felt by their European and U.S. counterparts.[245] Reforms aimed at enhancing the legitimacy of the FSB thus need to elevate the role of non-Western voices in organizational decision-making and foster more engagement by non-G-20 countries, but without diluting the key reforms required in the United States and Europe.

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244. *See* Eric Helleiner, *FSB Governance*, *in* GLOBAL FINANCIAL GOVERNANCE & IMPACT REPORT 2013, at 9-10 (New Rules for Global Finance ed., 2013).

245. *See* Ignazio Angeloni & Jean Pisani-Ferry, *The G20: Characters in Search of an Author* 27 (Breugel, Working Paper No. 4, 2012).

The FSB should still be wary of simple strategies like membership expansion without concomitant governance reforms. Even with only sixty-four members, the plenary is unwieldy—achieving the consensus necessary to act will only become more difficult if this membership grows. IAIS and IOSCO are paradigmatic examples of a more inclusive membership policy compromising organizational efficacy.[246] Before expanding its membership, the FSB should reevaluate its consensus-driven governance mechanisms. It might also adopt a more centralized approach to governance, with authority consolidated in a steering committee, with additional regional representation requirements.

Overall, the G-20 has signaled its awareness of the need to increase ownership of the global financial architecture by the major emerging economies. In 2012, for instance, the G-20 directed reforms to the FSB steering committee, including "representation from the executive branch of the 'G20 Troika' countries (the previous, existing, and subsequent G20 chairs) and of the five countries whose financial sectors were most systemically important."[247] To bind the emerging economies more firmly to the project of global reform, the FSB might rotate its meetings, as the G-20 has done since its first meeting in Washington, D.C. in 2008.

Commentators have suggested that a balance between broader and continued efficacy could be achieved through some version of the constituency system used by the IMF and World Bank (although these institutions, of course, have their own legitimacy concerns).[248] In the case of a consolidated steering committee, this might entail the division of plenary members into regional blocs, the equitable allocation of committee seats across these blocs, and the explicit expectation (via charter amendment) that each committee member represent not only its own national interests but also the broader interests of its bloc. A revamped steering committee could also be aligned more closely with the RCGs, with Committee members required to serve as co-chairs of the RCGs, thus ensuring that even non-member states have a relatively

246. *See* BRUMMER, *supra* note 50, at 78-79.

247. Helleiner, *supra* note 244, at 11.

248. *See id.* at 10; *see also* Angeloni & Pisani-Ferry, *supra* note 245, at 43 (describing remarks by former U.K. Prime Minister, Gordon Brown, and WTO head, Pascal Lamy, in favor of a constituency system at the level of the G-20). *But see* Truman, *supra* note 94, at 17 (noting that the "disadvantage of constituencies is that individual leaders feel constrained by obligations to represent the consensus of their constituencies and speak and act less freely.").

direct channel to the decision-making processes of the FSB.[249] In my judgment, however, these reforms are unlikely to improve the outcome of decision-making of the FSB. "Representatives" of blocs are more likely, not less, to "vote" for substantive outcomes that reflect suboptimal political jockeying, and the formalization of regional voting blocs seems likely to result in the further stymieing of reform.

Further reforms are also necessary to enhance the global accountability of the FSB and to address concerns about private-sector capture. For instance, FSB might increase operational transparency, better publicizing its meetings and other policymaking activities.[250] A 2012 Charter modification addressed some of these concerns, mandating periodic reporting to the G-20 and resulting in the development of a public website.[251] A 2013 civil-society review of FSB operations noted, however, that the board "still does not release much information to the general public about its meetings, including those of its Plenary and the RCGs."[252]

Although enhanced disclosure might help accountability, the narrow pursuit of transparency might also exacerbate capture. To the extent that the opaque decision-making processes of the FSB function as a secret ballot box of sorts, some measure of opacity might disrupt the influence of private-sector lobbying and enable member officials to make unpopular but sound decisions. It might also make private-sector actors less likely to extract promises from member officials by eliminating any means of evaluating compliance. Increased transparency might also disproportionately redound to the influence of private-sector actors to the extent that they possess more technical capacity and organizational resources to lobby than civil-society organizations.

On balance, though, enhanced transparency would enhance the legitimacy and accountability of the FSB. The FSB decision-making process is, in many ways, more complex and opaque than the domestic regulatory process. On the one hand, the FSB is making the sort of merits-driven policy judgments that more insulated domestic regulatory agencies make. On the other hand, much of its decision-making resembles the multilateral system of negotiation, coordination, and compromise that marks more formalized treaty-based regimes. Thus, even if enhanced transparency cannot directly shape institutional outcomes, it can help clarify the decision-making processes underlying

249. *See* Helleiner, *supra* note 244, at 10 (advocating similar reforms in the Plenary).

250. *See id.* at 10-11 (describing potential transparency and disclosure reforms).

251. FSB Charter art. 5(1).

252. Helleiner, *supra* note 244, at 10.

these outcomes such that domestic rule-making processes can better anticipate and compensate for these deficiencies.[253]

To increase transparency, and to strengthen linkages between national and global process, the FSB should formally adopt—via its Charter—procedures for notice-and-comment rule-making.[254] By developing structured processes for civil-society and private-sector actors to review and comment on proposed rules, the FSB would help ease coordination difficulties between the international and national regulatory processes and might also enhance procedural safeguards for impacted financial institutions. Currently, for instance, the process by which FSB and the other ISSBs arrive at G-SIFI determinations lacks robust procedural protections.[255] Notice-and-comment rule-making would extend to institutions affected by these determinations something akin to due process rights—the sort of rights already built, for example, into the FSOC's non-bank SIFI determinations in the United States.[256]

At the global level, the FSB might also consider a range of other governance mechanisms to give more weight to civil-society voices.[257] First, it might amend its Charter explicitly to include civil-society organizations alongside "private sector and non-member authorities"

253. One example of where this process-oriented transparency could be beneficial is in the case of the Basel III rules capping investments in other financial institutions, mortgage servicing rights, and deferred tax assets in full against Tier 1 capital. BASEL III CAPITAL PROPOSAL, *supra* note 189. Under Basel III, adjustments from any one of these sources may be no more than 10% of Common Equity Tier 1, and aggregate adjustments from all sources may be no more than 15% of Common Equity Tier 1. *Id.* paras. 87-88. Directionally, these rules reflect the on-the-merits policy judgments of the Basel Committee, and represent a strengthening of the more permissive Basel II regime. Substantively, however, these rules are still too weak—these assets should not be counted toward Common Equity Tier 1 capital—a symptom of international negotiation and compromise. More institutional transparency would likely not improve the quality of these rules—but it would provide more procedural clarity such that domestic rulemaking could better anticipate and account for these deficiencies.

254. *See also* BRUMMER, *supra* note 50, at 197-98 (describing the G-20 and FSB as laggards in the area of notice-and-comment rulemaking and other, similar accountability mechanisms).

255. In the past, the FSB has simply published an annual list of G-SIFIs and G-SIBs, using a relatively rigid methodology developed by the Basel Committee. *See, e.g.*, FIN. STABILITY BD., 2013 UPDATE OF GROUP OF GLOBAL SYSTEMICALLY IMPORTANT BANKS (2013), *available at* https://www.financialstabilityboard.org/publications/r_131111.pdf.

256. Financial Stability Oversight Council, Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies, 12 C.F.R. Part 1310 (2012), *available at* http://www.treasury.gov/initiatives/fsoc/documents/nonbank%20designations%20-%20final%20rule%20and%20guidance.pdf.

257. For a discussion of the importance of civil society voices in domestic regulatory controls, see, for example, Michael S. Barr, *Credit Where It Counts*, 80 N.Y.U. L. REV. 513, 601-02 (2005).

among the parties with which it can consult.[258] The Charter might also be amended to permit civil-society observers—in addition to private-sector observers—at plenary sessions, when invited by the chair.[259] Other commentators have suggested that civil-society organizations also be allowed to observe and participate in the work of the RCGs.[260] And while the 2012 Charter amendments provided for some form of public consultation,[261] the FSB might consider dedicating secretariat staff to civil-society consultation and outreach. Dedicated secretariat staff would ensure a more direct link between civil-society groups and FSB policy-making and might create more parity with private-sector groups by giving civil-society groups access to in-house technical expertise.

Reflecting concerns about capture and organizational independence, the FSB has also considered—and rejected, at least for now—the adoption of a membership fee.[262] This was a wise decision, as a membership fee would tie the fiscal status of the board to the political commitment of the G-20 nations. The lessons of the FSF are instructive here: resistance from a single nation—in that case, the United States—can easily torpedo the institutional efficacy of politically dependent institutions.[263] Furthermore, the experience of both the FSF and IASB suggests that reliance on membership fees requires significant organizational investment in the recovering of fees from members and only increases opportunities for capture.

Instead, BIS funding might actually provide more long-term viability for the FSB; the BIS is embedded in the global regulatory architecture and thus relatively less affected by waning interest in reform from the G-20 political leadership. At the same time, the FSB should modestly expand the size of its secretariat and should diversify its staffing both on a regional basis and across a broader variety of expertise. A larger, more diversified secretariat would preserve the institutional benefits of a

258. FSB Charter art. 3; *see also* Helleiner, *supra* note 244, at 11 (discussing the need for FSB consultation with civil society groups).

259. *See* Helleiner, *supra* note 244.

260. *See id.*

261. FSB Charter art. 3.

262. FIN. STABILITY BD., *supra* note 141, at 3.

263. *See* Donnelly, *supra* note 146, at 263 (describing how the prior refusal of the United States to submit itself to the IMF's Financial Sector Assessment Program left the FSF with "very little to do or room or inclination to grow further institutionally."). The United States in 2009 agreed to submit itself to the FSAP review and, needless to say, survived the process. *See* INT'L MONETARY FUND, UNITED STATES: PUBLICATION OF FINANCIAL SECTOR ASSESSMENT PROGRAM DOCUMENTATION (2010), *available at* https://www.imf.org/external/pubs/ft/scr/2010/cr10247.pdf.

financial relationship with BIS while improving the FSB's independent technical and policymaking capabilities.

Finally, further reforms are also necessary to strengthen FSB's efficacy, at both the national and international levels. At the national level, the FSB currently lacks any mechanisms for censuring noncompliant members (that is, members that fail to implement the standards promulgated by the FSB directly or through the standard-setting bodies it oversees).[264] One way to enhance national efficacy is to transform the FSB into a treaty-based regime; however, such a transformation is unlikely. The FSB's high-level working group considered such a transformation prior to the Los Cabos Summit in 2012; this approach was rejected as inappropriate at the time, and perhaps rightly so. A treaty-based regime would reduce or eliminate the benefits of national variation and provide opportunities for the financial sector to bludgeon national regulators into implementing weaker standards.

Different, but related, concerns also militate against the inclusion of financial regulation in global trade talks, including the addition of prudential concerns to transatlantic talks between the United States and European Union over the proposed Transatlantic Trade and Investment Partnership.[265] Squeezing the task of financial reform into trade talks would make it far easier for reforms to be assimilated into omnibus negotiations and domestic ratification and traded away in exchange for resolution of other global concerns.[266]

Some have suggested that the FSB could be housed formally within the IMF.[267] This would root the FSB within the hard-law, treaty-based regime of the IMF, with the goal of increasing its accountability and legitimacy. But the IMF is hardly a bastion of either value. Indeed, much of the developing world's critique of the IMF has been focused on its weighted voting that even after recent governance reforms still favors the developed world; its remoteness from local civil society or national mechanisms of accountability; and its insufficient efforts

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264. *See* Helleiner, *supra* note 244, at 12 (lamenting the FSB's lack of tools to force compliance).

265. Michael S. Barr, *Keep Financial Regulation Out of US-EU Trade Talks*, PROJECT SYNDICATE (Jul. 29, 2013), http://www.project-syndicate.org/commentary/us-eu-trade-talks-versus-financial-regulation-by-michael-s--barr.

266. *Id.*

267. *See* Pauly, *supra* note 170, at 17 (recommending that "member states should let the FSB do its modest work with its modest staff but then accept the necessity of embedding that work deeply into a larger collaborative macroeconomic policy arrangement," and suggesting that the IMF is the "coordinating institution . . . that fully engages the attention of heads of government, finance ministers and key legislators").

toward becoming a truly transparent body. Moreover, insertion of the FSB in the IMF would also risk subordinating the financial mission of the FSB to the more properly macroeconomic and monetary mission of the IMF. This option also lacks political viability, as the G-20 would lose direct authority over FSB operations (although G-20 nations do largely control IMF operations via their significant voting shares).[268]

A more modest approach might tie noncompliance with FSB policy standards to loss of membership privileges within FSB.[269] Failure to comply with these standards would jeopardize participation in the steering committee and other key FSB policymaking bodies.[270] Even this small step toward national efficacy, however, might threaten the fragile G-20 coalition that undergirds the FSB's authority. Although the FSB Charter was "not intended to create any legal rights or obligations,"[271] it, along with the articles of association, *does* condition membership on a commitment to national compliance.[272] And, short of a treaty-based sanction regime, the FSB still possesses significant informational authority over its membership.

Peer reviews can force compliance through interstate political pressure and should not be underestimated as an enforcement tool. Although more serious concerns might arise if the G-20 political commitment to reform wanes, the institutional efficacy and influence of the FSB would best be served by strengthening its peer review mechanisms and leveraging the interstate pressure that such surveillance generates. As in the case of accountability, a larger, more independent secretariat and a larger role for the secretary general would bolster the FSB's peer review system.[273] Indeed, the principal advantage of registering as a Swiss association is the FSB's legal authority to hire its own staff. Regardless, the more independent and purely technical the peer review process becomes, the easier it becomes

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268. *See* Int'l Monetary Fund, *IMF Members' Quotas and Voting Power, and IMF Board of Governors*, INT'L. MONETARY FUND, http://www.imf.org/external/np/sec/memdir/members.aspx (last updated May 4, 2014).

269. *See* Tony Porter, *Making the FSB Peer Review Effective*, *in* THE FINANCIAL STABILITY BOARD, *supra* note 90, at 39, 40.

270. *Id.*

271. FSB Charter art. 16.

272. *Id.* art. 5(1).

273. Bessma Momani & Eric Helleiner, *Financial Stability Board: The Arduous Road to Mission Accomplished*, CTR. FOR INT'L GOVERNANCE INNOVATION (May 18, 2012), http://www.cigionline.org/publications/2012/5/financial-stability-board-arduous-road-mission-accomplished ("The FSB's capacity to support extensive peer reviews has been constrained by the very limited size of its staff . . . .").

for major economies like those of the United States and Europe to discipline wayward members within the political confines of the G-20.

Much more could be done as well to tether the activities of the FSB and the standard-setting bodies to national mechanisms of accountability, transparency, and legitimization.[274] International standard-setting already contemplates national methods of execution. In both the United States and Europe, for example, this involves forms of notice-and-comment rule-making, albeit with different procedures, standards, and to some extent, expectations regarding the modes of engaging public voice and fostering transparency. These national (or in the case of the European Union, supranational) administrative processes should be seen as part of a transnational, nested set of systems to enhance the legitimacy and accountability of the global financial regulatory architecture.

These national systems could be further bolstered by facilitating public input into the decisions of national finance ministries and regulators *before* they agree to global standards, akin to a kind of "advance notice of proposed rulemaking" for the global negotiating space. National mechanisms could also make greater space for transparent, open mechanisms for civil-society organizations to provide input into national decision-making prior to finalizing (or in some instances, entering into) negotiations over key global-reform initiatives. While these national mechanisms to promote civil engagement and enhance transparency will not automatically guarantee better substantive outcomes, they may help bolster the case that the ultimate judgments of the FSB and the standard-setting bodies, as well as the ultimate implementation decisions of national regulatory authorities, are legitimate.

Beyond national mechanisms, reforms should focus on the relationship among the FSB, standard-setting bodies, and three other pillars of global economic governance: the IMF, World Bank, and WTO. Here, an expanded secretariat would also prove helpful, increasing the FSB's surveillance and policymaking capacities and making it more difficult for the standard-setting bodies to evade board oversight. As to the IMF, however, reform is not possible without direct intervention by the G-20, as tensions between the IMF and FSB raise issues that are fundamental to the global financial architecture: the division of labor between apex-level bodies like the FSB, World Bank, and IMF; the relationship

274. *See* Barr & Miller, *supra* note 1, at 28-31.

between the G-20, the institutions it oversees directly, and the set of institutions under the umbrella of the United Nations and ECOSOC; and the long-term mission of the G-20 itself.

Like the FSB, the G-20 might benefit from some degree of increased institutionalization.[275] It would ideally become more transparent and increase its communication and collaboration with other global bodies, including the IMF, World Bank, and United Nations.[276] The G-20 has taken some steps in this direction, engaging in more consultation with regional bodies and strengthening its own peer review mechanisms.[277] At some point, it may also make sense for the G-20 to adopt a formal charter and staff a small secretariat.[278] For now, however, there is good reason to be cautious about further hardening: the G-20 depends on the political commitments of its national members, and maintaining its coalition requires substantial strategic and operational flexibility. Furthermore, the national variation that has emerged in the absence of a more institutionalized G-20 has, at least to date, resulted in a much stronger set of cross-border financial rules.

Instead, any G-20 reforms—and any subsequent rationalization of the international regulatory order—depend on the G-20's clarifying and refining its own mission. Until the G-20 begins to develop blueprints for the post-crisis, post-response institutional architecture, the current web of organizational relationships among the FSB, standard-setting bodies, and Bretton Woods institutions will remain ad hoc. On the one hand, this lack of clarity produces important institutional experimentation;[279] it helps surface tensions and concerns and can inform subsequent architectural refinements.[280] On the other, it compromises institutional efficacy and incentivizes delay in national compli-

275. *See* Nancy Alexander, *G20 Governance*, *in* GLOBAL FINANCIAL GOVERNANCE & IMPACT REPORT 2013, *supra* note 244, at 20, 20-24 (proposing a variety of G20 reforms). *But see* Truman, *supra* note 94, at 17-18.

276. *See* Alexander, *supra* note 275.

277. *Id.*

278. *Id.*

279. *See* Romano, *supra* note 242, at 35-38 (arguing for more flexibility and experimentation in the international regulatory architecture).

280. *See* Hafner-Burton et al., *supra* note 64, at 88 ("[I]mprecision, as with nonbinding agreements, can lead to more cooperation . . . ."); *id.* ("[E]vidence abounds that hierarchical legal forms are impractical and that they undercut the experimentation and learning that are crucial in the early stages of developing useful law around cooperation problems; the best solutions are typically difficult to identify at the outset.").

ance and implementation.[281] Thus, particularly as the major economies complete implementation of the G-20's post-crisis agenda, the most sensible reform is for the G-20 to begin thinking about what a role beyond crisis management might look like and how its mission and institutional design may need to be augmented in order to accommodate the broader task of long-term governance.

## IV. Conclusion

The global financial regulatory architecture has evolved significantly since 1944. The first set of global regulatory institutions—the IMF, the World Bank, and the trade regime eventually embodied in the WTO—while concerned with key problems in international money, paid scant attention to the problem of global, cross-border supervision and regulation of financial firms and markets. This institutional lacuna gave rise to the networks—informal, bureaucratic standard-setting bodies—that initially caused significant concerns about legitimacy and accountability but that eventually began to develop nascent mechanisms of global administrative law.[282] The rules these institutions produced, however, did not work, to say the least, as the most recent financial crisis revealed. In the immediate aftermath of the crisis, the political leaders of the leading global economies asserted themselves more forcefully, producing a new set of institutions and institutional relationships that were more formal, more political, and more hierarchical. Although significant tensions still exist within this new system—particularly as among national variation, extraterritorial application of national rules, and the desire for uniform global standards—the substantive outcomes to date, while imperfect, messy, and contentious, evidence a stronger commitment to meaningful, long-lasting reforms.

There is still much more substantive work to do—on capital and liquidity, resolution, and derivatives, to name a few core areas in need of action. In fact, such an approach is essential to reduce the chances of another devastating global financial crisis. On bank resolution, the United States has a solid framework in place but is still working through how to make winding down a major financial firm plausible; in Europe, there is agreement on the need for resolution authority but a lot more to do to make this authority work within the context of E.U. member

281. *See id.* at 74 ("One of the challenges . . . is to obtain the advantages of flexibility while still sending credible signals. Imprecision and other forms of flexibility must not be so elastic that states misinterpret short-term variations in behavior as long-run deviations from compliance.").

282. *See* Barr & Miller, *supra* note 1.

states' legal and political frameworks, and structural reform proposals remain divisive. On derivatives, there is now general agreement on how to approach trading, clearing, and transparency, but much more work to do on capital requirements, margin requirements, clearinghouse supervision, global coordination on trade repositories, determination of equivalency across national borders, and other issues. Wholesale funding mechanisms, including repo transactions and securities-financing transactions, remain a source of risk in the system. Capital rules are taking shape, but a final agreement on liquidity and leverage must still be worked out, capital standards for the largest firms are still too low, and transparent, comparable, and tough stress testing in Europe and the United States, as well as consistent implementation of risk-based rules globally, will be critical going forward.

Ultimately, the strength of these reforms cannot be judged absent the next crisis. But if the post-crisis reforms are to endure, the system must shift from the task of emergency response to the project of governance, a project that will require more institutional clarity, and more sensitivity to the concerns of legitimacy and accountability, both globally and nationally. Conceptually "easy" answers—a treaty-based World Financial Organization, centralized adjudication, a global financial supervisor, and resolution authority, to name a few—are neither politically feasible nor normatively desirable. Instead, we are left with a messier, more iterative, less satisfying, but more realistic task: to continue to make progress on making the global financial system safer, fairer, and, one would hope, more focused on meeting the pressing needs of households and business in the real economy.