THE REFORM OF THE INTERNATIONAL FINANCIAL ARCHITECTURE AFTER THE GLOBAL CRISIS

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I. INTRODUCTION: FINANCIAL LAW AND FINANCIAL CRISES

The title of Andreas Lowenfeld's remarkable book *International Economic Law* is an understatement, as this fundamental work actually combines two treaties, one on International Economic Law and another on International Monetary Law. The

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latter comprises more than 300 pages and ranks among the most significant publications in this field over the past few decades.[1] Although this book does not contain a general presentation of the international financial architecture—a rather recent concept, which emerged after the end of the Bretton Woods monetary system, which was displaced by decentralized global financial markets—it includes a number of seminal remarks on the international financial standards developed by the Basel Committee on Banking Supervision. In effect, these remarks apply to all international financial standards. Thus, we read that, while the Basel Accords on capital requirements for international banks are not treaties within the meaning of international law, they "are more than 'soft law'; they reflect mutual commitments made after intense negotiations, and taken together, they contain both incentives for compliance and at least the suggestion of meaningful sanctions for non-compliance."[2]

In the light of these remarks, and considering the wide scope of the international financial standards, one may wonder why they failed to avert or at least mitigate the global financial crisis which broke out in 2008–2009. As a consequence of this unprecedented crisis, a number of initiatives have been taken in attempts to reform the international financial architecture and to make it more crisis-resistant. In this reform process, the April 2009 London summit of the G-20 was no doubt a landmark.

Before attempting an overview of the situation resulting from said reform process, it should be recalled that financial law—whether domestic or international—has always developed as a child of crises. This was obvious when modern banking supervision emerged (together with domestic banking legislation in most financial centers) in the wake of the world economic crisis of the 1930s. The same happened after the end of the Bretton Woods system when the uncontrolled expansion of international financial markets (then called "euromarkets") in the 1970s prompted concerns about those markets escaping proper national oversight. After the Herstatt

1. For another particularly fundamental book, see CHARLES PROCTOR, MANN ON THE LEGAL ASPECT OF MONEY (6th ed. 2005).

2. ANDREAS LOWENFELD, INTERNATIONAL ECONOMIC LAW 845 (2d ed. 2008); *see also id.* at 813.

affair in late 1974,[3] these concerns led to the establishment of the Basel Committee on Banking Supervision (BCBS),[4] which was to be the first of a number of bodies charged with setting international financial standards (IFSs).[5] Again, in 1999 the concept of International Financial Architecture (IFA) was cast by politicians after the Asian crisis, which prompted the creation of the G-20[6] and the Financial Stability Forum (FSF) to coordinate the activities of the various financial standard-setting bodies, such as the BCBS and IOSCO. These initiatives were taken with a view to avoiding regulatory gaps that might generate a systemic risk at the international level. Following the global financial crisis of 2008 and 2009, triggered by the US domestic subprime mortgage crisis, the G-20 has been revived and has now been entrusted with the task of sponsoring global financial regulation with increased responsibilities for the IMF and the FSF, renamed the Financial Stability Board (FSB),[7] and with the support of the existing standard-setting bodies.

Looking back, it may seem astonishing that the global financial crisis of 2008 and 2009, by far the worst since the 1930s, happened at the *international* level despite the existence of a comprehensive *corpus* of international financial standards (IFSs) that had been developed over the last thirty-five years and covered most areas of international financial law. Did the international financial architecture turn out to be a product of

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3. The failure of the German bank Herstatt, which had been heavily involved in financial operations in the Euromarkets, illustrated the problem of counterparty settlement risk. *See, e.g.*, JEFF GARNET, The Politics of Behind the EU Interbank Payment System: A Problematic Standard for Developing and Emerging Market Economies 6 (2006), *available at* http://www.garnet-eu.org/fileadmin/documents/workshop_reports/JERP%205.2.4:%20Global%20Economic%20Governance%20and%20Market%20Regulation/Jeffs_Garnet_2006.pdf.

4. The BCBS provides a forum for international cooperation on bank supervision, and its secretariat is located at BIS in Basel, Switzerland. See http://www.bis.org/bcbs for comprehensive information on the BCBS.

5. One such body is the International Organization of Securities Commissions (IOSCO). See http://www.iosco.org for comprehensive information on IOSCO.

6. See http://www.g20.org for comprehensive information on the Group of Twenty (G-20).

7. See http://www.financialstabilityboard.org for comprehensive information on the Financial Stability Board (FSB) and its predecessor, the Financial Stability Forum (FSF).

"fair weather architecture"?[8] With the benefit of hindsight, it now seems appropriate (I) to take stock of the main features of the crisis and to examine how it was able to occur notwithstanding the existing IFSs; (II) to summarize the initiatives taken so far with a view to strengthening the international financial architecture and IFSs; (III) to provide an overview of the reformed international financial architecture, especially its institutional and procedural aspects, following the April 2009 London summit; and, finally, (IV) to provide a tentative outlook on the implementation and future role of the IFSs.

II. The Outbreak of the Global Crisis Notwithstanding Existing IFSs Intended to Eliminate Systemic Risk

International Financial Standards (IFSs) can be defined as a set of minimum financial standards applied globally in order to prevent systemic risk.[9] The best known standard is the eight percent minimum capital requirement for credit institutions, a requirement established by the BCBS. The international financial architecture is comprised of the various institutions that produce and implement IFSs, the oldest and probably best known of which is the BCBS (Basel Committee). The IFSs developed since 1975 take the form of recommendations embodying widely accepted principles, practices, or guidelines, which were adopted by most countries through incorporation into national legislation, although the IFSs have no legally binding power as such. Twelve key standards are defined in a Compendium published by the FSF (now the FSB) and the IMF monitors their implementation in member countries through Reports on the Observance of Standards and Codes (ROSCs) and Financial Sector Assessment Programs (FSAPs),

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8. Mario Giovanoli, *A New Architecture for the Global Financial Market: Legal Aspects of International Financial Standard Setting*, *in* International Monetary Law, Issues for the New Millennium 59 (Mario Giovanoli ed., 2000). The question asks whether the soft law character of IFSs render them ineffective and unreliable, especially during crisis situations, and only able to stand up in fair weather. This article is one of the first comprehensive presentations of international financial standard setting, and its essential findings regarding the complex problems and legal deficits in this area appear to be still valid.

9. In a wider meaning, IFSs also include curative measures to deal with an international financial crisis or with a sovereign default.

together with the World Bank.[10] The implementation of the IFSs is further encouraged by a number of market and official incentives, the latter of which may take the form of peer pressure, peer assessment, or even blacklisting of non-cooperative countries or territories (in particular in the field covered by the FATF principles,[11] which combat money laundering and terrorist financing, and within the ambit of the OECD[12]).

The question thus arises: Why were the IFSs unable to prevent, or at least mitigate, the current global financial crisis? Indeed, the whole purpose of these standards is to cope with so-called systemic risk,[13] in other words the risk that a default, liquidity squeeze, or crisis in a given market, sector, or jurisdiction will spread to other markets, sectors, and jurisdictions and eventually develop into a full-fledged global financial crisis. To address this risk, the standards in the FSF Compendium, particularly the twelve key standards, aim at eliminating supervisory and regulatory gaps in any jurisdiction that might give rise to such systemic risks for international financial markets.

To say the least, the existing IFSs, despite their wide scope and sophistication, did not prevent the outbreak of the current crisis. Indeed, what initially was essentially a domestic crisis (admittedly in the world's largest economy) resulted in a worldwide financial and economic crisis. The sequence of events may be summarized, although in a simplified manner, as follows:[14]

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10. On ROSCs and FSAPS, see François Gianviti, *Legal Aspects of the Financial Sector Assessment Program,* 3 CURRENT DEV. IN MONETARY AND FIN. L. 219 (2005); see also http://www.imf.org/external/index.htm and http://www.worldbank.org.

11. See http://www.fatf-gafi.org for comprehensive information on the FATF and its 40 Recommendations combating money laundering and the 9 additional Recommendations combating terrorist financing.

12. See http://www.oecd.org for detailed information on the action of the OECD, particularly in the areas of public and corporate governance, fighting corruption, and international taxation.

13. On the concept of systemic risk, see Steven L. Schwarcz, *Systemic Risk,* 97 GEO. L. J. 193 (2008); *see also* Luc Laeven & Fabian Valencia, *Systemic Banking Crises: A New Database* 32-49 (IMF Working Paper No. 08/224, 2008) (for a database of systemic banking crises worldwide over 37 years).

14. For an in-depth analysis of the causes of the financial crisis, see *High-Level Group on Financial Supervision in the EU,* at 7-12 (Feb. 25, 2009), *available at* http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf [hereinafter *Larosière Report*].

(1) an *essentially domestic crisis* occurred within the subprime mortgage market in the United States against the backdrop of an expansive monetary policy, following exaggerated and imprudent lending to borrowers who did not meet normal criteria of creditworthiness;[15]
(2) as a consequence of the *securitization* of these credits, they were resold en masse to banks and other financial intermediaries all over the world;
(3) *credit default swaps* led to additional dissemination of the related credit risks;
(4) when the U.S. subprime mortgage market eventually collapsed after the burst of the real estate bubble, the related assets became virtually worthless ("*toxic assets*");
(5) when it appeared that a number of major banking institutions and other financial intermediaries all over the world held large exposures of toxic assets, general mistrust among banks caused the *quasi-disappearance of the interbank money market*;
(6) extensive *governmental support of the financial sector* (through guarantees of interbank loans, purchases or swaps of toxic assets, creation of "bad banks" to take over such assets, fresh capital, and takeovers of nearly defaulting banks) only partially restored confidence;
(7) the credit crunch resulting from the financial crisis eventually affected the *larger economy*, which fell into a deep *recession;*
(8) governmental support packages to the larger economy, in addition to the support already granted to the financial sector, massively *increased public deficits* (and increased potential inflationary pressure in the future);
(9) the rapidly increasing indebtedness of some countries raises concerns about their ability to meet their financial obligations in the future (expressed

15. In this connection, it is worthwhile mentioning that in the United States, the massive extension of mortgage credits beyond usual prudential limits was encouraged by political pressure (e.g., the Community Reinvestment Act, 12 U.S.C. §2901 (2007) and its later enforcement) on banks to provide credit access to all classes of the population (including low-income classes).

through increased spreads for newly issued debt) and may lead to *strains in international monetary relations.*

The current crisis provides a perfect illustration of systemic risk at the international level—the contamination of other markets, sectors, or jurisdictions following defaults in a given domestic economy. The impressive corpus of IFSs established over the last thirty-five years, aimed precisely at eliminating systemic risk, failed to do so. Did the IFSs help mitigate that risk, at the very least? It is impossible to know how the crisis would have developed in the absence of IFSs. On the other hand, it has been suggested that some of the rules introduced, or at least recommended, by the IFSs may have contributed, in a sort of perverse manner, to the emergence, aggravation, or international dissemination of the crisis. For instance (without limitation):

- The rules of Basel I and Basel II[16] provide for detailed and costly capital requirements which create powerful incentives for financial intermediaries to remove credits (particularly those of lesser quality) from their balance sheets by way of securitization (repackaging them and selling them to investors);[17]
- As regards securitization, the rules of the BCBS emphasize the requirement that the bank selling a credit portfolio to a special purpose vehicle (with a view to issuing securities to be sold to third parties) does not retain any responsibility or provide any guarantee with regard to the repackaged credits, whatever their quality;
- Mark-to-market accounting, heavily promoted at the international level may well enhance day-to-day transparency, but it also increases volatility of assets and has a procyclical effect: accounting gains in good times give rise to higher profits (instead of being kept as undisclosed reserves), while accounting losses in bad times must immediately be covered, although the assets in question were intended to be kept on the books of the

16. Basel I refers to the Basel Capital Accord of 1988, and Basel II to its revised 2004 version. For details on the Basel Committee's capital adequacy agreements, see http://www.bis.org/bcbs/history.pdf.

17. *Larosière Report*, *supra* note 14, at 9.

bank as long-term investments which might eventually recover their initial value;[18]

- With a view to a more sophisticated measurement of capital requirements, Basel II took into account the risk appraisals made by rating agencies;[19]
- With regard to securitized credits, it appears that the standing of the issuing bank was retained as the main criterion rather than the quality of the repackaged credits, for which no guarantee was provided by the issuer of the paper.

Beyond the unintended side-effects, it appears that some very basic prudential rules were overlooked, disregarded, or simply ignored—either at the national level or through IFSs. First, credits should not be extended (irresponsibly) to borrowers who are unable or unlikely to meet the corresponding financial obligations in the long run;[20] moreover, borrowers should not be lured into assuming such obligations by "teasing rates" or the like.[21] Second, there should be a minimum level of quality for credits that are repackaged and sold on the markets following securitization; prospective toxic assets should be excluded from such repackaging. Third, financial intermediaries should not be allowed to build up large exposures on financial instruments for which they are unable to measure the credit risk involved.[22] Fourth, sophisticated financial instruments should be rated not only with regard to the standing of the issuing financial intermediary, but also with primary consideration given to the quality (and risks) of the underlying assets. This is not the place to establish a full inventory of the fundamental flaws that gave rise to the current crisis. It is sufficient to note that the disregard for (or

18. *Id.* at 11-12.

19. *See id.* at 9 (discussing the role of Credit Rating Agencies).

20. *Id.* at 7.

21. Several of the current governmental support packages developed in response to the global crisis appear to be linked to undertakings by the banking institutions benefiting from such support to grant credit to the economy as liberally as possible in order to overcome the credit crunch and to limit the social consequences of the crisis. Such pressure for "credit easing" might again lead to excessive credit beyond purely financial and prudential criteria.

22. For discussion of risk management, see *Larosière Report*, *supra* note 14, at 8-9 (contending that failure on the part of financial firms to assess risks led in large part to the current financial crisis).

non-implementation of, in the ambit of IFSs) such basic rules contributed, to a greater or lesser extent, to the emergence of the crisis and to the contamination of the world financial markets.

To sum up, the current crisis revealed very serious shortcomings not only in the financial industry, but also on the side of regulatory and supervisory authorities, including at the international level.[23] It therefore is useful to take stock of what happened and to examine what responsive measures are being taken to reform the current international financial architecture and to enhance the IFSs in order to prevent future global financial crises.

III. Initiatives Taken So Far in 2008 and 2009 to Strengthen the International Financial Architecture and International Financial Standards

When it became apparent that the domestic U.S. subprime crisis had developed into a full-fledged international financial crisis, a variety of initiatives were taken at the international level with a view toward (1) reforming the international financial architecture and (2) enhancing and supplementing the existing IFSs in order to eliminate dangerous gaps in the supervision and regulation of international financial markets. These international initiatives are mainly of a preventive nature as they aim to make the international financial system more crisis-resistant. However, they also look to improve cross-border crisis management[24] and establish early warning systems.

It should be noted that the measures taken to overcome the current crisis, namely a variety of rescue packages for the financial sector and later for the larger economy, were all pur-

23. *Id.* at 11 ("Multilateral surveillance (IMF) did not function efficiently, as it did not lead to a timely correction of macroeconomic imbalances end exchange rate misalignments. Nor did concerns about the stability of the international financial system lead to sufficient coordinated action, for example through the IMF, FSF, G8 or anywhere else").

24. On March 12, 2009, the FSF endorsed a set of principles for cross-border cooperation on crisis management covering both preparatory work in normal times and appropriate sharing of information and cooperation in crisis times. *See* Press Release, FSF, Financial Stability Forum Meets in London (Mar. 12, 2009).

sued at the domestic level and financed by national governments. Even the initiatives taken within the European Union (EU) merely focused on the coordination of the national rescue plans and on ensuring that they were compatible with European competition rules. Discussions both in the U.S.[25] and in the EU[26] to make more efficient the respective fragmented supervisory authorities, including the idea of creating an integrated European supervisory authority for the financial markets, have also been internally-oriented.

Interestingly, at the international level, the approach chosen was to revive the G-20, "an informal forum that promotes open and constructive discussion between industrial and emerging-market countries on key issues related to global economic stability,"[27] which had been more or less dormant since its inception in 1999, and to establish it as the main forum for reforming the international financial architecture.[28] A first conference at the level of heads of state or heads of government ("Leaders' Summit") was held in Washington, D.C., on November 15th, 2008, and a second meeting took place on April 2nd, 2009 in London.[29] In other words, the "horizontal" approach of intergovernmental co-operation (through the "Gs" and the standard-setting bodies) was preferred over an

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25. *See generally Financial Regulation: A Framework for Crafting and Assessing Proposals to Modernize the Outdated U.S. Financial Regulatory System: Testimony before the S. Comm. on Homeland Sec. and Governmental Affairs* (2009) (statement of Gene L. Dodaro, Acting Comptroller General), *available at* http://www.gao.gov/new.items/d09314t.pdf; CONGRESSIONAL OVERSIGHT PANEL, SPECIAL REPORT ON REGULATORY REFORM (2009), *available at* http://cop.senate.gov/documents/cop-012909-report-regulatoryreform.pdf; DEP'T OF THE TREASURY, BLUEPRINT FOR A MODERNIZED FINANCIAL REGULATORY STRUCTURE (2008) *available at* http://www.treas.gov/offices/domestic-finance/regulatory-blueprint/.

26. On EU financial supervisory recommendations, see generally KAREL LANNOO, CTR. FOR EUR. STUDIES, CONCRETE STEPS TOWARDS MORE INTEGRATED FINANCIAL OVERSIGHT: THE EU'S POLICY RESPONSE TO THE CRISIS (2008); *Larosière Report*, *supra* note 14.

27. About G-20, Mandate, http://www.g20.org/about_what_is_g20.aspx (last visited Oct. 10, 2009).

28. This approach was chosen over the G-7 or the G-10 (which were not considered sufficiently representative), and the International Monetary and Financial Committee of the IMF (which was established as the Interim Committee in 1974).

29. Further information is available on the official website. The London Summit, http://www.londonsummit.gov.uk/en (last visited Oct. 10, 2009).

institutional "vertical" approach (involving an international organization such as the IMF to head the process).[30] In short, the G-20 established itself as the main forum for reforming the International Financial Architecture, which under the guidance of the G-20 would comprise a reformed IMF and an enhanced FSF. Furthermore, the G-20 decided that the FSF should be enlarged to include all G-20 members,[31] and invited the BCBS[32] and other standard-setting bodies[33] to expand their membership.

At the November 2008 Washington summit on the international response to the global financial and economic crisis, the G-20 Finance ministers were tasked with work in five areas, namely:

(1) strengthening transparency and accountability;

(2) enhancing sound regulation;

(3) promoting integrity in financial markets;

(4) reinforcing international cooperation; and

(5) reforming the International Financial Institutions (IFIs).

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30. During the unfolding of the crisis, the role of the IMF remained essentially limited to financial support to a few countries mostly in Eastern Europe. The list of the Standby Agreements (SBAs) granted by the IMF may be found at http://www.imf.org. Between November 2008 and May 2009, the beneficiaries of SBAs included Armenia, Belarus, Bosnia and Herzgovina, Georgia, Hungary, Iceland, Latvia, Romania, Serbia, and Ukraine, as well as Iceland.

31. This decision was made on March 11-12, 2009. *See* Press Release, FSB, Financial Stability Board Decides to Broaden its Membership (Mar. 12, 2009) [hereinafter FSF Decides to Broaden], *available at* http://www.financialstabilityboard.org/press/pr_090312b.pdf.

32. Decision made in two rounds on March 13, 2009 and June 10, 2009. *See* Press Release, BIS, Expansion of Membership Announced by the Basel Committee (Mar. 13, 2009) [hereinafter Expansion of Membership], *available at* http://www.bis.org/press/p090313.htm; Press Release, BIS, Basel Committee Broadens Its Membership (June 10, 2009) [hereinafter Basel Committee Broadens Membership], *available at* http://www.bis.org/press/p090610.htm.

33. *See* Press Release, ISAC Found., Trustees Enhance Public Accountability Through New Monitoring Board, Complete First Part of Constitution Review, at 1, 3 (Jan. 29, 2009), *available at* http://www.iasb.org/NR/rdonlyres/6A31C6E6-423D-4C6D-A18C-D82DFEBE8FD9/0/PRTrusteesenhancepublicaccountability.pdf (expanding the membership of IASB to 16 members with guidelines ensuring geographical diversity).

To this effect, the G-20 chair created four working groups,[34] each with representatives from all the G-20 countries and co-chaired by two senior officials, one from a developed economy and one from an emerging market economy. These working groups are:[35]

WG 1: Enhancing sound regulation and strengthening transparency (chairs: India and Canada);
WG 2: Reinforcing international co-operation and promoting financial integrity in financial markets (chairs: Mexico and Germany);
WG 3: Reforming the IMF (chairs: South Africa and a special envoy on the international economy);
WG 4: Reforming the World Bank and other Multilateral Development Banks (MDBs) (chairs: Indonesia and France).

The first two working groups are of particular relevance regarding IFSs and the international financial architecture. WG1 made recommendations to strengthen international standards in the areas of accounting and disclosure, prudential oversight, and risk management, while developing policy recommendations to dampen cyclical forces in the financial system and to address issues around the scope and consistency of regulatory regimes.[36] WG2 was in charge of developing proposals to enhance international co-operation in the regulation and oversight of international institutions and financial markets, to strengthen the management and resolution of cross-border financial crises, to protect the global financial system

34. Following the Washington Summit, the UK, as the 2009 Chair of the G-20, worked closely with Brazil (2008 chair) and Korea (2010 chair) to establish the four working groups to advance the work for the G-20 Leaders Summit on April 2, 2009 in London. G-20 Working Groups, http://www.g20.org/about_working_groups. aspx (last visited Sep. 8, 2009).

35. The working groups produced the following reports: G-20 Working Group 1, *Enhancing Sound Regulation and Strenghening Transparency* (Mar. 29, 2009), *available at* http://www.g20.org/Documents/g20_wg1_010409.pdf; G-20 Working Group 2, *Reinforcing International Cooperation and Promoting Integrity in Financial Markets* (Mar. 27, 2009), *available at* http://www.g20.org/Documents/g20_wg2_ 010409.pdf; G-20 Working Group 3, *Reform of the IMF* (Mar. 4, 2009), *available at* http://www.g20.org/Documents/g20_wg3_010409.pdf; G-20 Working Group 4, *The World Bank and other Multilateral Development Banks* (Mar. 2009), *available at* http://www.g20.org/Documents/g20_wg4_010409.pdf.

36. WORKING GROUP 1, *supra* note 35, at 1.

from illicit activities and non-cooperative jurisdictions, and to strengthen collaboration between international bodies and monitor expansion of their membership.[37]

The Declaration of the Washington Summit contains a detailed Action Plan setting forth some fifty measures (some for immediate action, others for later action) implementing the five agreed-upon principles for reform.[38] The basic principle is that all financial markets, products and participants (including hedge funds and other private pools of capital which may pose a systemic risk) must be subject to appropriate oversight or regulation. A Progress Report on the immediate actions of the Washington Action Plan was prepared by the UK Chair of the G-20 in preparation for the London summit in April 2009. The report gives detailed information on the various reforms that have been undertaken.[39]

In anticipation of the London summit, the G-20 Finance ministers and central bank governors met on March 14, 2009, to come to agreement on a number of important issues.[40] In addition, a common European position was developed by the EU,[41] and the G-7 finance ministers and central bank governors expressed their support for the G-20 global plan for recovery and reform.[42] Based on this extensive preparatory

37. WORKING GROUP 2, *supra* note 35, at 13.

38. G-20, *Declaration of the Summit on Financial Markets & the World Economy*, Action Plan to Implement Principles for Reform, at 5-10 (Nov. 15, 2008), *available at* http://www.g20.org.Documents/g20_summit_declaration.pdf.

39. UK Chair of the G-20, *Progress Report on the Immediate Actions of the Washington Action Plan* (Mar. 14, 2009), *available at* https://www.g20.org/Documents/g20_washington_actionplan_progress_140309.pdf.

40. G-20 Fin. Min. & Cent. Bank Governors, Communiqué on the Meeting of Financial Ministers and Central Bank Governors, United Kingdom (Mar. 14, 2009), *available at* https://www.g20.org/Documents/2009_communique_horsham_ uk.pdf.

41. At the EU mini-summit in Berlin on February 22, 2009 (Britain, France, Germany, Italy, Spain and the Netherlands), consensus was reached on a common European position for the London G-20 summit (endorsed at the formal EU summit in Brussels on 19-20 March 2009). For more information, see Press Release, Council of the Eur. Union, 2931st Meeting of the Council 8-9 (Mar. 10, 2009), http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/ en/ecofin/106576.pdf.

42. Statement of G-7 Fin. Ministers & Cent. Bank Governors (Feb. 14, 2009), *available at* http://www.g7finance.tesoro.it/opencms/opencms/handle404?exporturi=/export/sites/G8/it/2009ItalianPresidency/Meetings/

work, at the London summit in April 2009 the G-20 was able to agree on a substantial reform of the international financial architecture, no doubt a landmark in the development of international financial law. In short, this reform means that the global financial system will be based in the future on two pillars, namely the IMF and a reinforced FSF (renamed FSB), under the overall guidance of the G-20.

The G-20 Leaders' Statement published on April 2, 2009[43] contains three main elements. First, in order to tackle the economic crisis, the G-20 heads of state and government pledged to do whatever is necessary to restore confidence, growth, and jobs, to promote global trade and investment and to reject protectionism, to underpin prosperity and to build an inclusive, green, and sustainable recovery for all. Second, to prevent a similar financial crisis from recurring in the future, the leaders committed themselves to repairing the financial system to restore lending, strengthening financial supervision and regulation, rebuilding trust, and reforming global financial institutions to overcome the crisis and prevent future ones. Third, the G-20 agreed to strengthen global financial institutions, in particular by increasing substantially the financial resources available to the IMF and to the multilateral development banks.

Two sections of the Statement are of particular interest for the reform of the international financial architecture: that on *Strengthening financial supervision and regulation*[44] and that devoted to *Strengthening our global financial institutions*,[45] each supplemented by a separate and more detailed Declaration published on the same day.

The essential points of the *Declaration on Strengthening the Financial System* are the following:

February/Communiques/Documents/Comunicato.pdf. They also suggested developing a set of common principles and standards on propriety, integrity, and transparency of economic and financial activity (at the initiative of the Italian Minister of Finance Tremonti). However, the G-20 is not mentioned in this statement.

43. G-20 Leaders, *The Global Plan for Recovery and Reform* (Apr. 2, 2009) [hereinafter G-20 Leaders' Statement], *available at* https://www.g20.org/Documents/final-communique.pdf.

44. *Id.* ¶¶ 13-16.

45. *Id.* ¶¶ 17-21.

- Under the name Financial Stability Board (FSB), the expanded FSF should be re-established with a stronger institutional basis, a broader mandate and enhanced capacity;
- The international cooperation institutions (IMF, WB, OECD, FSB, BCBS, FATF, standard-setters) should be strengthened, in particular by creating supervisory colleges for all significant cross-border firms, cross-border crisis management, cross-border bank resolution arrangements, exit strategies, and early warning exercises;
- The international framework for prudential regulation should be improved (building up capital and liquidity buffers, mitigating procyclicality, risk management of securitization, etc.);
- The scope of regulation should be extended with a view to subject all systemically important financial institutions, markets, and instruments to an appropriate degree of regulation and oversight, taking into account macro-prudential risks across the financial system;
- A number of specific aspects need to be covered, such as hedge funds, credit derivatives markets, executive compensation, action against non-cooperative jurisdictions including tax havens, accounting standards mitigating procyclicality, and credit rating agencies.[46]

The *Declaration on Delivering Resources through the International Financial Institutions*[47] essentially provides for a massive increase of financial resources in favor of the IMF and various multilateral development banks, together with increased and more flexible credit arrangements to address the current crisis and meet the needs of emerging markets and developing economies.

Taken together, the landmark decisions made by the G-20 at the 2008 Washington and 2009 London summits constitute an unprecedented effort to overcome the current crisis and to reform the international financial architecture, no doubt the

46. G-20, *Declaration on Strengthening the Financial System* (Apr. 2, 2009), *available at* http://www.g20.org/Documents/Fin_Deps_Fin_Reg_Annex_020409_-_1615_final.pdf.

47. G-20, *Declaration on Delivering Resources Through the International Financial Institutions*, at 1-2 (Apr. 2, 2009) [hereinafter *Declaration on Delivering Resources*], *available at* http://www.g20.org/Documents/Fin_Deps_IFI_Annex_Draft_02_04_09_-__1615_Clean.pdf.

most significant movement in this field since the 1944 Bretton Woods Conference. Two points deserve to be highlighted: first, these decisions build on the continuing activity of the various standard-setting bodies and the FSF over the last thirty-five years; and second, they illustrate the shift from an institutional monetary system of the Bretton Woods type to the oversight of globally integrated financial markets.[48]

Other (non-G-20) initiatives in this connection include the establishment of a UN taskforce of experts to review the workings of the global financial system. The UN Commission of Experts that was created to this effect[49] was chaired by Professor Stiglitz, who is known to favor the establishment of a UN World Economic Council which would include not only the G-20 but all UN member countries.[50] The UN Commission of Experts' report on reforms of the international monetary and financial system (published on March 19, 2009) contains a number of proposals regarding the international financial architecture, such as:

- The creation of a new global reserve system and reforms of the governance of the IFIs;
- The establishment of a Global Economic Coordination Council, at a level equivalent to the UN Security Council or General Assembly, to "provide a democratically representative alternative to the G-20";
- Reform of financial markets regulation and supervision focusing on financial products safety (including the cre-

48. *See* Giovanoli, *supra* note 8, at 5-8.

49. *See* Office of the President of the General Assembly, *Terms of Reference, Commission of Experts of the President of the United Nations General Assembly on Reforms of the International Monetary & Financial System* (2008), *available at* www.un.org/ga/president/63/letters/doha281108.pdf (setting out the terms of reference for the commission, including information on the composition, scope of work, and procedures).

50. Under this proposal, the UN World Economic Council would link the UN system to existing institutions like the World Bank, IMF, and global trade organizations, as well as coordinate responses to economic issues. It is doubtful whether any such proposal is more realistic in the current geopolitical situation than the suggestions for a World Financial Authority developed some ten years ago in JOHN EATWELL & LANCE TAYLOR, GLOBAL FINANCE AT RISK: THE CASE FOR INTERNATIONAL REGULATION 221 (2000). For a discussion of the Stiglitz proposals, see TIME FOR A VISIBLE HAND: LESSONS FROM THE 2008 WORLD FINANCIAL CRISIS (Stephen Griffith-Jones, José Antonio Ocampo & Joseph Stiglitz eds., 2009).

ation of a Financial Products Safety Commission), comprehensive application of financial regulation, and regulation of derivatives trading and credit rating agencies;

- Enhancing and expanding the FSF to be made accountable; and
- Laying the groundwork for a Global Financial Regulatory Authority.

A think tank called the Group of Thirty (G-30) has taken a further initiative for global financial reform. On January 15, 2009, the G-30 Working Group chaired by P. Volcker published the report *Financial Reform – A Framework for Financial Stability*, which addresses flaws in the global financial system.[51] The report provides eighteen specific recommendations to improve supervisory systems, enhance the role of central banks, improve governance and risk management, address procyclicality via capital and liquidity standards, strengthen financial infrastructure, and increase international coordination. The core recommendations deserve to be highlighted:

> I. Gaps and weaknesses in the coverage of prudential regulation and supervision must be eliminated. All systemically significant financial institutions, regardless of type (including private pools of capital), must be subject to an appropriate degree of prudential oversight.[52]
>
> II. The quality and effectiveness of prudential regulation and supervision must be improved. This will require better-resourced prudential regulators and central banks operating within structures that afford much higher levels of national and international policy coordination (including with a view to avoiding excessive leverage).[53]
>
> III. Institutional policies and standards must be strengthened, with particular emphasis on standards for governance, risk management, capital, and liquidity. Regulatory policies and accounting standards must also guard against procyclical effects and be

51. GROUP OF THIRTY, WORKING GROUP ON FINANCIAL REFORM, FINANCIAL REFORM: A FRAMEWORK FOR FINANCIAL STABILITY (2009), *available at* http://www.group30.org/pubs/recommendations.pdf.

52. *Id.* at 8.

53. *Id.* at 10.

consistent with maintaining prudent business practices.[54]

IV. Financial markets and products must be made more transparent, with better-aligned risk and prudential incentives. The infrastructure supporting such markets must be made much more robust and resistant to potential failures of even large financial institutions.[55] This entails restoring confidence in securitized credit markets, enacting rating agency reforms, providing oversight of Credit Default Swaps and Over-the-Counter markets, ensuring transparency of structured product markets and establishing appropriate resolution mechanisms for defaulting financial institutions in countries where they do not already exist.[56]

It should be noted that most, if not all, of the recommendations of the G-30 report have been taken into account by the G-20 in its decisions, in particular the Action Plan agreed to at the Washington Summit and the Declaration on Strengthening the Financial System established at the London summit.

IV. The International Financial Architecture as Reformed by the April 2009 London Summit (Focusing on Institutional and Procedural Aspects)

A. *Overview*

The reformed international financial architecture, as it now appears following its 2009 restructuring, is based on three dissimilar entities: the G-20, the reformed IMF, and the Financial Stability Board. Each of these institutions has a different membership, mission, and legal status:

1. The *G-20* is an informal political steering group, comprised of nineteen countries and the EU, which has taken up the mission of strengthening, reforming, and overseeing the overall functioning of the international financial architecture, in particular through enhanced financial regulation based on fi-

54. *Id.* at 12.
55. *Id.* at 14.
56. *Id.* at 14-16.

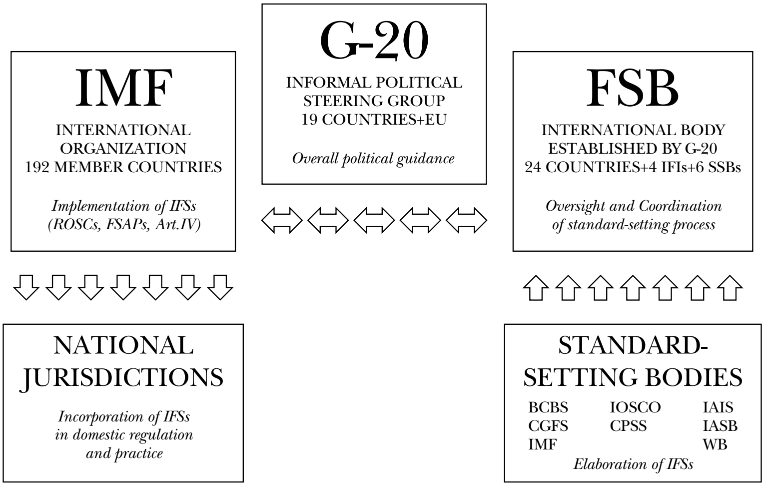
nancial standards agreed upon at the international level;
2. The *reformed IMF* is an international organization with universal membership based on quotas; it focuses on surveillance and the implementation of international financial standards, in addition to its traditional tasks, with increased resources;[57]
3. The *Financial Stability Board (FSB)* is the successor to the Financial Stability Forum, which now includes representatives of twenty-four countries (in addition to the IFIs and the standard-setting bodies), coordinates the standard-setting process, and oversees the standard-setting bodies.

The other actors involved in this process are the standard-setting bodies themselves, which differ widely in legal status and membership, and the national jurisdictions which, with the notable exception of the European Union, have the exclusive competence to incorporate the IFSs into their national legislation, regulation, and supervisory process.

The graphic representation of the International Financial Architecture in Graph 1 may help provide an overview of these elements.

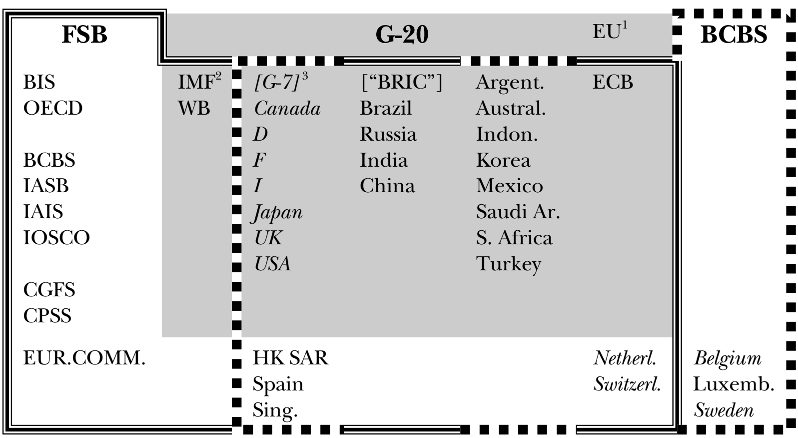
57. *See generally* IMF, History, http://www.imf.org/external/about/history.htm (describing the evolution of the tasks of the IMF).

GRAPH 1: INTERNATIONAL FINANCIAL ARCHITECTURE—GENERAL STRUCTURE



The comparative table of Graph 2 gives an overview of the membership of the G-20, the FSB and the BSCB (Basel Committee on Banking Supervision), the oldest and one of the most important standard-setting bodies.

GRAPH 2: SYNOPTIC TABLE OF MEMBERSHIP IN THE G-20, FSB AND BCBS



[1] Council Presidency
[2] Including chairs of IMFC and Development Committee for the G-20
[3] G-10 countries are in *italics* (G-7 plus Belgium, the Netherlands, Sweden and Switzerland)

In this connection, it may be helpful to recall the contents and legal nature of the IFSs. The FSF defines twelve key standards but there are many more IFSs.[58] These standards have the nature of "soft law;"[59] indeed, as the various international standard-setting bodies have no legislative power, the recommendations of the experts meeting in this ambit do not have any legal force on their own and need to be incorporated into domestic legislation, regulation, and administrative practice by the relevant national legislators of each jurisdiction. The IFSs are not based on an international treaty and thus, at least in theory, their implementation by national authorities is "voluntary." However, within the EU the contents of the major IFSs have been integrated into European directives, the implementation of which is compulsory for the twenty-seven member countries.[60] Nor are the IFSs part of international customary law, according to the prevailing view, as there is no general consensus on their compulsory nature (*opinio juris*).

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58. *See* FSB, Twelve Key Standards for Sound Financial Systems, http://www.financialstabilityboard.org/cos/key_standards.htm (providing a list of the standards and links containing further information). A list of the key standards is provided in the box on the next page (which also indicates the acronym of the relevant standard-setting entity).

59. INTERNATIONAL MONETARY LAW, ISSUES FOR THE NEW MILLENNIUM, *supra* note 8, at 33-34.

60. Giulia Bertezzolo, *The European Union Facing the Global Arena: Standard-Setting Bodies and Financial Regulation*, 34 EUR. L. REV. 257, 267, n.37 (2009).

Twelve key standards defined by the FSF (now the FSB)
1. Code of Good Practices on Transparency in Monetary and Financial Policies (IMF)
2. Code of Good Practices on Fiscal Transparency (IMF)
3. Special Data Dissemination Standard; General Data Dissemination System (IMF)
4. Insolvency and Creditor Rights (World Bank)
5. Principles of Corporate Governance (OECD)
6. International Accounting Standards, IAS (IASB)
7. International Standards on Auditing, ISA (IFAC)
8. Core Principles for Systemically Important Payment Systems (CPSS); Recommendations for Securities Settlement Systems (CPSS/IOSCO)
9. The Forty Recommendations of the Financial Action Task Force; 9 Special Recommendations Against Terrorist Financing (FATF)
10. Core Principles for Effective Banking Supervision (BCBS)
11. Objectives and Principles of Securities Regulation (IOSCO)
12. Insurance Core Principles (IAIS)

However, there is little doubt about the IFSs' bearing on regulations, codes of conduct, and administrative practices—and their relevance for the interpretation of and closing of gaps in the legislation—as the IFSs represent a consensus of supervisors or experts from the jurisdictions of the major financial centers. It should also be noted that the financial intermediaries are not directly the addressees of the "recommendations" contained in IFSs, which are rather aimed at national legislators, regulators, and supervisors who are "invited" to implement them in their respective jurisdictions. Unlike the case of domestic soft law (codes of conduct, etc.), there is no threat of legislative intervention in the case of non-compliance with IFSs. This being said, the implementation of IFSs is "encouraged" by a number of incentives, both official incentives (FSAPs, ROSCs, peer pressure, etc.) and market incentives. Furthermore, according to the Declaration of April 2, 2009,[61] the members of the FSB commit to pursue the maintenance of financial stability, to implement IFSs (including the twelve key standards), and to undergo periodic peer reviews and FSAPs. In certain areas, such as "tax transparency," the G-20 now envisages taking agreed action against non-cooperative jurisdictions[62] (as was already the case in connection with the FATF recommendations on money laundering and terrorist finance). Finally, there is a growing recognition of the relevance of

61. *Declaration on Strengthening the Financial System, supra* note 46, at 1.
62. *Id.* at 4-5.

IFSs under international law, particularly in the ambit of the UN and the WTO.[63]

B. *The G-20*

It was by no means evident that the G-20 should be the main forum tasked with reforming the international financial architecture. Like all the other "Gs,"[64] the G-20 is a sort of club created at the initiative of a group of influential countries. It is "an informal forum that promotes open and constructive discussion between industrial and emerging-market countries on key issues related to global economic stability."[65] This group was established in 1999 in the wake of the 1994-1995 "Tequila" crisis and the 1997 Asian economic crisis as an enlargement of the G-7. The G-20 was intended to be a broader forum which would bring together large emerging and systemically important economies to hold informal discussions on monitoring risks in the international financial system. During the first ten years of its existence, the G-20 kept a low profile and it was not significantly involved in sponsoring the international standard-setting process. However, at the Washington and London summits, the Leaders of the G-20 acknowledged their will to reform the financial regulations at the global level and to take whatever action was necessary to do so.[66]

In addition to the G-7 countries, the G-20 now includes the four "BRIC" countries[67] as well as Mexico, Argentina, South Africa, Saudi Arabia, Turkey, South Korea, Indonesia,

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63. On this aspect, see the extensive discussion in Régis Bismuth, *La coopération internationale des autorités de régulation du secteur financier et le droit international public* (doctoral thesis Paris 1 Panthéon-Sorbonne, Mar. 23. 2009) (publication forthcoming). An excerpt will soon be published in English: Régis Bismuth, *Financial Sector Regulation and Financial Services Liberalization at the Crossroads: The Relevance of International Financial Standards in WTO Law*, 44 J. WORLD TRADE (Forthcoming 2010).

64. With the exception of the Group of Thirty. http://www.group30.org/index.htm. *See* INTERNATIONAL MONETARY LAW, ISSUES FOR THE NEW MILLENNIUM, *supra* note 8, at 17-20 (discussing the genesis of the various intergovernmental "Gs").

65. This is the definition provided on the official G-20 website: http://www.g20.org/about_what_is_g20.aspx.

66. G-20 Leaders' Statement, *supra* note 43; *Declaration on Strengthening the Financial System, supra* note 46, at 1.

67. Brazil, Russia, India, and China.

Australia, and the EU.[68] The G-20 claims a high degree of representativeness and legitimacy as its members are drawn from all continents and account for nearly two-thirds of the global population and ninety percent of world GNP. However, the G-20 in its current composition excludes the non-G-7 members of the G-10[69] (which sponsored a number of important standard-setting bodies such as the BCBS) as well as some significant financial centers represented at the FSB (such as Hong Kong, Singapore, and Switzerland)[70] and six of the twenty-four constituencies electing Executive Directors at the IMF (and represented at the IMFC).[71] Following the enlargement of the FSB (by adding 13 new members to include all G-20 member countries as well as Spain and the European Commission), it would be appropriate to broaden the membership of the G-20 to include all FSB members. This would mean the addition of only five members[72] and would no doubt make the international financial architecture more consistent. It should be noted that G-20 membership is not based on a system of constituencies (which ensures at least an indirect universal representation) and that, unlike for the FSB, the composition of the group is not explicitly subject to periodic review.

68. The Managing Director of the IMF and the President of the World Bank, plus the chairs of the International Monetary and Financial Committee and Development Committee of the IMF and World Bank, also participate in G-20 meetings on an *ex-officio* basis.

69. The non-G-7 members of the G-10 are Belgium, the Netherlands, Sweden (all three members of the EU), and Switzerland. It is unclear what role the G-10 should have in the future and even whether it will continue to exist.

70. The world's seventh largest financial center according to the Financial Development Report 2009, published by the World Economic Forum, *available at* http://www.weforum.org.

71. The constituencies led by the Netherlands, Sweden, Egypt, Switzerland, Iran as well as the constituency of the French-speaking African countries are not represented in the G-20. Turkey is in the G-20 from the Belgian constituency and Mexico from the constituency including Spain. The list of the IMF constituencies may be found at http://www.imf.org.

72. The additional members would be the Netherlands, Hong Kong, Singapore, Spain and Switzerland. It would also make sense to invite the BIS and the OECD to join the G-20 (besides the IMF and the World Bank, which are already in the G-20), so that all four IFIs that are members of the FSF and play an important role in connection with financial standard-setting would also be represented at the G-20.

As regards the activity of the G-20 up until the two "leaders summits" in Washington (November 14, 2008) and London (April 2, 2009), the finance ministers and central bank governors typically met once a year.[73] The group has no seat, nor any permanent staff; it functions on the basis of a rotating chair, with a "troika" of past, current, and designated chairs to ensure continuity. It is unclear how frequently there will be further "leaders summits" at the level of heads of state or government, although one such meeting is scheduled for September 24–25, 2009 in Pittsburgh.[74] The finance ministers and central bank governors will meet in November 2009 in Scotland. If the G-20 endeavor is to become a permanent institution for the economic and financial governance of the world, the current organization and infrastructure might not be sufficient. There might be a need for a permanent secretarial structure and possibly for permanent or ad hoc working groups. In the longer run, it might be helpful to define more precisely the relations with other bodies involved in the international financial architecture, in particular the IMF and the FSB. Furthermore, it is unclear how the respective spheres of activity of the G-20 and of the G-7/G-8 will be delimited in the future. Finally, procedural aspects within the G-20 would no doubt benefit from further elaboration, including increased transparency of the consensus-building process, and possibly a consultation process for non-members.

It should be added that the G-20 has no formal legitimacy or competence to impose rules on its participants or on other countries or institutions. Nevertheless, in anticipation of the April 2009 conference, some members of the G-20 were very vocal about the desire to impose sanctions on tax havens based on a black list approved by the G-20 and established in cooperation with the OECD. At the April 2009 London summit, the leaders expressly agreed to take action against non-cooperative

73. G-20, What Is the G-20?, http://www.g20.org/about_what_is_g20.aspx ("It is normal practice for the G-20 finance ministers and central bank governors to meet once a year."). For further information on the G-20, see www.g20.org.

74. *See* The Pittsburg Summit 2009, http://www.pittsburghsummit.gov (official website for the summit).

jurisdictions.[75] This issue deserves further investigation from the viewpoint of international law.

C. *Position and Role of the IMF in the International Financial Architecture*

This paper does not intend to provide an in-depth analysis of the reform of the IMF, but only to make a few remarks regarding the IMF's role in the newly reformed international financial architecture, particularly in connection with the elaboration and implementation of international financial standards. In regards to the Fund's broad traditional role as a financier of balance-of-payments deficits, there appears to be general agreement on the need to provide the IMF with a substantial increase in its financial resources. The G-20 leaders decided at the London summit in April 2009 to set up increased IMF resources of 250 billion USD provided through bilateral lending from members, 500 billion USD provided by expanded and more flexible New Arrangements to Borrow (NAB), and finally a new Special Drawing Rights (SDR) allocation of 250 billion USD.[76]

Since its creation in 1944 to monitor the Bretton Woods international monetary system, the IMF has strayed from many of its initial functions[77] and has struggled to refocus its mission and activities.[78] The last decade has seen an increased focus on surveillance, with particular emphasis on the implementation of IFSs (through ROSCs, FSAPs and Art. IV).[79] This sur-

75. G-20 Leaders' Statement, *supra* note 43, ¶ 15; *Declaration on Strengthening the Financial System, supra* note 46, at 4-5.

76. G-20, *Declaration on Delivering Resources, supra* note 47. Special Drawing Rights are the unit of account and reserve asset created by the IMF. IMF, Factsheet – Special Drawing Rights, http://www.imf.org/external/np/exr/facts/sdr.htm.

77. After the end of the Bretton Woods System of fixed exchange rates, *de facto* in March 1973 and *de jure* on 1 April 1978 (upon entry into force of the revision of the Articles of Agreement decided at the Jamaica Conference of 1976). *See* ROSA MARIA LASTRA, LEGAL FOUNDATIONS OF INTERNATIONAL MONETARY STABILITY 354-68 (2006).

78. In particular through its possible involvement in capital account issues or the creation of a Sovereign Debt Resolution Mechanism, as advocated by the Krueger initiative of November 2001. Sean Hagan, *Designing a Legal Framework to Restructure Sovereign Debt,* [2005] 4 CURRENT DEV. IN MONETARY AND FIN. L. 195, 195-305.

79. On ROSCs and FSAPs, *see generally* Gianviti, *supra* note 10, at 219-28.

veillance function has been "officialized" by the G-20 and now appears as one of the major missions of the IMF in connection with the global financial system. However, it seems that ROSCs and FSAPs are based on the (voluntary) technical assistance provided to the Fund by its members, and not (or only marginally) on Art. IV surveillance activities.[80] Could this be a problem for the efficient implementation of international financial standards in the future?[81] All G-20 and FSB members committed themselves to undertake FSAPs and to support the transparent assessment of their national regulatory systems.[82] Furthermore, the IMF, as the overarching institution for macro-financial supervision with universal membership and macro-economic expertise, was invited to take a leading role in drawing lessons from the current crisis, consistent with its mandate,[83] and to conduct early warning exercises in cooperation with the FSB.

Unlike the G-20, the IMF is not a selective club of a number of influential countries, but a full-fledged international organization with a solid institutional underpinning and universal membership. For this reason, it is no doubt much more representative than any of the "Gs," although the system of quotas[84] and, even more so, the allocation of quotas have given rise to some discontent. At the April 2009 London summit, the leaders reached a broad agreement to enhance the representation of emerging-market economies through a revision of quotas. It remains to be seen whether there will be

80. On Art. IV Surveillance by the IMF, see generally IMF, Factsheet — IMF Surveillance, http://www.imf.org/external/np/exr/facts/surv.htm (last visited Sept. 9, 2009).

81. The issue is whether in the longer run, FSAPs and ROSCs should be made compulsory under the Art. IV surveillance through a revision of the Articles of Agreement. On the current concept underlying Art. IV surveillance, see *id.* *See also* Gianviti, *supra* note 10.

82. *Declaration on Strengthening the Financial System*, *supra* note 46, at 1.

83. UK Chair of the G-20, *supra* note 39, action plan number 40 and 41.

84. As compared with the "one country-one vote" principle applied by the UN (however, with a right of veto for a few superpowers at the UN Security Council). In financial matters, it appears difficult not to take into account the financial capacity of participants through the allocation of weighted voting rights (as in the IMF or in the ECB for decisions on financial matters). On the system of quotas within the IMF, which defines the participation and contributions of member countries on the basis of economic criteria, see IMF, Country Representation, http://www.imf.org/external/about/govrep.htm (last visited Sept. 16, 2009).

consequential changes in the composition of the Executive Board.[85] Another related issue, perhaps to be addressed at a later stage, is how the governance of the IMF could be enhanced, possibly through a reinforcement of the Executive Board or the creation of a Council at the ministerial level.

The G-20, rather than the IMF, has clearly taken the lead in the overall reform and oversight of the international financial architecture. The G-20's leadership is consistent with the developments that have occurred since the end of the original Bretton Woods system in the 1970s, when the G-5, the G-7, the G-10, and eventually the G-20 increasingly intervened in the oversight of the global financial markets, in particular by setting up standard-setting entities (such as the BCBS) and by establishing the FATF and the FSF (now the FSB). This kind of "horizontal" interstate cooperation at the level of governments and administrations competes with the more traditional "vertical" cooperation through international organizations such as the IMF. Until now, the relationship between the G-20 and the IMF has not been defined by any particular arrangement, but the G-20 countries hold a very substantial majority of the votes in the Executive Board and the General Meeting of the IMF, although not all of the IMF constituencies are represented in the G-20. On the contrary, the division of labor and responsibilities between the IMF and the FSB, as well as the position of the FSB within the international financial architecture, has recently been clarified in a number of documents.[86] The IMF has not only assumed the tasks relating to the overall surveillance of the global financial system and to the assessment of the implementation of international finan-

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85. Including possibly a rationalization of the representation of the EU, currently scattered over a number of partly mixed (EU and non-EU) constituencies. A first step could be to consolidate them into a few homogeneous "European" constituencies comprising exclusively EU member states. *See* JEAN-VICTOR LOUIS, L'UNION EUROPÉENNE ET SA MONNAIE 292-300 (3rd ed., 2009) (discussing this issue and various other proposals).

86. On reporting arrangements regarding the FSB, see *Declaration on Strengthening the Financial System, supra* note 46, and Press Release, FSB, Financial Stability Forum Re-established as the Financial Stability Board (Apr. 2, 2009) [hereinafter FSF Re-established as FSB], *available at* http://www.financialstabilityboard.org/press /pr_090402b.pdf.

cial standards by individual countries, but also participates in the elaboration of IFSs through its membership in the FSB.[87]

D. *The FSB*

There is little doubt that the establishment of the Financial Stability Board (FSB), the enhanced and expanded successor to the Financial Stability Forum (FSF), will in the long run be viewed as the main achievement of the Washington and London "leaders' summits" of November 2008 and April 2009. This reform indeed provides a greater degree of clarity, consistency, and (hopefully) efficiency to the international financial architecture. Nevertheless, the status of this renewed body is far from clear under international law. It still seems that the FSB as an institution does not have a legal personality under international law (in the absence of a treaty) or under private law (there is a lack of corporate will and of any incorporation or registration). Until this matter of legal personality is settled and the FSB receives a clear institutional basis, it appears that the FSB cannot legally act in its own name in relations with third parties.[88] It is unclear how the FSB can ensure its external representations, a difficulty also faced by the BCBS.[89] This does not, of course, prevent the FSB from working efficiently and publishing its recommendations and the product of its activity as the consensus of its participants. However, in the long run this is certainly an odd situation and may become a practical handicap for the FSB.

The creation of the FSB goes back to the establishment of the Financial Stability Forum in 1999 by the G-7. The FSF's mission was to coordinate the activity of the various international financial standard-setting bodies that have emerged

87. Joint Letter from Dominique Strauss-Kahn, IMF Managing Dir., and Mario Draghi, FSF Chairman, to the G-20 Ministers and Governors (Nov. 13, 2008), ¶ 2 [hereinafter Joint Letter], *available at* http://www.financial stabilityboard.org/ publications/r_081113.pdf.

88. For instance, it seems that it cannot open a bank account, enter into contracts (including employment contracts), or be sued for liability.

89. Thus, the BIS had to "represent" the BCBS for the creation of the PIOB (Public Interest Oversight Board), a foundation established jointly with IOSCO and the IAIS in charge of overseeing the standard-setting activities of IFAC (which is a private-sector body). But under usual legal concepts, it is unclear whether and how a body without legal personality could appoint an agent.

since 1974. This rather informal structure (the FSF and now the FSB) is not itself a standard-setting entity,[90] nor is it a supervisory authority; it has no institutional powers and can neither force any country (whether a member of the FSF/FSB or not) to implement the standards approved by it nor impose any sanctions. However, since the April 2009 London Conference, the countries participating in the FSB have committed themselves to the implementation of the IFSs and to undergo FSAPs and peer reviews in regard to the IFSs implementation.

Trying to understand this kind of informal structure, the pragmatic result of a sort of international legal existentialism, has always proved to be an intellectual challenge. Various concepts (which will not be discussed in depth here) have been suggested to this effect, especially in connection with the BCBS which is in a similar situation to that of the FSF/FSB. In particular, some have suggested that they represent the emergence of a sort of "global administrative law"[91] or the phenomenon of "transnational governmental networking."[92] However, the practical legal consequences of these stimulating analyses remain unclear, as the analyses are largely descriptive.

One of the most frequently heard critiques of the FSF in its former composition was of its restrictive membership, which some believed deprived this body of sufficient legiti-

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90. The FSF, however, published various recommendations and principles: FSF, REPORT OF THE FINANCIAL STABILITY FORUM ON ADDRESSING PROCYCLICALITY IN THE FINANCIAL SYSTEM (2009); FSF, FSF PRINCIPLES FOR SOUND COMPENSATION PRACTICES (2009); and FSF, FSF PRINCIPLES FOR CROSS-BORDER COOPERATION ON CRISIS MANAGEMENT (2009).

91. *See* Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15 (2005); Benedict Kingsbury, *The Concept of 'Law' in Global Administrative Law*, 20 EUR. J. INT'L L. 23 (2009); Benedict Kingsbury, *The Administrative Law Frontier in Global Governance*, AM. SOC. INT'L L. PROC. (2005); Nico Krisch & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 EUR. J. INT'L L. 1 (2006) (discussing the concept of global administrative law).

92. On "transgovernmental networking," see generally Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1, at 23 (2002); Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, 24 MICH. J. INT'L L. 1041, 1046-47 (2003); Anne-Marie Slaughter and David Zaring, *Networking Goes International: An Update*, 2 ANN. REV. LAW & SOC. SCI. 211, 222, 225 (2006); David Zaring, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*, 33 TEX. INT'L L. J. 281 (1998).

macy to impose its recommended IFSs on a worldwide scale. In other words, the greater international community lacked a general feeling of "ownership" over the FSF, despite its supposed purpose of implementing international standards.[93] This criticism now appears to be moot, as the FSF/FSB has attained a significantly broader membership since March 2009, a fact that will no doubt enhance its legitimacy. At its Washington meeting in November 2008, the G-20 called for an expansion of the FSF's membership to include more emerging economies. There was a belief that the FSB "will be much more effective in achieving [its] goals if all of the world's major economies and financial centers have a voice in the process."[94] The expansion was effected on March 11th and 12th of 2009, through the FSF's extension of membership invitations to Argentina, Brazil, China, India, Indonesia, Korea, Mexico, Russia, Saudi Arabia, South Africa, and Turkey, together with Spain and the European Commission.[95] The FSB, as it is now called, is comprised of thirty-six members, specifically delegations from twenty-four countries, four IFIs, six standard-setting or regulatory committees, plus the ECB and the European Commission. In addition, membership of the FSB is to be reviewed periodically,[96] which means that this body can no longer be considered a closed and selective club.

The FSB will continue to focus on setting standards on the basis of the FSF's original mandate to assess vulnerabilities affecting the financial system, identifying and overseeing actions needed to address the financial vulnerabilities, and promoting coordination and information among the authorities responsible for financial stability.

In addition, the FSB's broadened mandate now involves the following tasks:

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93. *See* Robert Delonis, *International Financial Standards and Codes: Mandatory Regulation Without Representation*, 36 NYU J. INT'L L. & POL. 563, 631-633 (2004) (discussing the challenges of limited FSF membership)

94. Mario Draghi, FSB Chairman, Re-establishment of the FSF as the Financial Stability Board (Apr. 2, 2009), at 1 [hereinafter FSB Chairman's Statement] (statement made at the conclusion of the London Summit), *available at* http://www.financialstabilityboard.org/publications/r_090402.pdf.

95. FSF Decides to Broaden its Membership, *supra* note 31.

96. FSF Re-established as FSB, *supra* note 86.

- monitor and advise on market developments and their implications for regulatory policy;
- monitor and advise on best practices for meeting regulatory standards;
- undertake joint strategic reviews of the policy development work of the international SSBs to ensure their work is timely, coordinated, and focused on priorities and addressing gaps;
- set guidelines for and support the establishment of supervisory colleges;
- support contingency planning for cross-border crisis management, particularly with respect to systemically important firms; and
- collaborate with the IMF to conduct Early Warning Exercises.[97]

Following its expansion to thirty-six members, the FSB will no doubt need to strengthen its institutional foundations as well as its procedures and working methods to ensure continued effective functioning.[98] For the sake of transparency, a number of details about the future functioning of the FSB have already been published[99] and it is possible that, following the FSB's first plenary meeting in June 2009[100] and the G-20 Pittsburgh summit in September 2009, more material will be made available to the public.

The new structures of the FSB include a Chairperson, who oversees the FSB's Steering Committee, a Plenary, and the Secretariat. It is not specified how the Chairperson is to be appointed. The Steering Committee, the composition of which will be decided by the FSB Chair, will provide operational guidance between plenary meetings to carry forward the directions of the FSB. The Plenary, which meets twice per year, is the decision-making organ of the FSB. Details on the

97. *Id.*

98. *See* FSF Decides to Broaden its Membership, *supra* note 31 (noting that the FSF will be acting to strengthen its institutional foundations).

99. *See, e.g.*, *id.*; FSB Chairman's Statement, *supra* note 94.

100. *See* Press Release, FSB, Financial Stability Board Holds Inaugural Meeting in Basel (June 27, 2009) [hereinafter FSB Holds Inaugural Meeting], *available at* http://www.financialstabilityboard.org/press/pr_090627.pdf (discussing the outcomes of the June meeting, and providing additional information on the institutional structures of the FSB, financial system risks, and responses and progress in work to strengthen financial systems).

level of representation and on seat assignments have been published, but the decision-making process and respective voting arrangements remain unclear. An enlarged permanent Secretariat, made up of approximately twenty people and based in Basel, Switzerland, and a full-time Secretary General support the FSB. Currently, the seat of the FSB is located on the premises of the BIS, which provides the whole office and administrative infrastructure to the FSB and hosts its staff.[101] The Plenary has established three Standing Committees: (1) Vulnerabilities Assessment; (2) Supervisory and Regulatory Cooperation (including supervisory colleges and cross-border crisis management); and (3) Implementation of Standards and Codes. The Plenary may establish other Standing Committees and ad hoc working groups (which can include non-FSB member countries) as necessary, while the Steering Committee may establish fast-acting ad hoc workstreams as needed.[102] There are currently no indications about the future funding and financial autonomy of the expanded FSB. The strengthening of the FSB's organizational structure should ensure that, following its expansion and enlarged membership, the FSB will be able to retain and even improve the current level of technical expertise, efficiency, flexibility, and speed of the former FSF. However, the texts published to date do not shed much light on the organization's procedural rules and decision-making process. More transparency in this regard could help reduce criticism relating to the alleged lack of accountability from, or democratic control over, "technocratic" experts producing IFSs.

Although the FSB has now been re-established by the G-20,[103] the G-20 has not explicitly established a general line for the FSB to report to the G-20 (which itself has no permanent structure). However, in connection with the Early Warning Exercises and together with the IMF, the FSB will report to the IMFC and the G-20 Finance Ministers and Central Bank Governors on the build-up of macroeconomic and financial risks and the actions needed to address them.[104] On the other

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101. The staff of the FSB benefits from immunities which derive from those of the BIS in its host country, Switzerland.

102. FSF Re-established as FSB, *supra* note 86, ¶ 11.

103. In the same way, its predecessor, the FSF, was created by the G-7 in 1999. On the creation of the FSF, see Giovanoli, *supra* note 8, at 25-27.

104. *Declaration on Strengthening the Financial System*, *supra* note 46.

hand, it was expressly stated that the various SSBs will report to the FSB "without prejudice to their existing reporting arrangements or independence" in support of the FSB's strategic reviews on timeliness, coordination, and adequacy of the standard-setting process.[105] The cooperation between the FSB and the IMF and its modalities will be examined below.

Some issues relating to the role of the FSB within the international financial architecture still remain unresolved or at least unclear to the outsider. For instance, within the general standard-setting process, which body will have the last word to designate IFSs as being relevant for the stability of the international financial system (a sort of formal adoption, endorsement, or homologation)? Will this decision be left to the single standard-setting bodies and, if so, which controlling organ will take the decision in each case and how is the decision-making process shaped? Or, must the FSB endorse IFSs, at least as regards the key standards the implementation of which will be monitored by the IMF? Will there be a general consultation process involving countries not represented in the single SSBs? To whom are the various SSBs accountable as regards their activity? Are there any legal remedies if a given jurisdiction or participant in the international financial markets is of the view that a standard is harmful? These issues, which may seem merely theoretical, will no doubt gain greater importance as IFSs increasingly are viewed as quasi-mandatory within the international community and as implementation of the IFSs is "encouraged" through bilateral or multilateral pressures or even sanctions.[106]

Within the reformed international financial architecture, the FSB and IMF will intensify their collaboration, each complementing the other's role.[107] The respective spheres of competence of the IMF and of the FSB in strengthening the international financial system and supporting the work of the G-20 have already been clarified in a joint letter dated November 13th, 2008, from the Managing Director of the IMF and the Chairman of the then-FSF (now Chairman of the FSB) to the

105. FSF Re-established as FSB, *supra* note 86, ¶ 10.

106. *See infra* Sect. V (providing an outlook regarding the content and implementation of international financial standards).

107. FSF Re-established as FSB, *supra* note 86, ¶ 14.

G-20.[108] The principles set forth in this document are still valid as applied to the FSB:

> In view of the ongoing financial crisis and against the background of the upcoming G-20 Leaders' Summit on Financial Markets and the World Economy, we have decided to enhance our collaboration and would like to clarify how we see the roles of our respective bodies in that regard.
>
> 1. Surveillance of the global financial system is the responsibility of the IMF.
>
> 2. Elaboration of international financial sector supervisory and regulatory policies and standards, and coordination across the various standard setting bodies, is the principal task of the [FSF]. The IMF participates in this work and provides relevant input as a member of the [FSF].
>
> 3. Implementation of policies in the financial sector is the responsibility of national authorities, who are accountable to national legislatures and governments. The IMF assesses authorities' implementation of such policies through FSAPs, ROSCs and Article IVs.
>
> 4. The IMF and the [FSF] will cooperate in conducting early warning exercises. The IMF assesses macro-financial risks and systemic vulnerabilities. The [FSF] assesses financial system vulnerabilities, drawing on the analyses of its member bodies, including the IMF. Where appropriate, the IMF and [FSF] may provide joint risk assessments and mitigation reports.[109]

Since its re-establishment on April 2nd, 2009, the FSB has continued the work undertaken by its predecessor.[110]

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108. Joint Letter, *supra* note 87 (stating that the IMF is responsible for surveying the global financial system and monitoring the implementation of financial policies by national authorities, the FSF is responsible for supervisory and regulatory policies and standards, and both organizations together conduct early warning exercises).

109. Reference is made to the Joint Letter both in the FSB press release, FSF Re-established as FSB, *supra* note 86, ¶ 14, and in the FSB Chairman's Statement, *supra* note 94, at 3.

110. *See* Mario Draghi, Chairman of the FSB, Statement to the International Monetary and Financial Committee (Apr. 25, 2009) [hereinafter

E. *The BCBS*

The Basel Committee on Banking Supervision (BCBS), created in 1974 by the G-10 central bank governors, is the oldest and arguably the most prominent international financial standard-setting body. The BCBS has made clear progress in enhancing its legitimacy by expanding its membership in March 2009 to twenty members, with the addition of representatives from Australia, Brazil, China, India, Korea, Mexico, and Russia, and in June 2009 to twenty-seven members, with the addition of representatives from Argentina, Hong Kong SAR, Indonesia, Saudi Arabia, Singapore, South Africa, and Turkey.[111] It remains to be seen whether the BCBS functions as efficiently as it did before in its new larger and less homogeneous form.

As regards the undefined legal status of the BCBS and its lack of legal personality, one can refer back to the corresponding remarks on the FSB, which is in a similar situation. As for the FSB, the BIS provides the infrastructure and hosts the staff. The BCBS is a member of the FSB and will report to it without prejudice to existing reporting arrangements or independences.[112]

To date, the BCBS has not published documents on its internal structure and functioning similar to those recently made available by the FSB. However, the two press releases relating to the broadening of the BCBS's membership specify that the "Basel Committee's governing body will likewise be expanded to include central bank governors and heads of supervision from these new member organizations."[113] Presumably, this enlarged governing body within the expanded BCBS will eventually decide on the final adoption of its standards. There is a need for more transparency in regard to the Com-

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Draghi statement to the IMFC] (transcript available at http://www.financialstabilityboard.org/press/st_090425.pdf) (providing an outline of the FSB's current activities). *See also* FSB Holds Inaugural Meeting, *supra* note 100, at 2 (detailing the progress in work to strengthen the financial systems).

111. Expansion of Membership, *supra* note 32; Basel Committee Broadens Membership, *supra* note 32.

112. *See* FSF Re-established as FSB, *supra* note 86, ¶ 10 ("[T]he SSBs will report to the FSB on their work without prejudice to their existing reporting arrangements or their independence.").

113. *See* Expansion of Membership, *supra* note 32; Basel Committee Broadens Membership, *supra* note 32.

mittee's procedures. More generally, following the expansion of the BCBS there may well be a need for more precise organizational rules and an enhanced infrastructure.

V. Outlook Regarding Contents and Implementation of International Financial Standards

The essential principle inspiring the reformed international financial architecture, and consequently the contents of the international financial standards, is the following:

> *All systemically important financial (1) intermediaries, (2) markets and (3) products irrespective of type must be subject to appropriate regulation and supervision (4) in all jurisdictions.*[114]

Furthermore, financial supervision should not only be exercised institution by institution ("micro-prudential" supervision), but it should also encompass the good functioning of the whole financial system ("macro-prudential" or systemic supervision).[115]

This paper does not intend to provide a list of all specific areas where regulation or supervision is currently being undertaken, as the reader can easily consult updated lists on the websites of the relevant organizations.[116] However, among the important points dealt with in international financial standards or other international arrangements, the following deserve special mention:

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114. G-20 Leaders' Statement, *supra* note 43, ¶ 15; *Declaration on Strengthening the Financial System*, *supra* note 46, at 3. *See also* Draghi Statement to the IMFC, *supra* note 110 (detailing the FSB's application of these principles worldwide).

115. *Declaration on Strengthening the Financial System*, *supra* note 46, at 3.

116. On the ongoing work stream, *see generally* UK Chair of the G-20, *supra* note 39; Draghi Statement to the IMFC, *supra* note 110, at 2-4; G-20 Leaders' Statement, *supra* note 43; *Declaration on Strengthening the Financial System*, *supra* note 46; FSF, Report of the Financial Stability Forum on Enhancing Market and Institutional Resilience (2008), *available at* http://www.financialstabilityboard.org/publications/r_0804.pdf; FSF, Ongoing and Recent Work Relevant to Sound Financial Systems (2008), *available at* http://www.financialstabilityboard.org/publications/on_0809.pdf?noframes=1; FSF, Report of the Financial Stability Forum on Enhancing Market and Institutional Resilience: Follow-up on Implementation (2008), *available at* http://www.financialstabilityboard.org/press/pr_081009f.pdf; FSF Meets in London, *supra* note 24; FSB Holds Inaugural Meeting, *supra* note 100.

- enhanced capital and liquidity requirements (including through an overall leverage ratio), ensuring that banks build additional buffers of resources in good times to mitigate the procyclical effects of capital requirements;
- improved risk management;
- improved accounting standards, in particular with respect to valuation of securities and complex or illiquid financial instruments (mitigating procyclical effects of "fair value" accounting);
- subjecting credit rating agencies to mandatory registration and oversight;
- promoting standardization and resilience of credit derivatives markets, in particular through the establishment of central clearing counterparties;
- subjecting hedge funds to appropriate oversight or regulation;
- establishing colleges of supervisors for all systemically relevant multinational banking and financial groups;
- development of an effective early warning system by the IMF and FSF;
- implementing the FSF principles on cross-border crisis management; and
- supporting efforts to develop an international framework for cross-border bank resolution arrangements.

It should be noted that, unlike in the aftermath of earlier crises where prudential aspects such as capital requirements were the focus, the current reform proposals also include a number of politically sensitive issues that did not necessarily have a significant influence on the outbreak of the current crisis. They essentially relate to governance or ethical principles, such as promoting integrity in financial markets (e.g., the G-7 "Tremonti" initiative), establishing tough rules on sound compensation practices in the financial industry (bonus payments), and pressure on non-cooperative (smaller) jurisdictions considered as "tax havens" with a view to obtaining information exchange in tax matters.

As a whole, the catalogue of the reforms that are being carried out is impressive. Eventually, the "corpus" of international financial standards with accompanying commentaries and methodologies, which was already quite important before the current crisis, may reach a volume equivalent to the legislation of a mid-size developed jurisdiction. Thus, obviously, a major issue will be the proper implementation of IFSs, which is essentially left to the discretion of the various single jurisdictions. Whatever the quality of the principles embodied in IFSs, they will only be effective to the extent that they are implemented.

As has already been noted, IFSs are generally characterized as "soft law" and they are not, in principle, compulsory under international law,[117] despite the persuasive pressure emanating from the influential group of countries (the G-20 and additional members of the FSB) that are now sponsoring the standard-setting process. Hence, they rely on a number of "incentives" to encourage their implementation.

Besides "market incentives" (the expectation that market participants will take into account in their credit and pricing decisions the degree and quality of implementation of IFSs in a given country), the G-20 is emphasizing the so-called "official incentives," especially the assessments by the IMF and the World Bank. At the London Leaders' Summit, the G-20 instructed its Finance Ministers to complete the implementation of the G-20 decisions and the Action Plan, and asked the FSB and the IMF, along with the FATF for money laundering and terrorist finance issues and the OECD Global Forum for tax havens and non-cooperative jurisdiction issues, to monitor the progress made.[118]

The Reports on Observance of Standards and Codes (ROSCs), produced jointly by the IMF and the World Bank, provide summary assessments of an economy's progress in observing standards on data dissemination, fiscal transparency, auditing and accounting, insolvency and creditor rights systems, corporate governance, and the financial sector. The more specialized Financial Sector Assessment Programs (FSAPs) provide for a joint evaluation of financial sector standards by the IMF and the World Bank. The FSAPs cover, in particular, those standards established by the BCBS, IOSCO, the IAIS, and the CPSS. Unlike the Art. IV surveillance of the IMF, participation in and publication of ROSCs and FSAPs is

117. *See supra* notes 9-12 and accompanying text (depicting the legal character of IFSs).

118. *Declaration on Strengthening the Financial System, supra* note 46.

voluntary, but most countries have made the assessments publicly available.[119]

Other "official incentives" include peer pressure and peer reviews in the ambit of the various standard-setting bodies and the FSB. A new development in this regard[120] is the commitment of FSB members to implement the IFSs and to undergo FSAPs and peer reviews with respect to the IFSs, including the key standards approved by the FSB.[121]

A more radical change, which might in the long run affect the legal character of IFSs,[122] is the agreement of the G-20 that "the relevant international bodies identify non-cooperative jurisdictions and develop a tool box of effective counter measures,"[123] such as:

- increased disclosure requirements on the part of taxpayers and financial institutions to report transactions involving non-cooperative jurisdictions;
- withholding taxes with respect to a wide variety of payments;
- denying deductions for expense payments to payees resident in a non-cooperative jurisdiction;
- reviewing tax treaty policy;
- asking international institutions and regional development banks to review their investment policies;

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119. ROSCs are available at http://www.imf.org/external/np/rosc/rosc.asp and http://www.worldbank.org/ifa/rosc_cg.html. *See also supra* notes 75-83 and accompanying text.

120. This is referenced in the Declaration on Strengthening the Financial System, in the section on tax havens and non-cooperative jurisdictions. *Declaration on Strengthening the Financial System, supra* note 46. The development referenced, however, already existed in the ambit of the FATF with respect to the implementation of the recommendations against money laundering and terrorist financing. *See* FATF Recommendation 21, *available at* http://www.fatf-gafi.org (applicable to all non-cooperative countries or territories and further countermeasures for jurisdictions that have failed to make adequate progress in addressing the serious deficiencies previously identified by the FATF).

121. *Declaration on Strengthening the Financial System, supra* note 46.

122. Until now, international financial standards have generally been recommendations, to be implemented "voluntarily" through incorporation into national law. See discussions on the legal nature of international financial standards, in particular Bismuth, *supra* note 63.

123. G-20 Fin. Min. & Cent. Bank Governors, *supra* note 40.

- giving extra weight to the principles of tax transparency and information exchange when designing bilateral aid programs; and
- further options relating to financial relations with these jurisdictions.

Although these counter-measures are aimed particularly at inducing non-cooperative jurisdictions to adhere to principles endorsed by the G-20 in the field of information exchange in tax matters, it is possible that they will be applied more generally in the future with regard to the implementation of other international financial standards. Indeed, the introductory paragraph to the section on counter-measures is quite general:

> It is essential to protect public finances and international standards against the risks posed by non-cooperative jurisdictions. We call on all jurisdictions to adhere to the international standards in the prudential, tax and AML/CFT areas. To this end, we call on the appropriate bodies to conduct and strengthen objective peer reviews, based on existing processes, including through the FSAP process.[124]

This approach builds on the practice of blacklisting non-cooperative countries and territories, which apparently originated in the ambit of the FATF but is also a technique used by the OECD and the UN. It should be noted that counter-measures or sanctions can be based on multilateral (e.g. G-20, FATF, etc.) or unilateral decisions (a blacklist established by a given country). The counter-measures themselves may emanate from international bodies (for instance with regard to financial or technical assistance, or membership in international bodies or working groups), or may be taken by national jurisdictions (e.g., conditions imposed upon foreign financial entities for accessing the domestic market, or on domestic entities for transactions with certain jurisdictions).

These new developments (or at least the generalization of earlier developments in particular areas) no doubt require further investigation and study under international law. Beyond the general question of the legal characteristics of IFSs under international law (are they still "soft law"?), there are several

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124. *Declaration on Strengthening the Financial System, supra* note 46, at 4-5.

issues of practical relevance to be considered, among which the following deserve to be highlighted:

- To the extent that international financial standards (or certain rules) are imposed on jurisdictions that did not subscribe to them or make commitments in this regard, which body should provide the final endorsement to a given international standard, making it "quasi-compulsory"? Upon what legal basis and under what procedures?
- What legal remedies, guarantees of due process and methods of conflict resolution are available to jurisdictions that do not consent to certain standards?
- To what extent are the various counter-measures and sanctions envisaged in this regard compatible with the general principles of international (public) law, including under WTO rules?

VI. Conclusion: Towards a crisis-resistant international financial system?

The expectations for the G-20 Leaders Summit on April 2, 2009, were huge, both in terms of restoring global growth to overcome the current recession and strengthening the international financial system. In connection with the second goal, a number of politicians had mentioned the need for a "new Bretton Woods agreement," in particular in the fall of 2008. It is of course difficult to draw conclusions about the success of the Summit at this stage, when a great number of initiatives are still being pursued.

With respect to the consolidation of the international financial architecture, the decisions taken at the Washington and London Leaders' Summits are no doubt a landmark. However, they appear to be an enhancement of the existing structures, based on the trinity of a revived G-20, a reformed IMF, and an enhanced FSF, rather than a complete restructuring of the international financial system along the lines of a new Bretton Woods. There is still no prospect for an international financial authority (in the fields of financial regulation, prudential supervision and jurisdiction), a development which is not realistically attainable in the present state of the world, and may not even be desirable.[125] A number of unresolved institutional problems remain, as the London Summit decisions are based on a multilateral approach involving a variety of entities with very diverse legal statuses in charge of setting and implementing IFSs. While the legitimacy and transparency of the process have been significantly enhanced, there is still room for further improvements.

Hopefully, the great number of specific measures which are now being taken, in particular the elaboration or revision of a number of international financial standards, will succeed in averting, or at least mitigating, a future major crisis, which would no doubt again trigger new and fascinating developments in international financial law. The effective implementation of the IFSs, which still fall short of being full-fledged, binding rules under international law, remains a critical aspect. The margin between potential regulatory or supervisory gaps and overregulation may be narrow. In any case, it should be borne in mind that regulation, including through international financial standards, even associated with supervision, has its limits and is not in itself a talisman warding off financial crises and ensuring global financial stability. To this effect, and of paramount importance, is the responsible behavior of all market participants, including not only financial intermediaries but also the general public and, last but not least, the politicians whose decisions often address short-term difficulties rather than long-term evolutions and thus may negatively impact financial stability.

125. *See supra* note 50 and accompanying text (expressing doubt that an international financial authority is realistic).