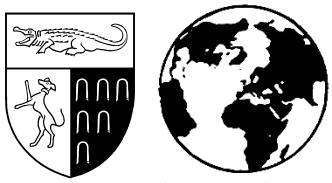
The Yale Journal of International Law Online



The Binding Force of G-20 Commitments

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The wave of international regulatory cooperation galvanized by the global financial crisis was by all measures a necessary response—financial markets are global and, in order to be effective, the regulatory response to the crisis had to be global as well. But in many ways, the best that could have been achieved was a loose system of dialogue and cooperation among the developed and developing nations concerned with the financial crisis. Now celebrating its sixth birthday and, as of this writing, preparing for the upcoming leaders' summit in Brisbane, Australia, the Group of Twenty (G-20) has spawned an ambitious set of commitments and the Financial Stability Board has developed meaningful recommendations for global financial regulatory reform. Implementation is underway. But how binding are the commitments? Are they any more than soft law? Are the commitments enforceable in their own right? Can they be enforced through other existing obligations or structures? This Article sets out a framework for analyzing G-20 commitments under international law, namely, as unilateral declarations, customary international law, or interfacing with general principles of law including reciprocity and estoppel.

INTRODUCTION

In the wake of the financial crisis of 2008, the leaders of twenty developed and developing economies convened the Group of Twenty (G-20) as a political and regulatory coordination body. Now celebrating just over six years since the first Leaders' Summit,[1] the G-20 boasts progress in cross-border cooperation on financial

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[1] *2008 Washington*, GROUP OF TWENTY, https://www.g20.org/about_g20/past_summits/2008_washington (last visited Oct. 3, 2014); GROUP OF TWENTY, RUSSIA G20: G20 5TH ANNIVERSARY VISION STATEMENT (Sept. 2013), https://www.g20.org/sites/default/files

regulation, the establishment of the Financial Stability Board (FSB), and other areas of economic and political coordination.[2] However, the G-20 and FSB face challenges in implementing decisions made at G-20 summits. These challenges raise questions as to the G-20 and FSB's effectiveness in the face of uncertainty regarding the binding character of their decisions.[3] For instance, although the FSB's charter includes an undertaking by the FSB's members (principally financial regulators and central banks) to "implement international financial standards,"[4] the FSB's charter also states that it is "not intended to create any legal rights or obligations."[5]

The financial crisis revealed the need for international financial regulatory cooperation.[6] The FSB has admirably put forward extensive recommendations on what shape the post-crisis regulatory framework should take, and these recommendations have been underpinned by international coordination.[7] The G-20 continues to develop mutual, collective agreements and mechanisms for multilateral coordination.[8] G-20 commitments by their nature are implemented domestically, and G-20 members have gradually adopted domestic regulations in conformity with their commitments and FSB recommendations.[9] For instance, the Committee on Payment

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/g20_resources/library/G20_5th_Anniversary_Vision_Statement.pdf; Karel Lannoo, *G-20 Plus Five: The Economic Forum's Mixed Record*, FOREIGN AFFAIRS (Feb. 27, 2014), http://www.foreignaffairs.com/articles/140972/karel-lannoo/g-20-plus-five.

2 *See generally* G-20 Communiqué, Meeting of G20 Finance Ministers and Central Bank Governors (Apr. 11, 2014), https://www.g20.org/sites/default/files/g20_resources/library/Communique%20G20%20Finance%20Ministers%20and%20Central%20Bank%20Governors%20Cairns.pdf (describing achievements of the G-20 and goals for future progress).

3 *See, e.g.*, NATHAN COPLIN, NEW RULES FOR GLOBAL FINANCE, GLOBAL FINANCIAL GOVERNANCE & IMPACT REPORT 26, 26-31 (2013), http://www.new-rules.org/storage/documents/global_financial_governance__impact%20report_2013%20.pdf.

4 Financial Stability Board Charter art. 5(1)(c) (Sept. 25, 2009) [hereinafter Charter 2009], http://www.financialstabilityboard.org/publications/r_090925d.pdf; Charter of the Financial Stability Board art. 6(1)(c) (June 19, 2012) [hereinafter Charter 2012], http://www.financialstabilityboard.org/publications/r_120809.pdf.

5 Charter 2012, *supra* note 4, at art. 23; *see also* Charter 2009, *supra* note 4, at art. 16. Despite the evolution of the FSB and its charter, these provisions have endured.

6 Joel P. Trachtman, *The International Law of Financial Crisis?*,104 AM. SOC'Y OF INT'L L. PROC. 295, 295-96 (2010).

7 *See, e.g.*, FINANCIAL STABILITY BOARD, OVERVIEW OF PROGRESS IN THE IMPLEMENTATION OF THE G20 RECOMMENDATIONS FOR STRENGTHENING FINANCIAL STABILITY (Sept. 5, 2013) [hereinafter FSB REPORT 2013], http://www.financialstabilityboard.org/publications/r_130905c.pdf; FINANCIAL STABILITY BOARD, OVERVIEW OF PROGRESS IN IMPLEMENTING THE LONDON SUMMIT RECOMMENDATIONS FOR STRENGTHENING FINANCIAL STABILITY, (Sept. 25, 2009) [hereinafter FSB REPORT 2009], http://www.financialstabilityboard.org/publications/r_090925a.pdf.

8 G20 LEADERS' DECLARATION SAINT PETERSBURG SUMMIT (Sept. 2013), https://www.g20.org/sites/default/files/g20_resources/library/Saint_Petersburg_Declaration_ENG_0.pdf; G-20, *Australia 2014*, GROUP OF TWENTY, https://www.g20.org/australia_2014 (last visited Oct. 3, 2014).

9 *See, e.g.*, Noam Noked, *FSB Reports Regulatory Reform Is Advancing, But Slowly*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (July 20, 2012, 9:21 AM), http://blogs.law.harvard.edu/corpgov/2012/07/20/fsb-reports-regulatory-reform-is-advancing-but-slowly/ (discussing progress on G-20 members' implementation of FSB recommendations); Gary M. Welsh, PriceWaterhouseCoopers, *Some Key International Implications of the U.S. Dodd-Frank Act*, 8 AMER. BANKRUPTCY INST., FIN. ADVISORS & INV. BANKING COMM. NEWSLETTER 140, 155-58

and Settlement Systems (CPSS, now called the Committee on Payments and Market Infrastructures, or CPMI)[10] and the International Organization of Securities Commissions (IOSCO) have begun monitoring implementation of CPMI-IOSCO's principles for financial market infrastructures (standards for payment, clearing and settlement systems, and trade repositories) among an array of developing and developed G-20 jurisdictions, including Australia, Brazil, India, Hong Kong, and Japan.[11] Governments on both sides of the Atlantic have adopted laws and rules dovetailing with G-20 commitments, including the United States' Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) and its implementing regulations,[12] and the European Union's European Market Infrastructure Regulation[13] and Markets in Financial Instruments Directive.[14]

The question arises, however, as to what consequences would follow from a failure to implement G-20 commitments. Could the G-20 commitments be used as instruments to impel—or, more pointedly, *compel*—action by G-20 members? Could they prompt the internalization of rules into the G-20 members' "normative system[s]?"[15] The G-20 commitments are typically regarded as non-binding,[16] but commentators have highlighted, for instance,

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(2011) (reviewing progress on G-20 financial regulation reform by G-20 jurisdiction). *See generally* G20 RESEARCH GROUP, ET AL., MAPPING G20 DECISIONS IMPLEMENTATION: HOW G20 IS DELIVERING ON THE DECISIONS MADE (Dec. 13, 2012), http://www.g20civil.com/upload/iblock/f3a/Mapping_G20_Decisions_Implementation_full_report.pdf (reviewing and scoring G-20 members on compliance with commitments as to fiscal consolidation, structural reforms, international financial institutions reform, financial regulation, protectionism, fossil fuel subsidies, and development).

[10] Press Release, Bank for International Settlements, CPSS – New Charter and Renamed as Committee on Payments and Market Infrastructures (Sept. 1, 2014), http://www.bis.org/press/p140901.htm.

[11] BD. OF THE INT'L ORG. OF SEC. COMMS., COMM. ON PAYMENT & SETTLEMENT SYS., IMPLEMENTATION MONITORING OF PFMIS: FIRST UPDATE TO LEVEL 1 ASSESSMENT REPORT 1-3 & n.4 (2014), http://www.bis.org/cpmi/publ/d117.pdf. Hong Kong was evaluated separately as a jurisdiction within China, a G-20 member. The listed jurisdictions received a rating of "4," the highest given by CPSS-IOSCO, across all categories of review for both principles and responsibilities. *See id*. at Annex A. Singapore, a G-20 guest country in 2014, was also reviewed and received a rating of "4" in all categories. *Id*.

[12] Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[13] Regulation 648/2012, of the European Parliament and of the Council of 4 July 2012 on OTC Derivatives, Central Counterparties and Trade Repositories, 2012 O.J. (L 201) 2.

[14] Press Release, European Commission, More Transparent and Safer Financial Markets: European Commission Welcomes European Parliament Vote on Updated Rules for Markets in Financial Instruments (MiFID II) (Apr. 15, 2014), http://europa.eu/rapid/press-release_STATEMENT-14-129_en.htm (describing planned updated rules for markets in financial instruments, including provisions "[t]o meet the G20 commitments"); *see also Legislation in Force: MiFID 1*, EUR. COMM. (Mar. 3, 2014), http://ec.europa.eu/internal_market/securities/isd/mifid/index_en.htm (describing the current EU regime for markets in financial instruments).

[15] *Cf.* Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2646, 2649 (1997) (discussing the process by which transnational actors initiate interaction to bind counterparties to internalize norms into the counterparties' internal systems).

[16] REBECCA M. NELSON, CONG. RESEARCH SERV., R40977, THE G-20 AND INTERNATIONAL ECONOMIC COOPERATION: BACKGROUND AND IMPLICATIONS FOR CONGRESS 6 (2013),

> the importance of the G20's actions when seeking to determine whether certain standards are considered customary international law. . . . [T]he G20 . . . standards articulated by informal groups . . . (for example, Financial Stability Board (FSB); Basel Committee; International Organization of Securities Commissions) are recognized and applied, if not "ratified," by formal, treaty-based international organizations (IMF; BIS) and political groups (G20). This adds a layer of legitimacy to the informal global normative process and provides positive evidence of the intent to rely on the standards generated by the global policy groups as binding international law.[17]

What, if anything, is the binding force of G-20 commitments? Are they more than informal lawmaking, if that?[18] What political, diplomatic, or legal implications exist if a G-20 member fails to carry through on a G-20 commitment? And, is there a feedback loop between the G-20 commitments, the FSB, and other agreements and organizations affecting global financial markets, perhaps yielding shared interpretive understandings?[19] This Article explores these questions.

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http://fas.org/sgp/crs/row/R40977.pdf; Daniel D. Bradlow, *A Framework for Assessing Global Economic Governance*, 36 B.C. INT'L & COMP. L. REV. 971, 979 (2013); Maria Monica Wihardja, *Is the G20 Failing?*, EAST ASIA FORUM, (Oct. 3, 2012), http://www.eastasiaforum.org /2012/10/03/is-the-g20-failing; *FAQs*, G20 INDIA SECRETARIAT, http://www.g20india.gov.in /faq.asp (last visited Oct. 3, 2014) ("G20 decisions are not legally binding on countries and institutions. However, all the members voluntarily commit to comply with the decisions. Also, compliances to the commitments made by countries are monitored through Mutual Assessment Process."). *But see* France Diplomatie, *France's Action at the G8 and G20* (Updated on Mar. 13, 2013), http://www.diplomatie.gouv.fr/en/french-foreign-policy-1/economic-diplomacy/a-european-and-international/making-international-regulations/article/france-s-action-at-the-g8-and-g20 (stating that the G-8's "decisions are not binding" but referring to the G-20 as "the premier forum for global economic cooperation" through which governments "make commitments for their national economic policies to contribute effectively to resolving the global crisis"); *Energy From Abroad: G8 and G20*, EURO. COMM. ENERGY (stating that "G8 . . . [d]ecisions taken do not have legally binding power" but stating that "at the Pittsburgh G-20 Summit, leaders agreed to rationalize and phase out over the medium term inefficient fossil fuel subsidies that encourage wasteful consumption. To deliver on this commitment, G-20 countries have worked to develop strategies and timeframes for implementing national-level policies to rationalize and phase out inefficient fossil fuel subsidies."), http://ec.europa.eu/energy /international/organisations/g8_and_g20_en.htm (last visited Oct. 3, 2014).

[17] Barbara Matthews, *Emerging Public International Banking Law? Lessons from the Law of the Sea Experience*, 10 CHI. J. INT'L L. 539, 555 (2010); *see also* Claire R. Kelly, *Financial Crises and Civil Society*, 11 CHI. J. INT'L L. 505, 515 (2011) (citing *id*.).

[18] *See* Jan Wouters & Dylan Geraets, *The G20 and Informal International Lawmaking* 15-31 (Leuven Centre for Global Governance Studies, Working Paper No. 86, March 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2274808.

[19] *Cf.* Robert B. Ahdieh, *Crisis and Coordination: Regulatory Design in Financial Crises*, 104 AM. SOC'Y OF INT'L L. PROC. 286, 287-89 (2010) (discussing the salience of transnational regulatory networks in the wake of the recent financial crisis); Pierre-Hugues Verdier, *Mutual Recognition in International Finance*, 52 HARV. INT'L L.J. 55, 82-92 (2011) (discussing

I. THE GLOBAL REGULATORY RESPONSE TO THE FINANCIAL CRISIS

In its report to the G-20 Leaders at their Pittsburgh Summit on September 25, 2009, the FSB set out regulatory coordination goals, including macro-prudential supervision, regulating over-the-counter derivatives, monitoring compensation of financial industry personnel, capital requirements, and addressing procyclicality.[20] Roughly four years after the Pittsburgh Summit, the FSB reported to the G-20 Leaders at their St. Petersburg Summit regarding implementation progress, noting that "[its] work has advanced substantially, but it is not yet complete."[21] As effective as dialogue and cooperation is—in many ways, the architectural core and modus operandi of modern regulation in a globalized world—it is worth reviewing the degree to which G-20 commitments can prescribe States' conduct. This Article proceeds to set out international law rubrics through which to analyze G-20 commitments.

II. RUBRICS FOR ANALYZING THE LEGALLY BINDING NATURE OF G-20 COMMITMENTS

The frequent starting point for analyzing sources of international law is Article 38(1) of the Statute of the International Court of Justice (ICJ), which sets out three main sources: treaties, customary international law, and general principles of law (supplemented by subsidiary means of understanding these three).[22] It is worth reviewing how the G-20 commitments square with these traditionally-analyzed sources of law. G-20 commitments are far from advice-and-consent treaties, but they may be facially viewed as a related source of law, unilateral undertakings by each G-20 member.[23] The commitments are also ingrained in the modern, albeit recent, practice of the G-20 members, raising their potential status as customary international law. And the practice of the G-20 Leaders also interfaces with general principles of international law, including reciprocity and estoppel.

A. Unilateral Undertakings by States

In international law, States' unilateral undertakings can in certain instances be binding.[24] Commenting on ICJ jurisprudence, Reisman and Arsanjani explain that:

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coordination among securities regulators and governments through memoranda of understanding).

[20] FSB REPORT 2009, *supra* note 7 *passim*. Procyclicality can be described as the tendency of accounting measures to cross thresholds precisely when market conditions worsen, thereby tending to exacerbate financial cycles.

[21] FSB REPORT 2013, *supra* note 7, at 3.

[22] Statute of the International Court of Justice art. 38, para. 1, June 26, 1945, 59 Stat. 1055, 3 Bevans 1179.

[23] *See* Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. 457, ¶ 49 (Dec. 20) ("Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration.").

[24] W. Michael Reisman & Mahnoush H. Arsanjani, *The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes*, 19 ICSID REV. 328, 329 (2004).

> The *Nuclear Tests* cases and the *Frontier Dispute* case hold that unilateral declarations made by States . . . may create legal obligations when: (i) interpretation establishes that the intention of the State was to bind itself with respect to a legal or factual situation; (ii) the declaration is given publicly and repeatedly, so that it cannot be dismissed as a random statement or a "trial balloon"; and (iii) those to whom the statements were directed could reasonably rely upon them.[25]

And as the ICJ recalled:

> [I]t is a well-established rule of international law that the Head of State, the Head of Government and the Minister of Foreign Affairs are deemed to represent the State merely by virtue of exercising their functions, including for the performance, on behalf of the said State, of unilateral acts having the force of international commitments. . . . [W]ith increasing frequency in modern international relations other persons representing a State in specific fields may be authorized by that State to bind it by their statements in respect of matters falling within their purview.[26]

The ICJ's jurisprudence points to the possibility that certain statements made by officials representing the G-20 members may be controlling, prescriptive commitments as unilateral declarations.[27] It may easily be accepted that the States' representatives at G-20 summits have sufficient powers to represent their respective States. The commitments are made publicly and other G-20 members' reliance upon the commitments may well be viewed as reasonable. But another approach is to view the commitments made by G-20 Leaders as "communication[s] . . . which shape[] expectations about appropriate future behaviour" giving rise to "functional lawmaking."[28] And the ICJ itself has noted that whether unilateral declarations are of the type to, and do, take on binding character is predicated on "the intention of the State making the declaration that it should become bound according to its terms,"

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[25] *Id*. at 336.

[26] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda), 2006 I.C.J. 6, ¶¶ 46-47 (Feb. 3).

[27] *Cf*. W. Michael Reisman, *The International Lawmaking Function*, *in* 351 RECUEIL DES COURS: THE QUEST FOR WORLD ORDER AND HUMAN DIGNITY IN THE TWENTY-FIRST CENTURY: CONSTITUTIVE PROCESS AND INDIVIDUAL COMMITMENT 119, 130, 135-38 (2010) ("Modern international law thus produces law or 'prescribes' in different settings and for different institutions and audiences[,] [including] treaties and other international agreements[,] the growing network of agreements between intergovernmental organizations[,] [and] [a]rrangements reached informally by levels of government in different countries . . . .").

[28] *Id*. at 122.

which "is to be ascertained by interpretation of the act."[29] As the International Law Commission has explained, "[t]o determine the legal effects of such declarations," which are "publicly made and manifesting the will to be bound," "it is necessary to take account of their content, of all the factual circumstances in which they were made, and of the reactions to which they give rise," giving weight "to the text of the declarations together with the context and the circumstances in which [they] [were] formulated."[30] The prescriptive character of G-20 commitments may therefore depend on the details of the commitments and intentions of the States.

B. Customary International Law

In its *North Sea Continental Shelf* cases, the ICJ explained that, in order for a practice among States to constitute customary international law, "[n]ot only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."[31] Moreover, as the ICJ elaborated in its *Nicaragua (Merits)* decision, "[i]t is not to be expected that in the practice of States the application of the rules in question should have been perfect . . . . The Court does not consider that . . . the corresponding practice must be in absolutely rigorous conformity with the rule."[32]

As to custom within a subset of States (e.g., a regional custom), the ICJ has explained that local custom may be established by a "long continued practice between two States accepted by them as regulating their relations," which can "form the basis of mutual rights and obligations between the two States."[33] However, "[t]he Party which relies on a [regional or local] custom . . . must prove that this custom is established in such a manner that it has become binding on the other Party."[34]

And as to the time required for a custom to have emerged, while the notion of "instantaneous custom" has received both support and criticism,[35] the ICJ has alluded to the possibility of a custom that emerges rapidly, but has noted that:

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[29] Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. 457, ¶¶ 46-47 (Dec. 20).

[30] International Law Commission, Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, G.A. Res. A/61/10 (Sept. 9, 2006), Guiding Principles 1, 3, 7.

[31] North Sea Continental Shelf (Ger. v. Den.; Ger. v. Neth.), 1969 I.C.J. 3, ¶ 77 (Feb. 20).

[32] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 186 (June 27).

[33] Right of Passage over Indian Territory (Port. v. India), 1960 I.C.J. 6, at 39 (Apr. 12).

[34] Asylum (Colom. v. Peru), 1950 I.C.J. 266, ¶ 276 (Nov. 20).

[35] *See* Niels Petersen, *Customary Law Without Custom?: Rules, Principles, and the Role of State Practice in International Norm Creation*, 23 AM. U. INT'L L. REV. 275, 281-82 (2007); Michael P. Scharf, *Seizing the "Grotian Moment": Accelerated Formation of Customary International Law in Times of Fundamental Change*, 43 CORNELL INT'L L.J. 439, 445-47 (2010); *see also* Bin Cheng, *Custom: The Future of General State Practice In a Divided World*, *in* THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW 513, 536 (R. St.J. Macdonald & Douglas M. Johnston eds. 1986) (discussing arguments in favor of instant custom).

> within the period in question, short though it might be, State practice, including that of States whose interests are specifically affected, should have been both extensive and virtually uniform . . . and should . . . show a general recognition that a rule of law or legal obligation is involved.[36]

There is little doubt that the G-20 Leaders' commitments are routine in the G-20 members' practice, accompanied by some consistency in the members' effectuation of their financial regulatory reform commitments.[37] It may be too soon to tell whether the practice of implementing G-20 commitments from the Leaders' Summits has risen to the level of binding international custom supported by the requisite *opinio juris*. However, domestic implementation may play a role in interpreting international commitments.[38] G-20 members have referenced G-20 commitments in the very rules and regulations that implement the agreed financial regulatory reform frameworks.[39] G-20 members can say that they are adopting legislation and regulations for domestic reasons, but the international implications remain.

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[36] North Sea Continental Shelf (Ger. v. Den.; Ger. v. Neth.), 1969 I.C.J. 3, ¶ 74 (Feb. 20).

[37] *See* G20 LEADERS, *supra* note 8.

[38] *See* Sungjoon Cho & Claire R. Kelly, *Promises and Perils of New Global Governance: A Case of the G20*, 12 CHI. J. INT'L L. 491, 514 n. 84 (2012); *cf.* Mallory Stewart, *Are Treaties Always Necessary? How U.S. Domestic Law Can Give Teeth to Non-Binding International Commitments*, 104 PROCEEDINGS OF THE ANNUAL MEETING (AM. SOC'Y OF INTL. L.) 189, 190-93 (2010) (discussing U.S. law concerning arms controls and participation in the Chemical Weapons Convention in light of international, nonbinding regimes).

[39] *See, e.g.*, Regulation 648/2012, *supra* note 13, recitals 5 & 8 (noting with approval G-20 commitments "that all standardised OTC derivative contracts should be cleared through a central counterparty (CCP) by the end of 2012 and that OTC derivative contracts should be reported to trade repositories" and to "improve transparency and regulatory oversight of OTC derivative contracts in an internationally consistent and nondiscriminatory way" and stating that "[i]t is appropriate and necessary in this context . . . to verify the effective equivalence of foreign regulatory systems in meeting G20 goals and standards . . . ."); Commodity Futures Trading Comm., Clearing Exemption for Swaps Between Certain Affiliated Entities, 78 Fed. Reg. 21,750, 21,752 (Apr. 11, 2013) (codified at 17 C.F.R. 50) (noting with approval G-20 agreements that "(1) OTC derivatives contracts should be reported to trade repositories; (2) all standardized OTC derivatives contracts should be cleared through central counterparties by the end of 2012; and (3) non-centrally cleared contracts should be subject to higher capital requirements" and emphasizing that "clearing through a [Derivatives Clearing Organization] is the best means of mitigating counterparty credit risk and providing an organized mechanism for collateralizing the risk exposures posed by swaps"); Commodity Futures Trading Comm., Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations, 78 Fed. Reg. 45,292, 45,349 (July 26, 2013) (to be codified at 17 C.F.R. 1) ("The Commission will continue discussion with other international partners with a view to establishing a more generalized system that would allow, on the basis of these countries' implementation of the G-20 commitments, an extension of the treatment the EU and the CFTC will grant to each other.").

C. General Principles of Law: Reciprocity and Estoppel

Reciprocity and estoppel are both general principles of international law of the ilk falling under Article 38(1)(c) of the ICJ Statute.[40] Generally, reciprocity is the concept that States may return the treatment they receive from other States with like treatment,[41] and estoppel is the concept that a State cannot reverse a position it has previously taken and on which other States have relied.[42] Can these principles be invoked to characterize a failure to comply with G-20 commitments as a violation of law? Under reciprocity, each G-20 member may choose to uphold its commitments only to the extent that other members uphold their commitments. Under estoppel, the argument is that a G-20 member is estopped from going back on a commitment it has made to other G-20 Leaders and upon which the other G-20 members have relied. G-20 members acting on reciprocity may lead to challenging outcomes—G-20 Leaders may be reluctant to follow a State's lead in, for instance, loosening financial market regulation under the aegis of reciprocity—but estoppel raises interesting questions. In addition to potential diplomatic setbacks a State may incur by going back on a G-20 commitment, fellow G-20 Leaders may argue that the State is estopped from a *volte face*. And as a potential future development, these general principles could be embodied in G-20 institutional objectives, compliance assessments,[43] or—with even greater impact—membership conditions such that failure to comply with G-20 commitments has consequences as to member benefits.[44]

D. Other International Obligations

In parallel with the rubrics reviewed above, a G-20 member that reneges on its commitments may run afoul of another, internationally enforceable, obligation.[45] Consider, for instance, that a G-20 member retracting from an earlier commitment may be party to a bilateral investment treaty containing an umbrella clause.[46] Dolzer

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[40] SEAN D. MURPHY, PRINCIPLES OF INTERNATIONAL LAW 101-03 (2d ed. 2012); BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 141-49 (2006); W. Michael Reisman & Mahnoush H. Arsanjani, *The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes*, 19 ICSID REV. 328, 339-40 (2004).

[41] Francesco Parisi & Nita Ghei, *The Role of Reciprocity in International Law*, 36 CORNELL INT'L L.J. 93, 94 (2003); *see also* ANTONIO CASSESE, INTERNATIONAL LAW 13-14 (2d ed. 2005).

[42] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 643-44 (7th ed., 2008).

[43] *See, e.g.*, *The G-20 Mutual Assessment Process (MAP)*, INT'L MONETARY FUND (Sept. 20, 2014), https://www.imf.org/external/np/exr/facts/g20map.htm; *ICC G20 Scorecard*, INT'L CHAMBER OF COM., http://www.iccwbo.org/Global-influence/G20/Reports-and-Products/ICC-G20-Scorecard/.

[44] For a critique of the G-20's governance, see Nancy Alexander, *Group of Twenty: G20 Governance in* GLOBAL FINANCIAL GOVERNANCE & IMPACT REPORT 2013 20, 20-25, http://www.new-rules.org/storage/documents/global_financial_governance__impact%20report_2013%20.pdf.

[45] *See generally* Jeffery P. Commission, *The Global Financial Crisis and International Investment Regimes*, 104 AM. SOC'Y INT'L L. PROC. 443, 444-47 (2010) (discussing investment treaty protections in light of the recent financial crisis and earlier financial crises).

[46] *See, e.g.*, Agreement on the Encouragement and Reciprocal Protection of Investments (with Protocol), Ger.-China, art. 10(2), Dec. 1, 2003, 2362 U.N.T.S. 253 ("Each Contracting Party

and Schreuer have suggested that "states may assume obligations not only by way of contracts but also through unilateral declarations such as legislation and executive acts," and "umbrella clauses . . . are capable of protecting obligations of the host state assumed unilaterally through legislation or executive acts."[47] This could provide another avenue of analyzing G-20 commitments, depending on the facts, circumstances, and the commitments' specificity.[48]

III. POLICY CONSIDERATIONS

The G-20 Leaders need one another to abide by undertakings they have agreed upon. The global community shares a mutual interest in sustainable, systemic stability in the shared financial market.[49] If the bedrock of global financial regulation has a fracture, not only is there the specter of regulatory arbitrage, but also the risk of precisely what the regulatory reforms were meant to prevent: another financial crisis. By many accounts, AIG Financial Products' buildup of credit default swap exposure went unseen because of a gap in systemic risk monitoring.[50] Consider, for instance, if oversight of a derivatives clearinghouse or central counterparty falls short of G-20 commitments and FSB recommendations. If G-20 commitments are not adhered to, and stability does not hold, the system could again fall through its fault lines.

CONCLUSION

As one international investment tribunal has stated, "[t]he reality of today's banking business is that major banks operate all over the world."[51] In grappling with the challenges of post-crisis financial regulation and international harmonization, the broader imperatives of systemic financial stability and market integrity continue to be pursued in a coordinated, global fashion. In this global economy, G-20 commitments continue to be made and implemented at the pace driven by need and mutual cooperation. If and when the time comes to consider stricter adherence to the commitments, the paradigms set out in this Article may prove helpful.

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shall observe any other obligation it has entered into with regard to investments in its territory by investors of the other Contracting Party.").

[47] RUDOLPH DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 177 (2nd ed. 2012).

[48] *Cf.* Micula et al. v. Romania, ICSID Case No. ARB/05/20, Award, ¶¶ 1, 130-31, 173, 427, 431-32, 446-47, 455-58 & n.46, 459 (Dec. 11, 2013) (discussing an approach under which the State's offer of incentives to investors under certain conditions could constitute an obligation protected by an umbrella clause but deciding, by majority, that the burden of proof as to such an obligation had not been met in that case).

[49] *See* Alan Greenspan, *The Crisis*, BROOKINGS PAPER ON ECON. ACTIVITY 201, 243-44 (Spring 2010), http://www.brookings.edu/~/media/Projects/BPEA/Spring%202010/2010a_bpea_greenspan.pdf.

[50] *See generally* William K. Sjostrom, Jr., *The AIG Bailout*, 66 WASH. & LEE L. REV. 943, 983-89 (2009) (discussing arguments as to the role of insufficient regulatory oversight in catalyzing AIG's condition in the recent financial crisis).

[51] Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/09/02, Award, ¶ 291 (Oct. 31, 2012).