# Coercive Peer Review in Transnational Financial Regulation: Comparative Law and Compliance

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This paper argues that comparative law is an increasing, and increasingly significant, component of financial regulation in a world where the need to improve financial stability gives new impetus to moves to harmonize financial regulation across borders.

Transnational financial regulation is accomplished in a multi-level and networked environment by means of mutual recognition of regulatory schemes, accommodations to foreign firms which are subjected to domestic regulation by the host state, and agreements by networks of domestic regulators on harmonized standards. All these mechanisms of transnational regulation now involve some component of regulatory peer review: mutual recognition requires a review by one regulator of the adequacy of regulation by another regulator, or a formalized system of mutual recognition such as that in the EU. Accommodating foreign firms by relaxing regulatory requirements based on the idea that conflicting regulatory requirements would impose too onerous a burden similarly involves an assessment of the host state's regulation. Peer review of states' implementation of international standards has become an increasingly visible and formalized adjunct to those standards.

A host regulator conducting a peer review process in the domestic context, whether concerned with issues of mutual recognition or regulatory accommodations to foreign firms, focuses on the interaction between a foreign regulatory regime and the domestic regulatory environment. At the regional or transnational level peer review has a wider-ranging function, because it is seen as a component of ensuring financial stability. In both contexts peer review is a type of comparative regulatory practice— even comparative law — engaged in by regulators. In the transnational context peer review is also designed as a component of procedures intended to ensure that states comply with their commitments to apply harmonized standards and to remind

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them to pay attention to the "international ramifications of domestic actions".[1] The international ramifications concern financial stability and thus implicate confidence in the financial markets as much as they do effective financial regulation. Thus peer review is both a component of networked financial regulation (where the network is one of public and private actors involved in regulation) and of a larger transnational political and diplomatic process. It is arguably a technocratic technique designed to achieve objectives which are as much political as they are technical.

This paper examines the development of peer review as a component of the transnational standard setting process, and in particular on the financial crisis-related peer review processes which have been established by the G20 and the Financial Stability Board (FSB). The FSB peer review documents, the paper argues, focus mostly on the formal characteristics of the subject states' regulatory regimes, and to rely to a large extent on the statements made by the subject states themselves. Apart from such statements the reviews are based on old data produced through the IMF-World Bank FSAP process.[2] But the FSB's documents suggest — although they do not show [3]— that the real significance of its peer review processes may be in the developing dialog between the states involved in these processes. In addition the paper argues that the cumulative impact of the IMF and World Bank's Financial Sector Assessment Program (FSAP) and the FSB's peer reviews is to change the characteristics of the transnational standards developed by the Basel Committee on Banking Supervision (Basel Committee), the International Organisation of Securities Commissions (IOSCO) and the International Association of Insurance Supervisors (IAIS). Standards which are frequently drafted in vague language and which seem to leave significant discretion to implementing states to decide on the details of implementation are

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[1] Remarks by Deputy Assistant Secretary Mark Sobel at the Woodrow Wilson Center on Mexico and the G-20 Leader's Summit (May.1, 2012) at http://www.treasury.gov/press-center/press-releases/Pages/tg1559.aspx.

[2] *See, e.g.*, IMF, Financial Sector Assessment, A Handbook (Sept. 29, 2005) at http://www.imf.org/external/pubs/ft/fsa/eng/index.htm .

[3] This raises some issues with respect to transparency. *Cf.* Caroline Bradley, *Transparency Is The New Opacity: Constructing Financial Regulation After The Crisis*, 1 AM. U. BUS. L REV. 7 (2011-12).

converted through the FSAP and peer review processes into less vague standards with less scope for discretion in implementation. If the FSAP and peer review processes were truly processes of consensus among peers this might not be significant, but peer reviews among the G20 countries are intended as a basis for pressuring non-G20 countries to conform their financial regulatory systems to the international standards, and thus the peer review system raises concerns about the legitimacy of the international standards process.[4]

The paper begins by describing the evolution of peer review as an aspect of international standards for financial regulation, and examines some of the FSB's peer reviews. It then compares the FSB concept of peer review to peer review in other contexts and analyzes these reviews as a type of comparative law.

## The Financial Stability Board and Peer Reviews of the Implementation of Transnational Standards

The global financial crisis provided a dramatic illustration of the transnational characteristics of our financial markets, and of the ways in which those markets transmit risks across national borders. The core story we tell about what happened involves irresponsibly made (or taken) sub-prime loans which were originated in the United States and then packaged into complex securities which were sold to investors around the world. Defaults by sub-prime borrowers undermined some issues of the securities they backed, which led to a transnational credit crunch and loss of confidence in the financial markets. Risks in assets based in the US were transmitted by means of securities issued in transnational financial markets to financial institutions based in different countries and, ultimately to the countries in which those financial institutions were based.

[4] A review by a powerful state with large financial markets of the regulatory system of a smaller, less powerful state is arguably not a peer review in any real sense. Similarly the review processes operated by the World Bank and IMF under the FSAP and ROSC programs are not really peer review processes. In this draft I do concentrate on the G20's recently initiated, post global financial crisis, peer review processes.

Governments of the G20 countries[5] reacted to the crisis by making public commitments to strengthen international co-operation with respect to financial stability, and prudential regulation.[6] In particular the G20 agreed that the Financial Stability Forum, which was established in 1999 to address issues of financial stability revealed by the Asian financial crisis,[7] would be reconstituted as the Financial Stability Board with a broader mandate and with increased institutional capacity. More than merely agreeing to increased co-operation, however, the G20 committed to "implement international financial standards (including the 12 key International Standards and Codes)"[8] and to "undergo periodic peer reviews, using among other evidence IMF / World Bank public Financial Sector Assessment Program reports."[9]

That the G20 took the lead in responding to the global financial crisis, as they had

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[5] The G20 comprises Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Mexico, Russia, Saudi Arabia, South Africa, Republic of Korea, Turkey, United Kingdom, United States of America and the EU. France, Germany, Italy and the UK are all members of the EU.

[6] G20, Declaration on Strengthening the Financial System (Apr. 2, 2009) at http://www.g20.utoronto.ca/2009/2009ifi.html . The G20 countries also agreed to work together in other areas, including the supervision of hedge funds and credit rating agencies.

[7] The FSF was designed to bring together representatives of national central banks, supervisory authorities and treasury departments, international financial institutions (e.g. the IMF and the World Bank), international regulatory and supervisory groupings, committees of central bank experts and the European Central Bank to focus on issues of financial stability.

[8] The 12 key International Standards and Codes are the IMF's Code of Good Practices on Transparency in Monetary and Financial Policies, Code of Good Practices on Fiscal Transparency, and Special Data Dissemination Standard /General Data Dissemination System, the Basel Committee's Core Principles for Effective Banking Supervision, IOSCO's Objectives and Principles of Securities Regulation, IAIS' Insurance Core Principles, The Basel Committee and IADI's Core Principles for Effective Deposit Insurance Systems, the World Bank's Insolvency and Creditor Rights, the OECD's Principles of Corporate Governance, the IASB and IAASB's International Financial Reporting Standards (IFRS) and International Standards on Auditing (ISA), the CPSS/IOSCO Principles for Financial Market Infrastructures, and the FATF Recommendations on Combating Money Laundering and the Financing of Terrorism & Proliferation. *See* http://www.financialstabilityboard.org/cos/key_standards.htm.

[9] *See, e.g.,* G20 Declaration, *supra* note 6.

responded to the Asian financial crisis ten years earlier, reflects a change from earlier times when the G7 or G8 countries were the relevant actors.[10] During the second half of the twentieth century a small number of developed economies dominated international politics and the development of transnational standards for financial regulation. The US dominated the IMF, and developed western economies dominated the three transnational networks of financial regulators: the Basel Committee on Banking Supervision, IOSCO, and the IAIS. However other countries began to challenge this dominance of a small number of countries and the transnational networks have responded to the challenge by opening up participation to a broader group of countries. The Basel Committee on Banking Supervision has expanded its membership: fourteen of the Basel Committee's 27 members were invited to join during 2009. Before March 2009 the members of the Basel Committee were Belgium, Canada, France, Germany, Italy, Japan, Luxembourg, the Netherlands, Spain, Sweden, Switzerland, the United Kingdom and the United States. In March 2009 the Committee announced that it had invited Australia, Brazil, China, India, Korea, Mexico and Russia to join.[11] Then in June 2009 the Committee invited Argentina, Indonesia, Saudi Arabia, South Africa, Turkey, Hong Kong and Singapore to join it.[12] In a short period of time, in the middle of the global financial crisis, the Committee doubled in size and introduced a large number of new countries from different regions of the globe. Notably the BRIC countries are part of the new network. In 2012 IOSCO announced changes to its structure which are "intended to stream-line its organization and decision-making, and bring about greater effectiveness and

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[10] *See, e.g.*, Gordon S. Smith, *G7 to G8 to G20: Evolution in Global Governance*, CIGI G20 Papers| No. 6 (May 2011)at http://www.cigionline.org/sites/default/files/G20No6.pdf (describing this transition).

[11] BIS, Press Release, Expansion of Membership Announced by the Basel Committee (Mar. 13, 2009) at http://www.bis.org/press/p090313.htm (announcing invitation to join the Committee to Australia, Brazil, China, India, Korea, Mexico and Russia).

[12] BIS, Press Release, The Basel Committee Broadens its Membership (Jun. 10, 2009) at http://www.bis.org/press/p090610.htm (announcing invitation to join the Committee to Argentina, Indonesia, Saudi Arabia, South Africa, Turkey, Hong Kong and Singapore).

inclusiveness."[13] Whereas IOSCO used to operate through a Technical Committee and an Emerging Markets Committee, it will in future operate through "a single integrated body."[14] The Technical Committee was composed of members from the world's most significant securities regulators, and its members will dominate the new body. All of the former members of the Technical Committee are members of the new Board, together with the Chair and Vice Chair of the Emerging Markets Committee and representatives of IOSCO's regional committees. IOSCO states that this "will ensure an appropriate balance and mix of members."[15] The new structure is a transitional structure, and the Board is charged with working out

> what objective measures might better be used to determine the participation in the IOSCO Board of the members which regulate the largest capital Markets, and whether the composition of the IOSCO Board permits adequate contribution from the whole membership, including emerging markets.[16]

The IMF has worked on changes to its quota and governance arrangements which it has described as "essential to the Fund's legitimacy and effectiveness as an impartial guardian of global economic stability."[17] These developments are important. Basel Committee, IOSCO and the IMF have taken steps to enhance their legitimacy as bodies which develop and seek to enforce compliance with transnational standards. However, there are still some questions about

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[13] IOSCO, Final Communiqué on the 37th Annual Conference, IOSCO/MS/01/2012 )May 22, 2012) at http://www.iosco.org/library/statements/pdf/statements-20.pdf.

[14] *Id.*

[15] *Id.*

[16] IOSCO, Resolution of the Presidents Committee on transitional arrangements for the IOSCO Board at http://www.iosco.org/library/resolutions/pdf/IOSCORES29.pdf .

[17] *See, e.g.*, IMF, IMF Quota and Governance Reform— Elements of an Agreement, 1 (Oct. 31, 2010) at http://www.imf.org/external/np/pp/eng/2010/103110.pdf . See also e.g., IMF Annual Report 2011 Pursuing Equitable and Balanced Growth, 8 at http://www.imf.org/external/pubs/ft/ar/2011/eng/pdf/ar11_eng.pdf ("During the year, agreement was reached on a fundamental overhaul of the IMF's governance structure. The reforms will bring about a substantial shift in voting power toward dynamic emerging market and developing countries, while protecting the voice of the poorest member countries, and enhance the IMF's legitimacy and effectiveness.")

whether the reforms go far enough: transnational standards are still the products of negotiations among a relatively small number of participants, with limited consultation of others who are affected by them.[18]

Before the global financial crisis the IMF and World Bank already had systems of review of states' adherence to transnational standards of financial regulation. The IMF and the World Bank together administer a Financial Sector Assessment Program (FSAP).[19] Although the transnational standards are not binding as a formal matter on states which belong to the organizations which promulgate them,[20] the IMF's and World Bank's reviews encourage states to follow them. In 2010 the IMF agreed that IMF member states with systemically important financial sectors (the top 25 financial sectors)[21] would be subject to review every five years.[22]

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[18] *Cf.* Caroline Bradley, *Consultation and Legitimacy in Transnational Standard-Setting*, 20 MINN. J. INT'L L. 480 (2011).

[19] See, e.g., The World Bank, Reports on the Observance of Standards and Codes (ROSC), Overview of the ROSC Accounting and Auditing Program (Jan. 2004) at http://www.worldbank.org/ifa/rosc_aa_overview.pdf , IMF, Financial Sector Assessment Handbook *supra* note 2. IMF financial sector assessment is generally characterized as technical assistance rather than surveillance. See IMF, Integrating Stability Assessments Under the Financial Sector Assessment Program into Article IV Surveillance, 3 (Aug. 27, 2010) at http://www.imf.org/external/np/pp/eng/2010/082710.pdf ("Although the FSAP is currently a form of technical assistance performed by the Fund at the request of members, the issues covered under financial stability assessments conducted under the FSAP may, as a legal matter, be discussed in the context of bilateral surveillance on a mandatory basis.")

[20] *See, e.g.*, D. E. Alford, *Core Principles for Effective Banking Supervision: an Enforceable International Financial Standard?*, 28 B. C. INT'L & COMP. L. REV. 237, 286 (2005) ("because the agreements are not legally enforceable, nations can vary in their own interpretation and implementation of the standards.")

[21] These are: Australia, Austria, Belgium, Brazil, Canada, China, France, Germany, Hong Kong SAR, India, Ireland, Italy, Japan, Luxembourg, Mexico, Netherlands, Russia, Singapore, South Korea, Spain, Sweden, Switzerland, Turkey, United Kingdom, and the United States. See IMF, Top 25 Financial Sectors to Get Mandatory IMF Check-Up, IMF Survey Online (Sep. 27, 2010) at http://www.imf.org/external/pubs/ft/survey/so/2010/NEW092710A.htm.

[22] IMF, IMF Expanding Surveillance to Require Mandatory Financial Stability Assessments of Countries with Systemically Important Financial Sectors, Press Release No.

Whereas participation in the FSAP program was previously voluntary, for IMF members with systemically important financial sectors FSAP reviews every five years are now a component of mandatory surveillance.[23] In developing financial sector assessment as a component of surveillance the IMF noted that the FSAP had suffered from some problems: FSAPs have been costly and infrequent,[24] and, as voluntary exercises, may have suffered from selection bias.[25] The IMF's Independent Evaluation Office reported in 2011 that IMF surveillance in the lead-up to the crisis had failed to identify the risks.[26] The IMF is now working on improving the effectiveness of surveillance and financial sector assessment.

During 2009, the Basel Committee changed the name of its Accord Implementation Group — which had focused on implementation of the Basel II framework — to the Standards Implementation Group (SIG), which was to have a broader mandate.[27] The Basel Committee's

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10/357 (Sep. 27, 2010) at http://www.imf.org/external/np/sec/pr/2010/pr10357.htm .

[23] *Id.*

[24] *See, e.g.*, IMF, Integrating Stability Assessments, *supra* note 19 at 6 (" The broad scope of joint Bank-Fund assessments, often going well beyond macro-critical issues, implies large teams, and high costs (for both country authorities and the two institutions). Moreover, the long gaps between updates have been identified as a major handicap for the timely analysis of financial sector vulnerabilities and macro-financial linkages.")

[25] *See, e.g.*, *id.* ("Though not, in itself, a proof of the selection bias argument, the fact that the country of origin of the most recent financial crisis had not, until recently, volunteered for an FSAP lends credibility to this concern.")

[26] Independent Evaluation Office of the IMF, IMF Performance in the Run-Up to the Financial and Economic Crisis: IMF Surveillance in 2004–07, 1 (2011) at http://www.ieo-imf.org/ieo/files/completedevaluations/Crisis-%20Main%20Report%20%28without%20Moises%20Signature%29.pdf ("The IMF's ability to correctly identify the mounting risks was hindered by a high degree of groupthink, intellectual capture, a general mindset that a major financial crisis in large advanced economies was unlikely, and inadequate analytical approaches. Weak internal governance, lack of incentives to work across units and raise contrarian views, and a review process that did not "connect the dots" or ensure follow-up also played an important role, while political constraints may have also had some impact.")

[27] BIS, Steps to Strengthen Implementation of Supervisory Standards and Guidance Taken by the Basel Committee (Jan.8, 2009) at http://www.bis.org/press/p090108.htm.

SIG has described some of its recent work as peer review.[28] IOSCO has been taking steps to enforce compliance by its members with IOSCO standards.[29] At the invitation of the G20 the FSB implemented a system of peer review to supplement the FSAP and ROSC programs.[30] The FSB peer review system is designed to ensure that the G20 countries in fact keep to their commitments to implement agreed transnational standards of financial regulation. It has been described as "a critical exercise in international "peer pressure."[31]

The result of the G20 commitments, reinforced by peer pressure, is supposed to be an increase in financial stability and confidence in the financial markets.[32] The G20 countries are "leading by example"[33]: their compliance with transnational standards, established by the peer

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[28] *See, e.g.*, BIS, Peer Review of Supervisory Authorities' Implementation of Stress Testing Principles, (Apr. 2012) at http://www.bis.org/publ/bcbs218.htm ("As part of its mandate to assess the implementation of standards across countries and to foster the promotion of good supervisory practice, the Committee's Standards Implementation Group (SIG) conducted a peer review during 2011 of supervisory authorities' implementation of the principles.")

[29] Presidents Committee of the International Organization of Securities Commissions Resolution on IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information, at http://www.iosco.org/library/resolutions/pdf/IOSCORES36.pdf.

[30] *See, e.g.*, FSB, Country Review of Mexico, Peer Review Report, 3 (Sept. 23, 2010) at http://www.financialstabilityboard.org/publications/r_100927.pdf ("FSB country peer reviews are intended to complement and support the IMF-World Bank Financial Sector Assessment Program (FSAP) by providing an opportunity for members to engage in dialogue with their FSB peers and share experiences on progress made in addressing relevant FSAP recommendations – notably those covering or requiring improvements in regulation, supervision and institutional and market infrastructure. ").

[31] Remarks by Mark Sobel, *supra* note 1.

[32] *See, e.g.*, *id.* ("While current FSB work is not headline grabbing, efforts to align nitty gritty regulatory policies are ongoing and advancing, precisely because the G20 early on agreed to put in place high quality standards in an internationally consistent manner and avoid a race to the bottom. There can be no doubt -- the global financial system is now more resilient and less dangerous.")

[33] FSB, FSB Framework for Strengthening Adherence to International Standards, 1 (Jan. 9, 2010) at http://www.financialstabilityboard.org/publications/r_100109a.pdf (" FSB member

reviews, will allow them, and the IMF and World Bank, more forcefully to encourage other countries to comply.[34] The G20 countries will only be expecting of other states what they are willing to do themselves. And there is some evidence that the G20 are succeeding in their objective. IOSCO, whose ordinary members comprise 115 securities regulators, reported in 2012 that its "members confirmed their continued interest in addressing the G20 and FSB agenda".[35]

However, if the peer review system succeeds in increasing the pressure on other states to conform to international standards it will arguably make issues with respect to the legitimacy of the standard-setting process more significant. The Basel Committee and IOSCO may have changed their governance structures to increase the participation in the standards process of states which were previously excluded from those processes,[36] but standards are still developed by a relatively small number of states. The Basel Committee, which develops standards for the regulation of international banks, has only 27 members, and these members are from the most developed economies. The international standards system resembles a self-regulatory system which seeks to impose standards developed for its members on others who are not included in any meaningful way in the development of the self-regulatory regime.

There are a number of different systems of review of the compliance of states with financial standards. Individual standard setters, such as the Basel Committee, focus on standards implementation; the IMF focuses in particular on the top 25 financial sectors; and the FSB focuses on the G20 countries. There is a substantial overlap between the members of the Basel Committee, the G20 and the IMF's top 25 financial sectors. However, there are some discrepancies: Austria and Ireland are in the IMF's list but are not members of the Basel Committee or the G20; Argentina, Indonesia, Saudi Arabia, and South Africa are members of the

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jurisdictions will lead by example. FSB member jurisdictions have committed to implementing international financial standards and disclosing their level of adherence.")

[34] *See, e.g.*, *id.* at ("The FSB, working through the Standing Committee on Standards Implementation, will foster a race to the top, wherein encouragement from peers motivates all countries and jurisdictions to raise their level of adherence to international financial standards.")

[35] IOSCO, Final Communiqué on the 37th Annual Conference, *supra* note 13.

[36] See *supra* page 5

Basel Committee and the G20 but do not make the IMF's list, and Belgium, Hong Kong, Luxembourg, the Netherlands, Singapore, Spain, Sweden, and Switzerland are members of the Basel Committee and on the IMF list, but are not members of the G20. As the EU is a member of the G20,[37] a number of these states have some indirect participation in the G20 processes but this does not apply to Hong Kong, Singapore and Switzerland.

**FSB Peer Review**

The FSB has established two types of peer review. One concentrates on a particular country's financial regulatory system,[38] and the other, described as a "thematic review" compares approaches to regulatory issues across the G20 countries.[39] The FSB's Framework document states that FSB peer reviews will add to the FSAP and ROSC reviews, and that what they add "will come in significant part from the cross-sector, cross-functional, system-wide perspective brought by its members. Dialogue with peers will be a key benefit of the reviews."[40] Teams of experts from member states of the FSB produce draft reports with the assistance of staff at the

[37] The Commission and European central Bank represent the EU at G20 meetings. See http://ec.europa.eu/economy_finance/international/forums/g7_g8_g20/index_en.htm.

[38] FSB Framework, *supra* note 33 at 2 ("Country peer reviews will focus on the implementation and effectiveness of financial sector standards and policies agreed within the FSB in achieving the desired outcomes in a specific member jurisdiction, notably through systematic and timely follow up to relevant recommendations arising from an FSAP or ROSC.") *See also*, *e.g.*, FSB, Peer Review of Canada (Jan. 30, 2012) at http://www.financialstabilityboard.org/publications/r_120130.pdf.

[39] FSB Framework, *supra* note 33 at 2("Thematic peer reviews will focus on the implementation across the FSB membership of policies or standards agreed within the FSB, with particular attention to consistency in cross-country implementation and the effectiveness of the policy or standard in achieving the intended results"). *See also, e.g.*, FSB, 2011 Thematic Review on Compensation (Oct. 7, 2011) at http://www.financialstabilityboard.org/publications/r_111011a.pdf.

[40] FSB Framework, *supra* note 33, at 2.

FSB secretariat.[41] The draft reports are then discussed in a Standing Committee on Standards Implementation and approved by the FSB Plenary.[42]

During 2011 the FSB published a Co-ordination Framework[43] and a handbook for FSB Peer Reviews.[44] The conduct of FSB peer reviews is thus becoming more formalized over time, although formalized along non-binding lines. As of the end of May 2012 the FSB has published six country peer reviews,[45] and five thematic reviews on four topics.[46]

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[41] *Id*.

[42] *Id*.

[43] FSB, Coordination Framework for Monitoring the Implementation of Agreed G20/FSB Financial Reforms, (Oct. 18, 2011) at http://www.financialstabilityboard.org/publications/r_111017.pdf (CFIM).

[44] FSB, Handbook for FSB Peer Reviews (Dec. 19, 2011) at http://www.financialstabilityboard.org/publications/r_120201.pdf.

[45] FSB, Peer Review of Canada, *supra* note 38; FSB, Peer Review of Switzerland ( Jan. 25, 2012) at http://www.financialstabilityboard.org/publications/r_250112.pdf; FSB, Peer Review of Australia (Sep. 21, 2011) at http://www.financialstabilityboard.org/publications/r_110926b.pdf; FSB, Peer Review of Spain (Jan. 27, 2011) at http://www.financialstabilityboard.org/publications/r_110207a.pdf; FSB,Peer Review of Italy (Jan. 27, 2011) at http://www.financialstabilityboard.org/publications/r_110207b.pdf; FSB, Country Review of Mexico Peer Review Report, *supra* note 30.

[46] FSB, Thematic Review on Deposit Insurance Systems Peer Review Report (Feb. 8, 2012) at http://www.financialstabilityboard.org/publications/r_120208.pdf; FSB, 2011 Thematic Review on Compensation Peer Review Report (Oct. 7, 2011) *supra* note 39 ; FSB, Thematic Review on Compensation Peer Review Report (Mar. 30, 2011) at http://www.financialstabilityboard.org/publications/r_100330a.pdf; FSB, Thematic Review on Risk Disclosure Practices Peer Review Report (Mar. 18, 2011) at http://www.financialstabilityboard.org/publications/r_110318.pdf; FSB, Thematic Review on Mortgage Underwriting and Origination Practices Peer Review Report (Mar. 17, 2011) at http://www.financialstabilityboard.org/publications/r_110318a.pdf.

**Peer Review and Compliance with Transnational Standards**

Ensuring that states in fact comply with transnational standards of financial regulation is a complex matter. The relevant standards tend to be drafted in rather vague language, and to leave significant discretion to the states which claim to be implementing them. Moreover, true compliance means not just enacting rules which implement the relevant standards but also enforcing compliance with those standards. Subject to the issue of how a peer review system might account for the possibilities of discretion in the implementation of transnational standards, reviewing the content of legislation and regulations is a demanding but probably not impossible task. In contrast, reviewing the enforcement of compliance with standards is a difficult and likely impossible task. Total compliance with regulatory requirements is neither expected nor achievable, and transnational standards documents do not specify an expected level of compliance.

The FSB peer reviews do not in fact claim to assess compliance with international financial standards.[47] They do not involve exhaustive investigations of any aspects of the countries' legislation and regulations, let alone of their compliance systems. They are designed as supplements to the FSAP process: some time after the completion of an FSAP the state will answer a questionnaire which focuses on what the country has done in response to any recommendations in the FSAP. For example, the Peer Review of Canada, published in January 2012, notes that it was "largely based on the Canadian financial authorities' responses to a questionnaire designed to gather information about the actions taken in response to the relevant recommendations of the most recent Financial Sector Assessment Program Assessment for

[47] *See, e.g.*, FSB Peer Review of Canada, *supra* note 38, at 5 ("Unlike the FSAP, a peer review does not comprehensively analyse a jurisdiction's financial system structure or policies, nor does it provide an assessment of its conjunctural vulnerabilities or its compliance with international financial standards.") Although *cf.* FSB, Progress since the Washington Summit in the Implementation of the G20 Recommendations for Strengthening Financial Stability, p.2, Report of the Financial Stability Board to G20 Leaders (Nov. 8, 2010) at http://www.financialstabilityboard.org/publications/r_101111b.pdf ("Peer reviews are a key element of ensuring internationally agreed standards and policies are being effectively applied to promote a level playing field, enhance efficiency in the financial system and monitor potential new vulnerabilities.")

Canada."[48] This FSAP assessment of Canada was carried out four years earlier, in 2008.[49] The FSB suggests that its peer reviews are geared to examining the responsiveness of the states subject to the reviews to recommendations made in the FSAP process rather than to monitoring compliance with international standards. Moreover, the time lag is significant. Canada's FSAP was completed in the early stages of the financial crisis, and so a focus on how Canada responded to recommendations at that time does not help very much to instil confidence about what Canada is doing with respect to changes in thinking about standards since early 2008. At the same time, the peer review report does include a lot of information about Canada's reactions to the financial crisis.[50] The peer review of Australia was completed in September 2011,[51] and was based on an FSAP review in 2006.[52] In both cases the peer reviews state that they are "largely based" on data which is several years old. But in the peer review documents much of the information is dated after the date of the relevant FSAP document, and there is a significant amount of discussion of how the states subject to the review responded to the financial crisis. This raises a question about the meaning of the "largely based" language, and about whether the peer review process is

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[48] FSB Peer Review of Canada, *supra* note 38, at 3.

[49] IMF, Canada: Financial System Stability Assessment—Update, IMF Country Report No. 08/59 (Feb. 2008) at http://www.imf.org/external/pubs/ft/scr/2008/cr0859.pdf .

[50] *See, e.g.*, FSB Peer Review of Canada, supra note 35, at 14 ("In November 2011, the government introduced the Financial System Review Act, which includes measures to promote financial stability and ensure that financial institutions continue to operate in a competitive, efficient and stable environment; fine-tune the consumer protection framework by enhancing the supervisory powers of the FCAC; and improve efficiency by reducing the administrative burden on regulated firms and adding regulatory flexibility. The authorities are also working on a number of other regulatory initiatives, notably Basel III implementation, the strengthening of resolution regimes, the introduction of a national securities regulator, and the development of central counterparties (CCPs).")

[51] FSB Peer Review of Australia, *supra* note 45.

[52] IMF, Australia: Financial System Stability Assessment, including Reports on the Observance of Standards and Codes on the following topics: Banking Supervision, Insurance Regulation, Securities Regulation, and Payment Systems, IMF Country Report No. 06/372 (Oct. 2006) at http://www.imf.org/external/pubs/ft/scr/2006/cr06372.pdf .

sufficiently transparent. Although the FSB provides a list of the members of the committee responsible for standards implementation[53] it provides no details about their working methods.

The FSAP process is itself a rather limited review of regulatory systems. An assessor of Canadian securities regulation noted that she had focused her attention on two provinces, Ontario and Quebec.[54] The FSAP and FSB review documents seem to look mostly at the surfaces of financial regulation rather than penetrating below the surface,[55] except to the extent that they reflect the views of domestic authorities. Both the FSAP document and the peer review for Canada suggest that the reviews provided an opportunity for the domestic authorities to explain what they were doing with respect to financial regulation rather than for the reviewers to interrogate the domestic authorities with any intensity. For example the peer review report contains a number of references to Canada's as yet unfinished efforts to harmonize securities regulation across the provinces.[56] In the context of a process designed to increase harmonization of securities regulation transnationally, it is not surprising that the desirability of increasing harmonization within a state is taken for granted, and perhaps even that the reviewers did not feel

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[53] http://www.financialstabilityboard.org/about/scsi.pdf.

[54] Canada FSAP, supra note 49, at 41 ("As it was impossible to assess 13 provinces, the assessment largely relied on the regulatory frameworks of Ontario and Quebec to draw inferences on the level of implementation of the Principles for the country as a whole. Given the high level of harmonization in regulations that has been brought about by the adoption of National Instruments, and the fact that these two provinces account for a very significant proportion of the activity of the Canadian securities market, the assessor and the Government of Canada believe that this is a reasonable approach. To the extent possible the assessor has highlighted the cases where important differences exist between the framework of these two provinces and other provinces/territories.")

[55] *See also, e.g.*, Basel Committee on Banking Supervision, Progress Report on Basel III Implementation, (Oct. 2011) at http://www.bis.org/publ/bcbs203.pdf, which does contain some information about methodology. *Id.* at 2. But the description illustrates that the focus on implementation is about formal implementation rather than implementation in substance. *Id. Cf.* William Twining, Surface Law.

[56] *See, e.g.*, FSB Peer Review of Canada, *supra* note 38, at 30 ("The current regulatory structure is complex and may give raise to potential inefficiencies, duplications or gaps. It would be beneficial for Canada to ensure that all of its provinces and territories participate in a harmonised regulatory structure.")

the need to investigate any of the details of the discrepancies. The reports do not make clear what issues of financial stability, or what issues with respect to implementation of international standards, may exist as a result of Canada's province-based system of securities regulation. It may be that the discussions involved more intense reflections than are shown in the documents. The point may be the process rather than the resulting reports.

It is the interactions between regulators in different jurisdictions which makes the FSB peer review process a comparative law process. Arguably the ambiguity of many of the standards which underlie the peer review process encourages the peer reviewers to engage in regulatory comparisons. The standards are not legally binding, so as a formal matter they may not constitute law,[57] but they are implemented in legal systems by means of binding legal rules. Thus examining the ways in which legislators and regulators in different jurisdictions say they are implementing the standards is in fact an exercise in comparative law. The reports sometimes suggest that other jurisdictions may be able to learn from experience in the state with is the subject of the review,[58] or that it may be able to learn from the experience of others.[59] The peer review documents suggest that the type of comparative law in which those involved engage tends to be a rather formalistic exercise, focusing on legal instruments rather than on how they are

[57] This of course depends on how one conceptualizes what law is.

[58] FSB Peer Review of Mexico, supra note 30, at 17 ( "Mexico carried out considerable reforms in the past few years to strengthen its safety net arrangements. This experience shows that the legal framework for both deposit insurance and bank resolution can be reformed materially within a limited timeframe to align it with good international practice.")

[59] FSB Peer Review of Mexico, supra note 30, at 6 ("Taking steps to further deepen financial markets. Committee members highlighted in particular the crucial roles of: (i) promoting financial education including via targeted school programs, which is a challenge for Mexico; (ii) increasing transparency by means of simplified disclosures that facilitate consumers' and investors' understanding and their ability to compare financial products; (iii) cracking down on illegal activity, including via the "whistle-blower" system being established in Mexico, through which regulated firms' employees and the broader public can make complaints to regulators; and (iv) promoting the development of institutional investors as part of a vibrant, sophisticated investor base that would, in turn, lead to deeper securities markets.")

applied in practice.[60] This is not always the case, for example the peer review of Switzerland noted that FINMA is required to take account of the competitiveness of the Swiss financial centre in carrying out its regulatory responsibilities. The report notes:

> Although this article could potentially give industry representatives some leverage in opposing regulation, no FINMA regulation has been challenged in court due to the competitiveness clause since the enactment of the Act. FINMA emphasises that it does not accept or promote inadequate or ineffective regulation in favour of competition and that, in fact, it considers the proposed TBTF regulations for the two SIBs as a competitive advantage for the Swiss financial centre.[61]

The peer review of Australia noted that the FSAP had suggested that although a principles-based approach to financial regulation had benefits, ASIC should provide more guidance to market participants.[62] The report shows that ASIC had provided some of the requested guidance.[63] In many cases the peer review reports accept that there may be many ways of achieving the same regulatory objectives, and they do recognize that it is not just the law on the books that matters.[64]

The tendency of the reports to concentrate on the law on the books may reflect in part the huge scale of the project of harmonizing financial regulation across jurisdictions with very

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[60] Although *cf.* FSB, Peer Review of Switzerland, *supra* note 45, at 6 ("Implementation issues will be important for the success of the TBTF package. First, Switzerland's experience with the use of contingent capital instruments (CoCos), which are a relatively new instrument and represent a large portion of the additional capital requirements, will be useful in determining the broader use of these instruments at the international level... at least as important as higher capital levels and liquidity buffers is ensuring...a robust supervisory framework in FINMA with sufficient resources and intensive supervision.")

[61] *Id.* at 19.

[62] FSB Peer Review of Australia, *supra* note 45, at 32.

[63] *Id.* at 34-5.

[64] FSB Peer Review of Spain, *supra* note 45, at 27 ("Although there is no single optimal structure and different organisational models have their own pros and cons, the relevant authorities need to be able to work together and exchange information. Organisational structures are secondary to ensuring that these agencies have the tools to intervene when necessary, and the willingness and independence to do so.")

different histories and cultures. In part it may be a function of the documentation of the results of the reviews rather than of the exercise itself. The reports reflect the conclusions of the review rather than the thinking through of the issues.

**Peer Review as Coercive Dialog**

For academics the term "peer review" tends to refer to the processes academic journals establish to ensure that articles they select for publication meet best practices with respect to the quality of research and that they are original works. Journals rely on academics to perform peer reviews of articles which relate to their own areas of expertise. Publication in peer reviewed journals is important for junior scholars as they are measured by their success in placing articles with respected peer reviewed journals. The FSB's peer review system is clearly quite different to these academic peer review processes. In particular, whereas academic peer- reviews look for originality as well as compliance with best practices the FSB's processes are geared solely to ensuring compliance. Academic peer reviews involve academic experts in particular fields concentrating on one article at a time, whereas the FSB's processes focus on a whole regulatory system or a particular regulatory issue across jurisdictions.

The academic peer review system is imperfect. It relies on the unpaid labor of volunteers, and is slow.[65] Some authors complain that the system is infected by bias.[66] Reviewers are anonymous and therefore unaccountable. And peer review does not guarantee that articles are based on sound scholarship or even that they are original: peer reviews have failed to detect plagiarism. Traditional peer-reviewed publications are now challenged by online fora for the distribution of academic work: Academia.edu, arXiv, Bepress, ResearchGate, and SSRN all

[65] Perhaps the development of crowdsourced peer reviews will help. *See, e.g.*, http://www.sympoze.com/ .

[66] *See, e.g.*, Michael J. Mahoney, *Publication Prejudices: An Experimental Study of Confirmatory Bias in the Peer Review System*, 1Cognitive Therapy and Research 161, 173 (1977) ("(a) referee evaluations may be dramatically influenced by such factors as experimental outcome, and (b) interreferee agreement may be extremely low on factors relating to manuscript evaluation.")

provide means for academics to publish their research. These fora do not displace peer-reviewed journals, but provide a mechanism for publicizing research more quickly than peer-reviewed journals can.

Invoking the idea of peer review with respect to compliance with transnational standards analogizes the FSB's processes with a standard established approach to evaluating scholarly work. Many of the staff of international organizations and domestic financial regulators are oriented to the academic environment,[67] and peer reviews with respect to regulation fit the academic mindset. Relying on the idea of peer review helps to emphasize the technical and expertized characteristics of the standards and their implementation. Peer review of financial regulation involves review by experts rather than by the crowd.. And the FSB has addressed some of the dangers inherent in anonymous reviews: unlike academic peer reviews, the FSB identifies those who are involved in producing its peer reviews.[68] And unlike academic peer reviews the FSB's process involves dialog between financial authorities in the country subject to review and representatives of financial authorities in other FSB jurisdictions.[69]

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[67] The BIS' mission includes "conducting research on policy issues confronting central banks and financial supervisory authorities." BIS Annual Report 2010/11, 101 (Jun. 26, 2011) at http://www.bis.org/publ/arpdf/ar2011e7.pdf . Staff at the World Bank, IMF and BIS produce regular working papers. The Bank of England, which participates in the work of the Basel Committee states: "The Bank has some 200 economists trained to Masters and PhD level whose research benefits from close contact with academia. Research produced by its economists is published in the Working Paper Series, in internationally-refereed journals and presented at academic conferences. The Bank hosts regular conferences and workshops with other central banks, public organisations and academics." See http://www.bankofengland.co.uk/research/Pages/default.aspx .

[68] *See, e.g.*, Peer Review of Canada, *supra* note 38, at 3 ("The draft report for discussion was prepared by a team chaired by Tom Scholar (HM Treasury, United Kingdom) and comprising Matías Gutiérrez Girault (Central Bank of Argentina), Nicoletta Giusto (Companies and Stock Exchange Commission, Italy), Antonio Pancorbo (Bank of Spain), Carlos Serrano (Mexican National Banking and Securities Commission), and Ravi Shankar (Reserve Bank of India). Jason George and Costas Stephanou (both FSB Secretariat) provided support to the team and contributed to the preparation of the peer review report.")

[69] See, e.g., FSB Peer Review of Canada, *supra* note 38, at 5 ("Unlike the FSAP, a peer review does not comprehensively analyse a jurisdiction's financial system structure or policies,

The terminology of peer review has another advantage over other terms the G20 and FSB might have used: it suggests an equality between the reviewer and the reviewed which was likely diplomatically useful in the negotiations over the G20 statements about the crisis. Those involved characterize the peer review system as a mechanism for keeping them all honest.[70] They are all in it together. At the same time, while the members of the G20 are clearly denominated peers, other states do not so clearly benefit from this designation.[71] And, alongside its peer review system the FSB has addressed the issue of compliance with international standards on international co-operation and information exchange by adopting the approach the Financial Action Task Force (FATF) has taken in the money-laundering context of identifying non-cooperative territories. For this purpose the FSB has identified "a pool of about 60 jurisdictions for evaluation, including all 24 FSB member jurisdictions."[72] This initiative is clearly as much, if not more, about evaluating jurisdictions outside the peer group as it is about reviewing peers. But this is inherent in the FSB's structure and mandate: it is a limited membership organization charged with ensuring

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nor does it provide an assessment of its conjunctural vulnerabilities or its compliance with international financial standards.")

[70] *See, e.g.*, Paul Tucker, *Resolution: A Progress Report*, Speech at the Institute for Law and Finance Conference, Frankfurt (May 2012) ("The nations of the G20 have signed up to the FSB's Standard on resolution regimes. But, of course, we need to keep each other honest. That is why the FSB has proposed a Peer Review process, involving top officials, to ensure that this is working. The Bank of England is 100% behind this. Not only would we like an opportunity to vet the existence of viable resolution plans for the current SIFIs from the US, Germany, France, Switzerland and, no doubt, other countries down the road. We also really want other countries to be able to confront us with harsh reality if we don't deliver on having viable resolution plans for UK SIFIs over the next few years.")

[71] The language quoted in note 34 is somewhat ambiguous on this point ("encouragement from peers motivates all countries and jurisdictions to raise their level of adherence"). The FSB Framework also notes that its work on encouraging "adherence of all countries and jurisdictions to international financial standards" will include "identifying non-co-operative jurisdictions." FSB Framework, *supra* note 33, at 2.

[72] FSB, Promoting Global Adherence to Regulatory and Supervisory Standards on International Cooperation and Information Exchange Progress Report (Apr. 29, 2011) at http://www.financialstabilityboard.org/publications/r_110429.pdf .

global financial stability.[73]

The EU has implemented a peer review system to ensure that its Member States implement EU rules properly,[74] and the FSB's system resembles the EU system in some respects. Both systems require the states involved to co-operate with the process. The European Securities and Markets Authority (ESMA) notes that the success of its peer reviews depends on the co-operation of competent authorities in the Member States.[75] In the same way, the effectiveness of the FSB's peer review process depends on the quality of the information on which they are based. The EU and FSB review processes differ because the EU's are embedded in a context of binding

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[73] *See* http://www.financialstabilityboard.org/about/mandate.htm (" The mandate of the FSB is to: assess vulnerabilities affecting the financial system and identify and oversee action needed to address them; promote co-ordination and information exchange among authorities responsible for financial stability; monitor and advise on market developments and their implications for regulatory policy; advise on and monitor best practice in meeting regulatory standards; undertake joint strategic reviews of the policy development work of the international standard setting bodies to ensure their work is timely, coordinated, focused on priorities, and addressing gaps; set guidelines for and support the establishment of supervisory colleges; manage contingency planning for cross-border crisis management, particularly with respect to systemically important firms; and collaborate with the IMF to conduct Early Warning Exercises.")

[74] EU bodies which have responsibilities for financial regulation administer systems of peer review. *See, e.g.*, Regulation Establishing a European Supervisory Authority (European Securities and Markets Authority), Art 30(1) O.J. No. L 331/84 at 104 (Dec. 15, 2010) ("The Authority shall periodically organise and conduct peer reviews of some or all of the activities of competent authorities, to further strengthen consistency in supervisory outcomes. To that end, the Authority shall develop methods to allow for objective assessment and comparison between the authorities reviewed. When conducting peer reviews, existing information and evaluations already made with regard to the competent authority concerned shall be taken into account"); ESMA, Decision of the European Securities and Markets Authority Establishing its Review Panel, ESMA/2011/BS/229 (Nov. 8, 2011) at http://www.esma.europa.eu/system/files/2011-bs-229.pdf; ESMA, ESMA Review Panel Methodology, ESMA/2012/33 (Jan. 25, 2012) at http://www.esma.europa.eu/system/files/2012-33.pdf.

[75] *See, e.g.*, ESMA Methodology, *supra* note 74, at ¶ 9 ("Only if all Competent Authorities co-operate and commit themselves to the work of the Review Panel and provide complete, coherent and high-quality responses, will the Review Panel work result in a meaningful outcome.")

treaty and legislative commitments and permanent institutional arrangements rather than a context of non-binding agreements. And whereas some of the EU Member States are clearly wealthier and more powerful than others, the EU is also committed in important respects to the idea that the Member States are in fact peers. The connection between the Member States of the EU, while challenged by recent events, is more established and more intense than the connections between the states involved in the FSB and the G20.

FSB and ESMA peer reviews are imperfect from the perspective of transparency. Although ESMA states that its Review Panel "shall work in an open and transparent manner,"[76] ESMA's website does not identify all of the members of the Review Panel, merely the Chair and two Rapporteurs.[77] This contrasts with the EU's Treaty commitments to transparency:[78] ESMA thus does not operate as transparently as many EU bodies do, and it works in English rather than in all of the EU official languages or even in the most commonly used EU languages. The FSB, like the Basel Committee and IOSCO, does not operate within a regime with established rules about transparency.

Within the EU's structures, peer reviews are similar to systems established under treaty regimes for monitoring of compliance with treaty requirements by state parties.[79] IMF surveillance is such a system.[80] And there are systems for ensuring compliance with treaties

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[76] Id. at ¶ 3.

[77] *See* http://www.esma.europa.eu/page/Review-Panel.

[78] *See, e.g.*, Caroline Bradley, *Transparency and Financial Regulation in the European Union: Crisis and Complexity* (forthcoming, Fordham Int'l L. J.).

[79] The EU has a more coercive enforcement system for ensuring compliance by the Member States with their Treaty obligations. *See, e.g.*, Pål Wennerås, *Sanctions Against Member States under Article 260 TFEU: Alive, but Not Kicking?*, 49 COMMON MKT. L. REV 145 (2012).

[80] *See, e.g.*, IMF, IMF Executive Board Adopts New Decision on Bilateral Surveillance Over Members' Policies, Public Information Notice (PIN) No. 07/69 (Jun. 21, 2007) at http://www.imf.org/external/np/sec/pn/2007/pn0769.htm#decision. *Cf.* Independent Evaluation Office of the IMF, IMF Performance in the Run-Up to the Financial and Economic Crisis: IMF Surveillance in 2004-07 (2011) available from http://www.ieo-imf.org/ieo/pages/IEOPreview.aspx?img=i6nZpr3iSlU%3d&mappingid=dRx2VaDG7EY%3d.

relating to human rights,[81] weapons of mass destruction and environmental protection. In these contexts, experts examine the extent of states' compliance with their commitments under international treaties. Treaty-based systems for ensuring compliance have a greater degree of formality than the FSB's peer review system. For example, as the IMF exercises surveillance over its members it is also subject to evaluation by an Independent Evaluation Office.[82]

Something like a system of peer review is arguably inherent in any multi-jurisdiction legal system. In the US, the American Law Institute develops Restatements of different areas of the law in the different states. Courts in different members of the Commonwealth treat decisions of other Commonwealth courts as persuasive, if not as binding precedent. In both cases the assessments of experienced lawyers and judges influence the extent to which the rules applicable in different jurisdictions are taken seriously.

The FSB peer review system differs from these multi-jurisdictional systems of comparative law in that the FSB seeks to establish the extent to which the G20 states (and others) conform their regulatory regimes to a system of agreed transnational standards: it is a system to encourage compliance rather than a system for establishing and comparing the rules in effect in different jurisdictions and, perhaps also for establishing best practices (as some parts of the ALI Restatements seem to do). At the same time, the transnational standards which are the subject of the FSB peer reviews are drafted in language which is often not very specific and which seems to leave significant discretion to states which claim to implement them.[83] Transnational standards tend to embody principles rather than rules. Thus any process which reviews the extent to which states are implementing transnational standards of financial regulation is arguably more of a system of comparing rules to principles and comparing implementation of principles across

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[81] *See, e.g.*, OHCR Report 2011 at http://www2.ohchr.org/english/ohchrreport2011/web_version/ohchr_report2011_web/index.html

[82] *See, e.g.*, Independent Evaluation Office of the IMF, Governance of the IMF: An Evaluation (2008) at http://www.ieo-imf.org/ieo/files/completedevaluations/05212008CG_main.pdf.

[83] Transnational standards developed by the Basel Committee, IOSCO and IAIS are much less detailed than the EU's rules, and leave much more discretion to states with respect to implementation.

jurisdictions. The question is how the subject state is behaving with respect to implementation as compared to other states which also claim to have implemented the same standards. But this means that the combination of FSAP reviews and FSB peer reviews can end up redefining a state's commitments to implement international standards. A state which has embarked on a process of implementing transnational standards may find that the IMF and FSB review bodies characterize its commitments differently from the way it understood them at the time of entering into them. This is a feature of multi-lateral treaty regimes: a tribunal may interpret treaty commitments differently from the way a state party interprets those same commitments. And this is more likely to be true for states which were not involved in developing the standards. But international standards are not treaties, and they are not legally binding. Thus, the effect of applying peer review to systems of transnational standards in financial regulation is arguably to constrain the discretion states have with respect to implementation. The standards may be drafted in language which allows for discretion, but if the body which conducts the peer reviews takes a particular view of what is appropriate to implement a particular standard that body's view may trump the language of the standards.

Peer review systems to encourage states to comply with treaty commitments are soft law mechanisms for enforcing formally binding obligations. The enforcement of compliance with binding treaty obligations by means of peer review involves a softening of the treaty obligations. In contrast the FSB's peer review system interacts with commitments to implement transnational standards, which are as a formal matter not binding, to harden those commitments. To the extent that this affects states which are involved in the process and have the opportunity to participate effectively in standard setting and in the peer reviews this is relatively unproblematic. But if the effect of the peer review system is to increase the constraints of the international standards on non-participants this is a different matter.

**Conclusions**

There is a rather dramatic difference between the grand public statements at summit meetings and the documents produced by technocrats — a common feature of. transnational financial regulation. The G20 declarations suggested that the new peer review system was about

making sure that G20 member states complied with their commitments to apply international standards of financial regulation. The G20 did not explain that the extant standards were mostly rather amorphous and left much scope for the regulatory imagination. The FSB, without the resources to focus on compliance with international standards, has focused on developing dialogs about its members' compliance with FSAP recommendations. The process involves serious issues of time lag. And whereas the G20 seemed to be making claims about real compliance, the FSAP-FSB documents seem mostly to be content with describing formal characteristics of states' regulatory systems.

Peer reviews of the implementation of international standards of financial regulation transform those standards from vaguely worded exhortations leaving significant discretion to implementing states into less-vague standards with less scope for discretion in implementation. This effect can be seen as an acceptable evolution of the standards, if viewed as the states' mutual evolution of those standards. But the point of the FSB peer review process is not just to ensure that FSB members are applying international standards appropriately, it is to use established compliance by members as the basis for encouraging non-member countries to conform their financial regulatory systems to the international standards. Imposing these more restrictive standards on other states is problematic when they have so little role in their creation. The peer review system therefore raises significant concerns about the legitimacy of the international standards process.