

2011

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Recommended Citation

Bradley, Caroline, "Consultation and Legitimacy in Transnational Standard-Setting" (2011). *Minnesota Journal of International Law*. 320.

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Consultation and Legitimacy in Transnational Standard-Setting

Caroline Bradley*

The recent financial crisis has generated agreement on the need for new transnational standards for financial regulation. When governments work together to develop transnational standards and rules they do so using processes which are not uniform, which often seem to develop in an ad hoc manner, and which do not necessarily reflect any particular conception of good government. Transnational standard-setters have responded to critiques of the legitimacy of their role by emphasizing consultation of stakeholders. This article will compare the uses of consultation in the development of policy at the national and supranational levels. It will examine the weaknesses in the construction of transnational consultations which undermine their value as mechanisms of legitimation. For example, transnational consultations lack visibility, they are usually carried out in a limited number of languages, or even only in English. More fundamentally, this article will critique the stakeholder focus of transnational consultations. In practice the identification of stakeholders who are potential respondents to consultations seems to imply that there may be others (non-stakeholders) whose views are less important. As the financial crisis has shown, it is not only those who consider themselves to be stakeholders in financial regulation who are affected by its failures.

I. INTRODUCTION: TRANSNATIONAL FINANCIAL STANDARD-SETTING

The global financial crisis demonstrated the transnational nature of financial market activity and persuaded governments to commit to an intensified co-ordination of financial market

* Professor of Law, University of Miami School of Law, PO Box 248087, Coral Gables, FL, 33124, cbradley@law.miami.edu; <http://blenderlaw.umlaw.net/>. © Caroline Bradley 2010. All rights reserved.

regulation,¹ including a review of existing harmonized standards,² the introduction of new harmonized regulatory standards,³ and the development of new structures for addressing systemic risks.⁴ At the same time, the crisis meant that financial regulation (often treated as a technocratic sphere) came to be seen as a matter of significant domestic political interest.⁵ For example, politicians, regulators and private sector groups recognized that citizen-voters were offended by the fact that bankers, who were seen as having caused the crisis and whose institutions were bailed out by taxpayers, nevertheless had contractual rights to large bonuses while non-bankers suffered increased rates of mortgage foreclosure and unemployment.⁶ Market and regulatory

1. See, e.g., The Group of Twenty [G-20], *Declaration on Strengthening the Financial System* (Apr. 2, 2009), available at [http://www.g20.org/Document s/Fin_Deps_Fin_Reg_Annex_020409_-_1615_final.pdf](http://www.g20.org/Document%20s/Fin_Deps_Fin_Reg_Annex_020409_-_1615_final.pdf); cf. Elliott Posner, *Making Rules for Global Finance: Transatlantic Regulatory Cooperation at the Turn of the Millennium*, 63 INT'L ORG. 665, 669 (2009) (describing an institutionalization of transnational co-operation in financial regulation after 2002).

2. See, e.g., Bank for Int'l Settlements [BIS], Basel Comm. on Banking Supervision, *Consultative Document: Proposed Enhancements to the Basel II Framework*, 1 (Jan. 2009) available at <http://www.bis.org/publ/bcbs150.pdf> ("The Basel Committee has finalised its proposals for enhancing the Basel II framework in the area of securitisation and more specifically for dealing with resecuritisations. These enhancements are intended to strengthen the framework and respond to lessons learned from the financial crisis.").

3. See, e.g., *id.* at 2 ("[O]nce recovery is assured, prudential regulatory standards should be strengthened. Buffers above regulatory minima should be increased and the quality of capital should be enhanced. Guidelines for harmonisation of the definition of capital should be produced by end 2009. The BCBS should review minimum levels of capital and develop recommendations in 2010.").

4. G-20, *supra* note 1, at 1 ("We have agreed that the Financial Stability Forum should be expanded, given a broadened mandate to promote financial stability, and re-established with a stronger institutional basis and enhanced capacity as the Financial Stability Board (FSB).").

5. In the aftermath of elections in the UK and the US during 2010, newly empowered politicians called for changes in financial regulation. See, e.g., HM TREASURY, A NEW APPROACH TO FINANCIAL REGULATION: JUDGEMENT, FOCUS AND STABILITY, 2010, Cm. 7874, available at http://www.hm-treasury.gov.uk/d/consult_financial_regulation_condoc.pdf; R. Christian Bruce, *Congress: GOP-Controlled House of Representatives May Shape Rulewriting Under Dodd-Frank*, 42 SEC. REG. & L. REP. (BNA) 2093 (Nov. 4, 2010).

6. See, e.g., Productivity Commission, *Executive Remuneration in Australia*, Productivity Commission Inquiry Report No 49, (2009) [xv] (Austl.), available at http://www.pc.gov.au/_data/assets/pdf_file/0008/93590/executive-remuneration-report.pdf ("A catalyst for this inquiry was concern that

failures in the financial markets⁷ were acknowledged to have imposed externalities on those outside the financial markets.⁸ These developments led to debates about the extent to which the financial markets provide value to the real economy.⁹

executive pay had got out of hand. This perception was fuelled by practices in financial institutions abroad that were seen as a key contributor to the global financial crisis (GFC). Further, while local shareholder value plummeted in 2008 as a result of that imported crisis—with some companies and sectors being propped up by taxpayers—executive pay seemed to emerge unscathed, crystallising a view that executives were being rewarded for failure (after having been rewarded for success.); Financial Services Authority (FSA), *Reforming Remuneration Practices in Financial Services*, CP 09/10 (2009), available at http://www.fsa.gov.uk/pubs/cp/cp09_10.pdf; The Conference Board [TCB], *The Conference Board Task Force on Executive Compensation* (Sep. 2009), available at http://www.conference-board.org/pdf_free/ExecCompensation2009.pdf.

7. See, e.g., FSA, *The Turner Review: a Regulatory Response to the Global Banking Crisis*, at 22 (Mar. 2009) [hereinafter *The Turner Review*], available at http://www.fsa.gov.uk/pubs/other/turner_review.pdf (identifying excessive reliance on particular risk management techniques as a factor contributing to the crisis: “Central to many of the techniques was the concept of Value-at-Risk (VAR), enabling inferences about forward-looking risk to be drawn from the observation of past patterns of price movement. This technique, developed in the early 1990s, was not only accepted as standard across the industry, but adopted by regulators as the basis for calculating trading risk and required capital, (being incorporated for instance within the European Capital Adequacy Directive).”).

8. See, e.g., FIN. CRISIS INQUIRY COMM’N, PRELIMINARY STAFF REPORT: SHADOW BANKING AND THE FINANCIAL CRISIS, 41 (May 4, 2010), available at <http://c0182732.cdn1.cloudfiles.rackspacecloud.com/2010-0505-Shadow-Banking.pdf> (“[M]any financial firms were crippled, and some only survived with substantial government assistance. Their capital was depleted and many of their revenue channels were extinguished or impaired by the decline in financial activity. This condition severely restricted their capacity to provide funding to consumers, businesses, and governments, reinforcing reductions in real economic activity around the world and magnifying the ensuing recession.”).

9. See, e.g., Adair Turner, Speech at CASS Business School: What Do Banks Do, What Should They Do and What Public Policies Are Needed to Ensure Best Results for the Real Economy? (Mar.17, 2010), http://www.fsa.gov.uk/pubs/speeches/at_17mar10.pdf; cf. SOMO, *EU Financial Reforms Newsletter* (April 2010), http://somo.nl/dossiers-en/sectors/financial/eu-financial-reforms/newsletter-finance/april_2010/view (“The financial sector has the potential to serve the real economy, to improve sustainability and to help people in need, for instance, through credit and investments. However, recent financial crises have shown that the financial industry primarily serves itself. The financial sector has become so powerful that some say we “live in financial times”. It is therefore important to seize the momentum of the ongoing financial reforms to truly transform the financial sector so it serves the real economy, the environment and the interests of the most vulnerable within Europe and especially within developing countries.”).

Even before the crisis a number of transnational organizations developed standards for financial regulation:¹⁰ at the international level, the International Organization of Securities Commissions (IOSCO),¹¹ the Basel Committee on Banking Supervision (Basel Committee),¹² and the International Association of Insurance Supervisors (IAIS)¹³ have all published harmonized principles of financial regulation. The European Union (EU) has promulgated harmonized rules of financial regulation which are binding on its members.¹⁴ Since the crisis, efforts to develop and implement transnational standards have intensified.

Supranational standards and rules often require implementation within domestic legal systems in order to be effective. EU harmonization measures which are binding on the Member States are often¹⁵ structured as directives, which require Member State legislation for implementation, and standards developed by bodies such as the Basel Committee and IOSCO are not formally binding, leaving some discretion to states which implement them.¹⁶ The International Monetary

10. Note on terminology: this paper refers to the products of the Basel Committee and IOSCO as standards rather than rules because of their formally non-binding character. However, IOSCO and the Basel Committee often refer to what they produce as principles, rather than as standards. Their principles are principles which should be reflected in domestic regulatory schemes, rather than standards to be met by the suppliers of financial services, which would be more analogous to the products of other standards processes.

11. For a discussion of IOSCO's Principles of Securities Regulation see, for example, K. Pistor, *The Standardization of Law and Its Effect on Developing Economies*, 50 AM. J. COMP. L. 97, 116–120 (2002).

12. See, e.g., JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION 104 (2000) (describing how central bank governors established what is now the Basel Committee on Banking Supervision in response to the failures of the Herstatt Bank and Franklin National Bank in 1974).

13. See, e.g., Pistor, *supra* note 11 at 120–21.

14. See, e.g., Caroline Bradley, *Consumers of Financial Services and Multi-level Regulation in the European Union*, 31 FORDHAM INT'L L. J. 701 (2008).

15. Although not always. See, e.g., Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on Credit Rating Agencies, O.J. No. L 302/1 (Nov. 17, 2009), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:302:0001:0031:EN:PDF>.

16. 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) (“[B]ecause the agreements are not legally enforceable, nations can vary in their own interpretation and implementation

Fund (IMF) and the World Bank monitor implementation of standards by their members.¹⁷ Weaker states will tend to have less discretion in implementation than more powerful states, but even more powerful states notice the results of reviews by the international financial institutions.¹⁸ Since the financial crisis the Financial Stability Board has begun a system of peer review to supplement the FSAP and ROSC programs.¹⁹

Where discretion in implementation of transnational standards is limited, formally as is often the case in the EU,²⁰

of the standards.”).

17. The IMF and World Bank do so through Reports on the Observance of Standards and Codes (ROSC) and the Financial Sector Assessment Program (FSAP). 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), available at http://www.worldbank.org/ifa/rosc_aa_overview.pdf, IMF, *Financial Sector Assessment: A Handbook* (Sept. 29, 2005), available at <http://www.imf.org/external/pubs/ft/fsa/eng/index.htm>.

18. See, e.g., IMF, Financial Sector Assessment Program, *United States of America: The IOSCO Objectives and Principles of Securities Regulation—Detailed Assessment of Implementation*, at 26, IMF Country Report No. 10/125 (May 2010), available at <http://www.imf.org/external/pubs/ft/scr/2010/cr10125.pdf> (“The overall ratings in the Report, however, do not reflect the CFTC’s and SEC’s regulatory successes and, in some cases, suggest a misunderstanding of the U.S. regulatory system. Thus, the Commissions strongly disagree with many of the ratings in the Report. By way of example, while the IOSCO Principles recognize that regulators may use different approaches to accomplish the same objectives, the Report’s rating on market intermediaries is based on the assumption that every intermediary must be regulated the same way. That is, they must undergo an extensive review prior to registration. This requirement, however, cannot be found in the Principles or the assessment Methodology. The Report rejects a legitimate risk-based approach to a registration requirement and oversight of futures and securities intermediaries without evidence that the approach is ineffective. The Report also states that capital requirements for futures and securities firms do not fully address risk, yet provides no evidence that the CFTC’s and SEC’s current requirements do not already exceed recognized international best practice as reflected in the Principles.”).

19. See Financial Stability Board (FSB), *Country Review of Mexico: Peer Review Report*, at 3 (Sept. 23, 2010), available 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.”); FSB, *Thematic Review on Compensation: Peer Review Report* (Mar. 30, 2010), available at http://www.financialstabilityboard.org/publications/r_100330a.pdf.

20. A number of the EU’s single market measures are maximum standards measures. See, e.g., Directive 2003/71/EC, of the European

or because of the need to pacify international financial institutions (IFIs) or perhaps because of public commitments such as those made in the G20's crisis-related declarations,²¹ the processes whereby the transnational standards are agreed upon become more significant.²²

Before the crisis, and in response to critiques of the transparency and inclusiveness of transnational standard-setting,²³ supranational standard-setters began to formalize their procedures, developing practices for consulting on proposed standards, and even establishing consultation policies.²⁴ The transnational standard-setters are transplanting a technique which is often used in the domestic context, particularly in the domestic regulatory context, to their own transnational sphere. But there are significant differences between this transnational context and the domestic context. Some commentators have argued that the multi-level features of transnational standard-setting may in fact enhance

Parliament and of the Council of 4 November 2003 on the Prospectus to be Published When Securities are Offered to the Public or Admitted to Trading and Amending Directive 2001/34/EC, O.J. No. L 345/64 (Dec. 31, 2003).

21. See also IMF, *The G-20 Mutual Assessment Process and the Role of the Fund* (Dec. 2, 2009), available at <http://www.imf.org/external/np/pp/eng/2009/120209a.pdf>; FSB, *FSB Framework for Strengthening Adherence to International Standards* (Jan. 9, 2010), available at http://www.financialstabilityboard.org/publications/r_100109a.pdf.

22. In this paper I do not seek to argue that there is one optimal procedure for the development of transnational standards, but to critique current consultation processes as a component of such procedures. The literature on global administrative law tends to assume that a global administrative law should be based on Western principles. See, e.g., Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 EUR. J. INT'L L. 187, 207 (2006) ("Administrative law is largely a Western construct, taking its shape during the late 19th century as an instrument for the control of public power."). Harlow questions this assumption. See, e.g., *id.* at 213–4, (arguing "for pluralism: for diversity as the overarching value and for subsidiarity as the fundamental principle of global administrative law. Otherwise, the likely contribution of global administrative law will be to stifle what is democratic and legitimate what is not.").

23. For a critique of the global legal harmonization phenomenon generally, see, for example, IUC Global Legal Standards Research Group, *IUC Independent Policy Report: At the End of the End of History - Global Legal Standards: Part of the Solution or Part of the Problem?*, 9:3 GLOBAL JURIST (2009).

24. See, e.g., IOSCO, Executive Committee, *IOSCO Consultation Policy and Procedure* (Apr. 2005), available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD197.pdf>; cf. Harlow, *supra* note 22, at 199–200 ("The link between the pursuit of global administrative law and the agenda of cosmopolitan democracy for a 'new world order' lies in the concept of participation.").

accountability²⁵ and legitimacy.²⁶ Others are more skeptical.²⁷ This paper focuses on consultation as a component of policy-making, and, in particular on the different motivations and structuring of consultations domestically and in the transnational context to argue that it is not a simple matter to transplant techniques from one context to another.

At the transnational level, different organizations approach consultation and the reporting of the results of consultation differently.²⁸ Moreover, although transnational standard-setters have improved the transparency and openness of their processes, their role and activities are fundamentally different from those of many domestic legislators and regulators. Transnational standard-setters engage in consultation as a concession rather than as a matter of obligation: they are not required by any binding rules to carry

25. Accountability is a term which is used in different ways. For an argument that we should distinguish between accountability as a virtue and accountability as a mechanism, see Mark Bovens, *Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism*, 33 W. EUR. POL. 946 (2010).

26. See, e.g., Michael S. Barr & Geoffrey P. Miller, *Global Administrative Law: The View from Basel*, 17 EUR. J. INT'L L. 15, 17 (2006) ("While far from ideal, the Basel process has come a long way from the purely closed 'club' model of its origins, and demonstrates the possibility for enhanced accountability and legitimacy in international regulation. At the international level, the Basel committee has recently engaged in a relatively open process akin to a notice and comment rule-making in developing international capital standards, and has improved its transparency. At the domestic level, central banks and national bank regulators have enmeshed the Basel standards in the domestic notice and comment rule-making process, enhancing the legitimacy of the international process through local procedural protections. Moreover, international regulatory processes, including Basel, can in some instances help to reinforce, rather than undermine, domestic norms of accountability and legitimacy, particularly in countries where inside elites block reforms and prevent transparent domestic regulatory processes from occurring.").

27. See, e.g., B.S. Chimni, *Co-Option and Resistance: Two Faces of Global Administrative Law*, 37 INT'L L. & POL. 799, 800 (2008) ("By focusing exclusively on GAL, a false impression may arise that existing international institutions are becoming more participatory and responsive to the concerns of developing countries and their peoples."); see also *id.* at 806 ("[E]merging GAL is an integral part of international law and institutions that have an imperial character. As in the case of a non-democratic nation-state, non-democratic international laws and institutions—that is, the imperial nascent global state—cannot tolerate a robust application of principles of administrative law. GAL is today being shaped by a transnational capitalist class that seeks to legitimize unequal laws and institutions and deploy it to its advantage.").

28. See generally Caroline Bradley, *Private International Law-Making for the Financial Markets*, 29 FORDHAM INT'L L.J. 127, 140–154 (2005).

out consultations at all or in any particular way. As a corollary of this lack of obligation, stakeholders do not have meaningful rights to be consulted. Even the EU is concerned to ensure that its interests are taken into account in the transnational standard-setting process.²⁹

There are still few possibilities for challenging transnational standards,³⁰ and no harmonized supranational administrative law.³¹ Governmental agencies are subject to court challenges to their domestic rule-making activities,³² and to formal review by legislatures and other governmental agencies.³³ Transnational standard-setters are not subject to

29. See, e.g., Decision of the European Parliament and of the Council Establishing a Community Programme to Support Specific Activities in the Field of Financial Services, Financial Reporting and Auditing, O J No. L 253/8 (Sep. 25, 2009), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:253:0008:0016:EN:PDF>. Recital number 3 states: “In a global economy, there is also a need to converge standards between jurisdictions and develop international standards under a transparent and democratically accountable process. It is therefore important that the Community play a role in the international standard-setting process for financial markets. To ensure that the interests of the Community are respected and that global standards are of high quality and compatible with Community law, it is essential that the interests of the Community are adequately represented in that international standard-setting process.” *Id.*

30. However, the EU courts have stated that EU and Member State authorities which implement Security Council resolutions must ensure that EU fundamental rights are respected. See Joined Cases C-402/05 and C-415/05, *Yassin Abdullah Kadi and Al Barakaat Int’l Found. v. Council of the European Union and Comm’n of the European Cmtys.*, 2008 E.C.R. I-06351 at para. 314.; Case T-85/09, *Kadi v. Comm’n*, 2010 E.U.E.C.J., available at <http://www.bailii.org/eu/cases/EUECJ/2010/T8509.html>.

31. See, e.g., Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROB. 15, 16 (2005) (noting “an accountability deficit in the growing exercise of transnational regulatory power.”).

32. See, e.g., *Chamber of Commerce v. SEC*, 443 F.3d 890 (D.C. Cir. 2006); cf. HM Government, *The Coalition: Our Programme for Government*, 10 (U.K. May 2010), http://www.cabinetoffice.gov.uk/media/409088/pfg_coalition.pdf (“We will give the public the opportunity to challenge the worst regulations.”). Court review of administrative agency rule-making is not unproblematic, however. See, e.g., Jerry L. Mashaw, *Law and Engineering: In Search of the Law-Science Problem*, 66 L. & CONTEMP. PROBS. 135, 143–35 (critiquing the courts’ reviews of rule-making and recalls by the NHTSA).

33. See, e.g., U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-8 OCC PREEMPTION RULEMAKING: OPPORTUNITIES EXISTED TO ENHANCE THE CONSULTATIVE EFFORTS AND BETTER DOCUMENT THE RULEMAKING PROCESS, 5 (Oct. 17, 2005), <http://www.gao.gov/new.items/d068.pdf> (“OCC does not have written guidance, policies, or procedures detailing the rulemaking process. Instead, OCC uses a ‘rulemaking checklist’ that serves as a guide for completing the required reviews and the routing of documents. According to

the same type of formal monitoring,³⁴ and their work is insulated from the sort of scrutiny (however imperfect) the media apply to domestic governmental and legislative bodies. To the extent that the transnational standards pre-empt domestic policy choices these facts matter.

II. CONSULTATION AS AN ASPECT OF DOMESTIC GOVERNANCE

Domestic conceptions of good government and of how governments should relate to their citizens vary.³⁵ Governments frequently inform³⁶ and consult with their citizens during the policy-making process,³⁷ but such consultation is carried out in various ways,³⁸ performs a

internal control standards for the federal government, agencies should follow written procedures in making important decisions. Without such documentation, it may not be clear—to agency management, auditors, or oversight committees—that an agency followed applicable requirements.”).

34. See, e.g., Chinmi, *supra* note 27, at 810 (“The Indian experience shows that the role of social movements may prove particularly critical at the global level, given the fact that judicial intervention is often not a possibility.”); cf. Harlow, *supra* note 22, at 212 (“[I]n global space, power is diffused to networks of private and public actors, escaping the painfully established controls of democratic government and public law.”).

35. Cf. HOUSE OF COMMONS PUBLIC ADMINISTRATION SELECT COMMITTEE, GOOD GOVERNMENT, EIGHTH REPORT OF SESSION 2008–09, H.C. 97-1, ¶ 1 (U.K. June 18, 2009) (“Good government is the professed aim of all governments. But while everyone can agree that it is a desirable thing, it is much harder to define what good government actually is and how to achieve it.”).

36. The World Bank encourages communication with citizens as an aspect of good governance. See, e.g., Helen Darbishire, *Proactive Transparency: the Future of the Right to Information?*, (World Bank Institute, Governance Working Paper Series, 2010), <http://siteresources.worldbank.org/EXTGOVACC/Resources/DarbishireProactiveTransparency.pdf>.

37. Courts may treat the fact of consultation as significant. See, e.g., *Lehman Bros. Int. (Europe) (In Administration) v. CRC Credit Fund Ltd. & Ors.*, [2010] EWCA (Civ) 917 [58], [2010] WLR (D) 227, [58] (Eng.) (“The rules should also in my judgment be taken to be grounded in reality. FSMA requires the rules to be the subject of detailed and far-reaching consultation in the market prior to adoption (section 155). It is thus improbable that the FSA was oblivious to the fact that mistakes or worse are made by firms in practice, and that serious mistakes have been made in the past. It can be assumed that the FSA as regulator would seek to ensure that the rules ensured investment protection even where mistakes were made.”).

38. See, e.g., HM GOVERNMENT, CODE OF PRACTICE ON CONSULTATION, 5 (U.K. July 2008), <http://www.bis.gov.uk/files/file47158.pdf> (“At times, a formal, written, public consultation will not be the most effective or proportionate way of seeking input from interested parties, e.g. when engaging with stakeholders very early in policy development (preceding formal consultation) or when the

number of different functions, and often has mixed motives. Moreover, the differences in relationships between the executive and legislative branches of government in different jurisdictions influence who carries out consultations and how they are constructed.

The UK's Prime Minister, who is the Head of Government, is generally the leader of the political party which has a majority in Parliament. Through the Whip system, the government can usually ensure the passage of legislation it proposes. In contrast, in the US, the election of a President has no necessary connection with majorities in Congress, and political parties have much less power over elected representatives. In both countries the legislature engages in fact finding about issues and policy and about proposed legislation through hearings. And in both countries interest groups seek to influence legislation. But in the UK the government has a much tighter control of the development of broad outlines of policy than does the executive branch in the US, and UK government departments regularly issue consultation documents as a component of the policy development process.³⁹ At the same time, the UK's ability to make independent decisions about the development of policy is limited by the UK's membership of the European Union, so although the UK government carries out some consultations relating to its own legislative proposals, in other cases it consults with respect to the implementation within the UK of proposals developed in the EU.⁴⁰ The UK and the US also differ

scope of an exercise is very narrow and the level of interest highly specialised. In such cases an exercise under this Code would not be appropriate. There is, moreover, a variety of other ways available to seek input from interested parties other than formal consultation.”).

39. *But cf., e.g.*, HOUSE OF LORDS SELECT COMMITTEE ON THE CONSTITUTION, FIXED-TERM PARLIAMENTS BILL, H.L. Paper 69, ¶ 19 (U.K. Dec. 16, 2010), <http://www.publications.parliament.uk/pa/ld201011/ldselect/ldconst/69/69.pdf> (“The speed with which the policy was introduced, with no significant consultation, no green paper and no detailed assessment of the pros and cons of a five year term over a four year term, suggests that short-term considerations were the drivers behind the Bill’s introduction. The Hansard Society argued that ‘political expediency appears to have taken priority over Parliament’s right to properly scrutinise the executive.’ Democratic Audit stressed that ‘this change is yet another piecemeal alteration, implemented with insufficient consultation, to the UK constitution.’” (footnotes omitted)).

40. *See, e.g.*, HM TREASURY, LAYING OF REGULATIONS TO IMPLEMENT THE NEW E-MONEY DIRECTIVE: A CONSULTATION DOCUMENT (U.K. Oct. 2010), http://www.hm-treasury.gov.uk/d/emoney_directive_consultation.pdf.

in the organization of their administrative or regulatory agencies.

But, despite these structural differences in government, different states do collect information and consult with citizens as a component of policy-making. The global financial crisis has led to a huge transnational fact-finding exercise, carried out by staff at the international financial institutions⁴¹ and by states. The US established a Financial Crisis Inquiry Commission,⁴² and the Government Accountability Office published a number of reports on financial regulation.⁴³ The UK established an Independent Commission on Banking which has stated that it wants “to stimulate a wide debate” on reforms to the banking sector.⁴⁴ The EU Commission has emphasized that in developing its new rules for financial regulation, “[a]ccording to better regulation principles, the proposals are being prepared after stakeholder consultation and impact assessments.”⁴⁵

Recent trends in the UK⁴⁶ and the US⁴⁷ have emphasized the idea of drawing citizens into the policy-making process

41. See, e.g., 98 OECD JOURNAL: FINANCIAL MARKET TRENDS, no. 1, 2010, *passim*.; INT'L MONETARY FUND, GLOBAL FINANCIAL STABILITY REPORT: SOVEREIGNS, FUNDING, AND SYSTEMIC LIQUIDITY (Oct. 2010), <http://www.imf.org/external/pubs/ft/gfsr/2010/02/pdf/text.pdf>.

42. The Financial Crisis Inquiry Commission was established by the Fraud Enforcement and Recovery Act of 2009, Pub. L. 111-21, § 5, 123 Stat. 1617, 1625 (May 20, 2009). The Commission's website is at <http://www.fcic.gov/>.

43. See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-216, FINANCIAL REGULATION: A FRAMEWORK FOR CRAFTING AND ASSESSING PROPOSALS TO MODERNIZE THE OUTDATED U.S. FINANCIAL REGULATORY SYSTEM (Jan. 2009); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-739, FINANCIAL CRISIS HIGHLIGHTS NEED TO IMPROVE OVERSIGHT OF LEVERAGE AT FINANCIAL INSTITUTIONS AND ACROSS SYSTEM (July 2009).

44. Press Release, Independent Commission on Banking, Independent Commission on Banking: Public Events, para. 1 (Nov. 4, 2010), available at <http://bankingcommission.independent.gov.uk/bankingcommission/wp-content/uploads/2010/10/ICB-Press-Release-6.pdf>.

45. *Regulating Financial Services for Sustainable Growth*, at 2, COM (2010) 301 final (June 2, 2010).

46. See, e.g., Caroline Spelman, *Foreword*, in AN INVITATION TO SHAPE THE NATURE OF ENGLAND: DISCUSSION DOCUMENT, 2 (Defra ed., U.K. July 2010), <http://www.defra.gov.uk/environment/natural/documents/newp-discussion-260710.pdf> (“This document is a big, open invitation to all, to help shape the future of our natural environment, and in so doing, help shape a brighter future for our economic prosperity and quality of life. I welcome all views and ideas, and very much hope you will participate.”).

47. See, e.g., Memorandum of January 21, 2009, Transparency and Open Government, 74 Fed. Reg. 4685, 4685 (Jan. 26, 2009) (“Government should be participatory. Public engagement enhances the Government's effectiveness

more effectively, and at an early stage in the process. And the EU clearly envisages citizen involvement in policy development as a way of improving public acceptance and approval of the EU and its institutions. But although consultation seems to reflect a governmental commitment to transparency as well as to engagement with citizens,⁴⁸ consultation documents typically frame questions and invite responses to those questions, thus attempting to influence how consultees engage with government. For example, Defra, which has issued “a big open invitation to all” to participate in the discussion about shaping the nature of England,⁴⁹ and which encourages grass roots organizations to engage people they work with in the discussion,⁵⁰ has published documents which are designed to guide the grass roots organizations: *A Guide for Facilitators*,⁵¹ and a *Briefing Note for Participants*.⁵²

and improves the quality of its decisions. Knowledge is widely dispersed in society, and public officials benefit from having access to that dispersed knowledge. Executive departments and agencies should offer Americans increased opportunities to participate in policymaking and to provide their Government with the benefits of their collective expertise and information. Executive departments and agencies should also solicit public input on how we can increase and improve opportunities for public participation in Government.”).

48. See, e.g., Cary Coglianese, *The Transparency President? The Obama Administration and Open Government*, 22 *GOVERNANCE* 529, 535 (2009) (“[T]ransparency can affirmatively improve governmental decision making by helping inform the public about the problems governmental officials seek to solve and the options they are considering. By making more information available, the public can then participate more thoughtfully in the governmental process . . .”).

49. See, e.g., Spelman, *supra* note 46.

50. See AN INVITATION TO SHAPE THE NATURE OF ENGLAND, <http://ww2.defra.gov.uk/environment/natural/whitepaper/> (last visited Feb. 11, 2010) (“We want all interested parties to have a say in shaping the development of the White Paper. To do this we encourage national organisations who already have a relationship with local groups, societies, consumers or individuals, to engage them. For example, NGOs who have local groups or large memberships, civil society organisations who are in touch with local civic groups, and any businesses who wish to engage their consumers on White Paper issues.”).

51. DEFRA, AN INVITATION TO SHAPE THE NATURE OF ENGLAND: GUIDE FOR FACILITATORS, 1 (U.K. 2010), <http://ww2.defra.gov.uk/files/def-newp-facil-guide.pdf> (identifying “[t]he questions we would like addressed”). A feedback form is available at <http://ww2.defra.gov.uk/files/def-r13142-newp-form.doc> (last visited Feb. 11, 2011).

52. DEFRA, AN INVITATION TO SHAPE THE NATURE OF ENGLAND: BRIEFING NOTE FOR PARTICIPANTS (U.K. 2010), <http://ww2.defra.gov.uk/files/def-newp-brief-note.pdf>.

In recent years, many proposals to reform the policy process have focused on trying to ensure that policy is evidence-based,⁵³ and that it is considered carefully in the early stages.⁵⁴ Consultation processes may be a component of evidence-based policy-making.⁵⁵ They may be designed to collect information,⁵⁶ either factual information about the context for which policy is

53. See, e.g., Matthew Cashmore et al., *Evaluating the Effectiveness of Impact Assessment Instruments: Theorising the Nature and Implications of Their Political Constitution*, 30 ENVTL. IMPACT ASSESSMENT REV. 371, 371 (2010) (“The principle underlying the evidence-based policy agenda is that interventions should be based on ‘what works’ (i.e. empirical evidence of effectiveness), rather than political belief . . .”). There is a vast literature on the relationship between law and science, which addresses the complexities of the idea of evidence as a foundation for policy. See, e.g., Mashaw, *supra* note 32.

54. See, e.g., GOOD GOVERNMENT, *supra* note 35, ¶ 57 (“The Better Government Initiative (BGI), comprising several former senior civil servants and government advisers, drew on their extensive experience of policy making to suggest a range of measures which would contribute to improved government. One key recommendation was for policy proposals to be as comprehensive and well-thought through as possible. According to the BGI, the policy making process should allow for effective and informed policy deliberation, including through the publication of serious, ‘unspun’ white papers and the provision of draft bills as a matter of course.”).

55. And some respondents to consultations urge that policy-making be evidence-based. See, e.g., Int’l Swaps & Derivatives Ass’n, *Comments on The Turner Review: A Regulatory Response to the Global Banking Crisis*, 8 (June 18, 2009), <http://www.isda.org/speeches/pdf/ISDA-Response-to-Turner-Review-and-DP092.pdf> (“We have no objection, of course, to product regulation being considered, but believe that it is vital to do three things in conducting any such exercise: 1. Recognise the level of de facto product regulation that already exists 2. identify a clear, proportionate and evidence-based rationale for any additional regulation, 3. work with the grain of existing industry initiatives, notably (at the time of writing) those relating to regulatory transparency.”).

56. Governments adopt other strategies for developing policy, including Commissions and Committees which are tasked with reviewing or developing the law to achieve particular objectives. See, e.g., Australian Financial Centre Forum, *Australia as a Financial Centre: Building on our Strengths*, (Nov. 2009) 5, http://www.treasury.gov.au/afcf/content/reference_papers/downloads/AFCF_Building_on_Our_Strengths_Report.pdf (“On 26 September 2008, the then Assistant Treasurer and Minister for Competition Policy and Consumer Affairs, the Hon Chris Bowen MP, announced the establishment of the Australian Financial Centre Forum, designed to position Australia as a leading financial services centre. The Minister stated that the focus of the initiative was on ensuring that Australia’s policy settings allowed the financial sector to take full advantage of business opportunities in the region The Minister announced the appointment of Mr Mark Johnson, retired Deputy Chairman of Macquarie Bank, to lead the work of the Forum, along with the establishment of a small group of senior financial sector executives to form a Panel of Experts The Forum was further supported by the establishment of a Reference Group of representative industry bodies.”).

to be developed, or specific technical feedback on the details or drafting of proposed changes. Here it must be noted that although evidence-based policy-making is meant to be neutral from a political perspective, the evaluation of evidence is complex,⁵⁷ and data is often manipulated to further ends which are inherently political.⁵⁸ Trade associations, think tanks, other interest groups, and government agencies all seek to influence the policy development process, and consultation provides fora in which they can do so.⁵⁹

Trade associations are often responsible for a substantial proportion of contributions to consultations.⁶⁰ Governments may adopt procedures to try to ensure that the data on which they rely in policy-making are sound.⁶¹

57. See, e.g., Cashmore et al., *supra* note 53, at 372 (“Evaluating effectiveness is conceptually and methodologically problematic, and it is arguably the case that rejuvenation of interest in, and growth in demand for, evaluation has yet to result in significant advances being made in relation to these issues.”).

58. Cf. D. T. Hornstein, *Accounting for Science: The Independence of Public Research in the New, Subterranean Administrative Law*, 66 L. & CONTEMP. PROBS., Autumn 2003, at 227, 228 (“[T]his Article identifies within OMB’s programs the expanded boundaries of a new, subterranean battleground in administrative law, one in which the scent of future regulation is caught by stakeholders who then battle to shape the scientific facts on which future regulation may be based.”).

59. See, e.g., Anthony M. Bertelli & Jeffrey B. Wenger, *Demanding Information: Think Tanks and the US Congress*, 39 BRIT. J. POL. SCI. 225, 225 (2009) (“We advance the theoretical claim that the nature of debate in legislative committees drives a demand for strategic information, and the benefactors of think tanks, seeing a market opportunity, create and maintain the organizations which supply that information.”).

60. See, e.g., FSA, *Short selling: Feedback on DP09/1*, ¶ 1.7 (U.K. Oct. 2009), http://www.fsa.gov.uk/pubs/discussion/fs09_04.pdf (“There were 54 responses to DP9/01, including 17 from trade associations (or trade association coalitions) representing the views of their members. Most of the other responses came from authorised firms, but there were several responses both from non-authorised firms and individuals. We thank respondents for their comments.”).

61. See, e.g., HOUSE OF COMMONS SCIENCE AND TECHNOLOGY COMMITTEE, THE GOVERNMENT’S REVIEW OF THE PRINCIPLES APPLYING TO THE TREATMENT OF INDEPENDENT SCIENTIFIC ADVICE PROVIDED TO GOVERNMENT, H.C. 158-1 (U.K. Dec. 14, 2009), available at <http://www.publications.parliament.uk/pa/cm200910/cmselect/cmsctech/158/158i.pdf>. Cf. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-773T, SCIENTIFIC INTEGRITY: EPA’S EFFORTS TO ENHANCE THE CREDIBILITY AND TRANSPARENCY OF ITS SCIENTIFIC PROCESSES (June 9, 2009), available at <http://www.gao.gov/new.items/d09773t.pdf>.

Public consultation by governments is, in any case, about more than gathering policy-relevant data. In many technical areas citizens may not have the necessary skills and knowledge to evaluate properly the evidence cited as the basis for policy proposals.⁶² Governments want to know not just what facts citizens have which are relevant to policy-making, but also what their opinions are. Governments may choose to revise⁶³ or to abandon policies which would be unpopular, even if they might be effective. Often, consultations combine data-gathering and opinion forming functions. Pre-legislative consultations carried out by the executive allow governments to communicate with voters about their proposals to change the law in order to maintain confidence that they are addressing perceived problems or keeping campaign commitments. In a sense, therefore, some, particularly pre-legislative, consultations are designed to improve a government's relations with its public.⁶⁴ Consultations may even be designed to manipulate public opinions about proposed legislation.

62. See, e.g., Sheila Jasanoff, *Transparency in Public Science: Purposes, Reasons, Limits*, 69 L. & CONTEMP. PROBS., Summer 2006, at 21, 24 (“[M]odern societies' increasing dependence on science has proceeded hand in hand with developments that disable most citizens, even the most technically expert, from effectively addressing the larger set of questions: Is it good science; what is it good for; and is it good enough? Science has not only become infused with multiple social and political interests; it is also in danger of escaping effective critical control. Too often scientific knowledge seems to be ‘sequestered,’ concealed from those who could benefit from it or who could comment meaningfully on its quality and relevance.”).

63. See, e.g., HOUSE OF COMMONS REGULATORY REFORM COMMITTEE, DRAFT LEGISLATIVE REFORM (REVOCATION OF PRESCRIBED FORM OF PENALTY NOTICE FOR DISORDERLY BEHAVIOUR) ORDER 2009, H.C. 1108, ¶ 12 (U.K. Nov. 18, 2009), available at <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmdereg/1108/1108.pdf> (“The rationale of the response is essentially that the Department did not want to delay, but was unable to lay the draft Order immediately after consultation because consultation had shown the proposal to be more controversial than expected. That rather misses the point that a principal purpose of consultation is to establish whether there are views on a policy that might cause it to be reconsidered.”).

64. See, e.g., BIS, The Insolvency Service, *Encouraging Company Rescue – a consultation*, ¶ 2 (June 15, 2009) [hereinafter *Rescue Consultation*], available at http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/c_on_doc_register/ (“The UK has a long established and well developed insolvency legislative framework, which is highly regarded worldwide, with a reputation for fairness and for striking the right balance between the interests of debtors and creditors. We want to ensure that the insolvency regime remains world class and fit for purpose and this consultation is part of that ongoing process.”).

These two main functions of consultations (relationship oriented and fact oriented) operate together in the context of domestic politics, and sometimes may blur together. A concern for facts and evidence to support policy may lead governments to over-emphasize the comments of those who appear to have expertise when they weigh responses to consultations. For example, reports have raised questions about whether governmental authorities were too willing to accept financial institutions' claims about their ability to assess and manage the risks associated with their operations in developing rules of financial regulation.⁶⁵

At the domestic level, consultations may be structured differently at different stages in the policy-development process. Consultation exercises may be presented as preliminary, for example being denominated as discussions rather than consultations.⁶⁶ Governments may set up groups of experts to provide advice in particular policy areas.⁶⁷ Data gathering consultations may be carried out by congressional or parliamentary committees at an early stage before the consideration of proposed legislation,⁶⁸ or in the context of specific legislative proposals. When governments publish documents setting out their proposals for new legislation they may seek data from the public about the likely impact of the proposals.⁶⁹ Government-generated impact assessments and

65. See, e.g., *The Turner Review*, *supra* note 7.

66. See, e.g., HM TREASURY, DISCUSSION PAPER ON DEVELOPING NON-BANK LENDING CHANNELS FOR UK BUSINESSES (Jan. 12, 2010), *available at* http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/non_bank_lending_discussionpaper.pdf.

67. See, e.g., Press Release, Dep't for Bus., Innovation & Skills Press Release, Business Secretary Vince Cable today announced the creation of a new group of experts to advise him on business and economic policy (May 18, 2010) (on file with author), *available at* <http://nds.coi.gov.uk/content/Detail.aspx?ReleaseID=413396&NewsAreaID=2>.

68. See, e.g., HOUSE OF LORDS SCIENCE AND TECHNOLOGY SELECT COMMITTEE, CALL FOR EVIDENCE: BEHAVIOUR CHANGE (July 29, 2010), *available at* <http://www.parliament.uk/documents/lords-committees/science-technology/behaviourchange/CfEBehaviourChange.pdf>.

69. See, e.g., *Rescue Consultation*, *supra* note 64, at 8 (“A1. Do you agree that it would be helpful for medium and large-sized companies to be allowed to benefit from the option of a moratorium from creditor action for up to 28 days? A2. How useful do you think this would be? Do you think it would encourage medium and large-sized companies to utilise the CVA procedure? (If you can give figures, or comment on those in the initial Impact Assessment, that would be helpful.)”).

cost-benefit analyses⁷⁰ may also be communicated to the public in the course of consultations. In times of emergency governments may limit their consultations in the interests of speedy rule-making.⁷¹

Pre-legislative consultations may raise broad issues of principle for discussion. However, pre-legislative consultations on measures to implement supranational rules or standards are less likely to raise such broad issues. Although governmental authorities do sometimes carry out domestic consultations while they are negotiating transnational standards,⁷² this is not inevitable. So, at the time of implementation the Government carrying out the consultation may have already committed itself to the fact of implementation, although it may have retained some discretion with respect to the modalities of implementation. Implementation consultations will therefore reflect any limits on discretion with respect to implementation that are inherent in the supranational rules or standards. As noted above, governments may have limited discretion in implementation either as a legal matter, because the rules by their terms limit discretion, or as a practical matter because of political rather

70. See, e.g., UK GOV'T'S IMPACT ASSESSMENT LIBRARY, <http://www.ialibrary.berr.gov.uk/>; see also, e.g., European Ct. of Auditors, Impact Assessments In the EU Institutions: Do They Support Decision-Making? 24 (Special Report No. 3 2010) available at <http://eca.europa.eu/portal/pls/portal/docs/1/5412743.PDF> ("Public scrutiny of legislative proposals is of the utmost importance in relation to the policy objective of better regulation. The Commission's final IA reports are public documents available online to all interested parties once the related policy initiative has been proposed. This is international good practice.").

71. Cf. SELECT COMMITTEE ON THE CONSTITUTION, FAST-TRACK LEGISLATION: CONSTITUTIONAL IMPLICATIONS AND SAFEGUARDS, REPORT 2008-09, H.L. 116-I, ¶ 163 (U.K.), available at <http://www.publications.parliament.uk/pa/ld200809/ldselect/ldconst/116/116.pdf> ("We . . . urge the Government to put mechanisms in place to ensure that relevant parliamentary committees and stakeholders are consulted about and given the opportunity to respond to proposed fast-track legislation ahead of Second Reading in the House in which the bill is introduced. This should be possible in all but the most extreme circumstances.").

72. See, e.g., HM TREASURY, REVISION OF THE E-MONEY DIRECTIVE AND EU REGULATION ON CROSS-BORDER PAYMENTS: A CONSULTATION, 3 (Jan. 20, 2009) available at http://webarchive.nationalarchives.gov.uk/20100407010852/http://www.hm-treasury.gov.uk/d/consult_emd_200109.pdf ("This document consults on both proposals, with a view to informing the Government approach towards EU level negotiations on revision of the EMD, and the implementation of a revised Regulation 2560 into UK law.").

than legal commitments. Governmental authorities may ask potential commenters how they should go about meeting their obligations to implement the supranational rules.⁷³ And they may even consult on implementation in circumstances where they have limited discretion. For many reasons consultation at the time of implementation of transnational standards may have a limited impact on the implementing measures. Consultations about implementation may come to resemble domestic regulatory consultations which, reflecting the limited rule-making powers of the regulatory agency, concentrate on relatively narrow, more technical questions.

III. CONSULTATION IN REGIONAL AND GLOBAL GOVERNANCE

When governments work together in different fora to generate agreements about standards and rules that should operate transnationally, they do so using processes which are not uniform, which often seem to develop in an ad hoc manner, and which do not necessarily reflect any particular conception of good government. A growing literature on global administrative law seeks to address deficiencies in rule-making and standard-setting at the supranational level.⁷⁴ This literature tends to take as a given that supranational standard-setting is analogous to regulation rather than legislation at the domestic level.⁷⁵ However, although supranational standard-

73. See, e.g., HM TREASURY, PUBLIC CONSULTATION: DRAFT TERRORIST ASSET-FREEZING BILL, 2010, Cm. 7852 4, available at http://www.hm-treasury.gov.uk/d/consult_terrorist_assetfreezing_bill.pdf (“The Government is committed to ensuring that there is full and effective scrutiny of its draft asset freezing legislation. As such, it is launching this public consultation exercise to seek the views of interested parties and the general public on our proposed approach to terrorist asset freezing. In particular, the Government is interested in responses to the following questions: • does the draft Bill set out the most effective way of meeting our UN obligations and protecting national security whilst also ensuring sufficient safeguards in respect of human rights?”).

74. See, e.g., Benedict Kingsbury, Nico Krisch, & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15, 17 (2005) (defining “global administrative law as comprising the mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make.”).

75. See, e.g., Harlow, *supra* note 22, at 196 (“The principles of agency

setting may seem to take on the form of administrative processes, it also operates at a more fundamental policy-setting level.⁷⁶ Even where supranational standard-setters develop highly technical standards, those standards may embed policy assumptions, and they may have significant impacts on the lives of citizen-voters around the world.

The generation of supranational standards may be intended to prevent national governments from making policy choices which diverge from the standards, and may in fact preclude such divergent choices.⁷⁷ For example, the 1988 Basel Capital Adequacy Accord required states to impose capital adequacy requirements on international banks, even if those states addressed risks to financial stability in other ways. The Accord was agreed after the US and the UK announced they would apply stringent capital adequacy requirements to foreign banks doing business in their jurisdictions.⁷⁸

Thus transnational standard-setting is arguably analogous to domestic political consultations, involving choices between goals, rather than to technical domestic regulatory consultations where the objective is to identify the best way of regulating to achieve a goal mandated by a statute. However, the transnational standard-setters are networks of bureaucrats rather than political bodies. And, although supranational

and delegation are used to legitimate regulatory standard-setting in global space.”).

76. For example, The Basel Committee on Banking Supervision develops technical standards for capital adequacy but has also set out what it regards as the core necessary elements of banking regulation. See BIS, Basel Committee on Banking Supervision, *Core Principles for Effective Banking Supervision* (Oct. 2006), available at <http://www.bis.org/publ/bcbs129.pdf> and BIS, Basel Committee on Banking Supervision, *Basel II: International Convergence of Capital Measurement and Capital Standards: A Revised Framework—Comprehensive Version* (June 2006), available at <http://www.bis.org/publ/bcbs128.pdf>.

77. Cf. Liesbet Hooghe & Gary Marks, *A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus*, 39 BRIT. J. POL. SCI. 1, 2 (2009) (“Governance is a means to achieve collective benefits by co-ordinating human activity. Given the variety of public goods and their varying externalities, efficient governance will be multi-level. But governance is also an expression of community. Citizens care—passionately—about who exercises authority over them. The challenge for a theory of multi-level governance is that the functional need for human co-operation rarely coincides with the territorial scope of community.”).

78. See, e.g., Stavros Gadinis, *The Politics of Competition in International Financial Regulation*, 49 HARV. INT'L L. J. 447, 500–03 (2008).

standards and rules may reduce the discretion of national governments, and thus would seem to imply a more general, principle-focused consultation, transnational consultations tend to resemble domestic regulatory, rather than pre-legislative, consultations. In this context the EU, with parliamentary representation of citizens as an aspect of the policy development process, is more like a domestic government than more technocratic bodies such as the Basel Committee and IOSCO. The EU's policy development process includes the publication of Green Papers, White Papers, Communications,⁷⁹ and other pre-legislative consultative documents which solicit comments on general policy issues.⁸⁰ Other supranational and transnational organizations may respond to the EU's consultations.⁸¹

Transnational standard-setters such as the Basel Committee and IOSCO are structured as groupings or networks of domestic regulators.⁸² Thus the standards-development process they are engaged in is qualitatively different from that of a legislative or governmental body. But it may also be different from that of a domestic regulatory body

79. See, e.g., *Communication from the Commission Reinforcing Economic Policy Coordination*, COM (2010) 250 final (May 12, 2010) available at http://ec.europa.eu/economy_finance/articles/euro/documents/2010-05-12-com%282010%29250_final.pdf.

80. Cf. Mario Monti, *A New Strategy for the Single Market: At the Service of Europe's Economy and Society, Report to the President of the European Commission*, José Manuel Barroso 17 (May 9, 2010) available at http://ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_en.pdf ("Before launching the single market project with the 1985 White Paper, Jacques Delors had prepared the initiative through a "tour des capitales" of the then 10 Member States, plus Spain and Portugal who were soon to join. Today the European Union is not only larger and more diverse, with its 27 Member States, but also more complex in its articulation, with a much broader involvement of stakeholders and civil society.").

81. See, e.g., IMF, *Regional Economic Outlook: Europe, Fostering Sustainability*, 21 n.4 (May 2010), available at <http://www.imf.org/external/pubs/ft/reo/2010/EUR/eng/ereo0510.pdf> ("The consultation documents, including the IMF's staff contributions, are available on DG Markt's website: ec.europa.eu/internal_market/bank/crisis_management/index_en.htm#consultation; and ec.europa.eu/internal_market/consultations/2009/deposit_guarantee_schemes_en.htm.").

82. On governance networks, see, for example, Carolyn M. Hendriks, *The Democratic Soup: Mixed Meanings of Political Representation in Governance Networks*, 22 GOVERNANCE 689 (2009). Hendriks examines the enactment of representation in a governance network around energy reform in the Netherlands in terms of dramaturgy and rhetoric. *Id.* at 693–4.

engaged in domestic rule-making. Regulators may not have formal rule-making powers as a matter of domestic law,⁸³ but their limited domestic responsibilities may not effectively limit their ability to participate in transnational standard-setting.⁸⁴ More generally, even where domestic regulators have rule-making powers, these powers are constrained by statute. Regulators may not feel themselves to be constrained in the same way when they participate in transnational standard-setting.

In normal times, and to the extent that transnational standard-setting is really a process of identifying best practices based on what national regulatory systems prescribe, such that regulators with limited domestic functions do no more than represent the characteristics of their domestic systems in the transnational processes, the idea of constrained domestic regulators functioning as the articulators of transnational standards seems relatively unproblematic. If, on the other hand, constrained domestic regulators see their role in the context of transnational standard-setting as being the development of standards which differ from those they are charged to administer, this is more problematic.⁸⁵ And in the aftermath of the crisis transnational standard-setters are clearly doing more than just distilling current best practices

83. See, e.g., Julia Black & Stéphane Jacobzone, *Tools for Regulatory Quality and Financial Sector Regulation: A Cross-Country Perspective* 9 (OECD Working Papers on Public Governance, Paper No. 16, 2009), available at <http://oecd.org> (“The greatest variation is with respect to rule making powers, where OSFI and ASIC lack powers to make binding rules, yet in contrast the FSA, the Securities and Exchange Commission (SEC) and the Commodities and Futures Trading Commission (CFTC), for example, have extensive rule making powers exercised independently of the executive.”). Although Australian Securities & Investments Commission (ASIC) does not have the power to make regulations it does have the power to issue regulatory guidance and regulatory relief. See, e.g., ASIC, *ASIC: A Guide to Our Regulatory Documents: An ASIC Better Regulation Initiative*, (June 2007) 5, available at [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ASIC_Guide_to_regulatory_docs.pdf/\\$file/ASIC_Guide_to_regulatory_docs.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ASIC_Guide_to_regulatory_docs.pdf/$file/ASIC_Guide_to_regulatory_docs.pdf).

84. As of May 12, 2010 Tony D'Aloisio, the Chairman of ASIC, was a member of IOSCO's Presidents' Committee, Executive Committee and of its Technical Committee.

85. Cf. Jonathan R. Macey, *Regulatory Globalization as a Response to Regulatory Competition*, 52 EMORY L. J. 1353, 1354 (2003) (suggesting that regulators may engage in “regulatory globalization” to make it difficult for local opponents to block policy changes the regulator’s favours).

into transnational standards: they are developing new rules for the transnational financial system.

The idea that the role of transnational standard-setters has evolved from a positive role of describing existing best practices to a normative function of identifying what best practices should be raises new questions about the role of consultation in the transnational context. Supranational standard-setters have turned to consultation to enhance their perceived legitimacy, to inform their work, and to make those affected by their standards more receptive to them.⁸⁶ Some have argued that shifting decision-making to multilateral institutions can improve democracy, rather than undermine it.⁸⁷ But transnational consultations as currently structured suffer from numerous weaknesses which undermine their value as mechanisms of legitimization.

Transnational consultations lack visibility; they are usually carried out in a limited number of languages, or even only in English. They state that they are aimed at stakeholders, which likely reflects their limited visibility and the aim of achieving buy-in by those likely to be most affected by the standards. But this stakeholder emphasis also implies that there may be others (non-stakeholders) whose views are less important. As the financial crisis has shown, it is not only those who consider themselves to be stakeholders in financial regulation who are affected by its failures.

If one takes the view that what matters in the context of standard-setting is the identification of optimal rules, limited consultation of those with relevant expertise might be appropriate. However, if one takes the view that there are no optimal substantive rules, but perhaps only optimal or good enough processes for identifying rules, the structure of consultation is critical. Better Regulation agendas⁸⁸ involve

86. See, e.g., IOSCO Executive Committee, *IOSCO Consultation Policy and Procedure* (Apr. 2005), available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD197.pdf>.

87. See, e.g., Robert O. Keohane, Stephen Macedo & Andrew Moravcsik, *Democracy-Enhancing Multilateralism*, 63 INT'L ORG. 1 (2009). The authors state that a "[M]ultilateral institutions can empower diffuse minorities against special-interest factions, protect vulnerable individuals and minorities, and enhance the epistemic quality of democratic decision making in well-established democratic states." *Id.* at 26.

88. See, e.g., *Commission Action Plan: Simplifying and Improving the Regulatory Environment*, COM (2002) 278 (June 5, 2002) available at

aspects of both of these views: the emphasis on evidence-based policy-making⁸⁹ suggests that the objective of identifying the right rules is key, whereas focusing on transparency and accountability involves a concern for process.⁹⁰

The legitimacy of global governance clearly involves a wide range of issues apart from those relating to how consultation is carried out with respect to proposals for new standards and rules. The financing of standard-generating bodies also has implications for the perceived legitimacy of their standards.⁹¹ The structure and composition of decision-making bodies raise complex and controversial issues.

Supranational standard-setters are evolving their own governance principles and codes of consultation. The EU with its complex institutional structures has a closer resemblance to a federal government than other supranational standard-setters, and has focused greater attention on issues of

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0278:FIN:EN:PDF> [hereinafter *Action Plan*]; *Commission Report on Better Regulation for Growth and Jobs in the European Union*, COM (2005) 97 (Mar. 2005) at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0097:FIN:EN:PDF>. More recently, policy makers have been promoting smart regulation. See, e.g., *Commission Report on Stakeholder Consultation on Smart Regulation* (Apr. 23, 2010), available at http://ec.europa.eu/governance/better_regulation/smart_regulation/docs/smart_regulation_consultation_en.pdf [hereinafter *Smart Regulation*].

89. See, e.g., GOOD GOVERNMENT, *supra* note 35, at 25 ("Processes for preparing and scrutinising policy and legislation should be as thorough and well-informed as possible, in the interests of good government."). Impact assessment is a component of better regulation. See, e.g., *Action Plan*, *supra* note 88, at 7.

90. See, e.g., *Commission Consultation Document: Towards a Reinforced Culture of Consultation and Dialogue - Proposal for General Principles and Minimum Standards for Consultation of Interested Parties by the Commission*, COM (2002) 277 (June 5, 2002) available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0277:FIN:EN:PDF>. The Commission notes that "good consultation serves a double purpose by helping to improve the quality of the policy outcome and at the same time enhancing the involvement of interested parties and the public at large." *Id.* at 5.

91. Cf. U.S. SEC. & EXCH. COMM'N, WORK PLAN FOR THE CONSIDERATION OF INCORPORATING INTERNATIONAL FINANCIAL REPORTING STANDARDS INTO THE FINANCIAL REPORTING SYSTEM FOR U.S. ISSUERS 17 (Oct. 29, 2010), available at <http://www.sec.gov/spotlight/globalaccountingstandards/workplanprogress102910.pdf> ("In the 2010 Statement, the Commission recognized the importance of independent funding to support a standard-setting process free of undue influence for the ultimate benefit of investors."). In 2010 the International Accounting Standards Board faced a funding shortfall.

governance⁹² and consultation.⁹³ Consultation is a significant element of policy-making in the EU:

[W]ide consultation of stakeholders and in-depth impact assessments prior to legislative proposals . . . help to ensure that proper account is taken of the concerns of citizens and of all interested parties. They make essential contributions to implementing the Commission's 'better lawmaking' policy.⁹⁴

The Basel Committee on Banking Supervision has recently expanded its membership (twice)⁹⁵ to reflect concerns that a body representing only a small fraction of the world's banking regulators and central banks would not have the legitimate authority to set standards for banking regulation for the world. Similarly, the IMF is reviewing its governance arrangements.⁹⁶

IV. STRUCTURING CONSULTATIONS: WEAKNESSES IN THE CONSTRUCTION OF TRANSNATIONAL CONSULTATIONS

Although transnational standard-setters have increased their emphasis on consultation as a mechanism of legitimation, consultations carried out by the Basel Committee and IOSCO lack some of the critical characteristics of domestic consultations. Transnational standard-setters work towards

92. *Commission White Paper on European Governance*, COM (2001) 428 final (July 25, 2001).

93. See, e.g., *Communication from the Commission Towards a Reinforced Culture of Consultation and Dialogue—General Principles and Minimum Standards for Consultation of Interested Parties by the Commission*, 10, COM (2002) 704 (Dec. 11, 2002).

94. *Commission Green Paper: European Transparency Initiative*, 2, COM (2006) 194 (May 3, 2006).

95. See Press Release, BIS, The Basel Committee Broadens its Membership (June 10, 2009), available 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); Press Release, BIS, Expansion of Membership Announced by the Basel Committee (Mar. 13, 2009), available at <http://www.bis.org/press/p090313.htm> (announcing invitation to join the Committee to Australia, Brazil, China, India, Korea, Mexico and Russia).

96. See Comm. on IMF Governance Reform, *Final Report*, 6 (Mar. 24, 2009), available at <http://www.imf.org/external/np/omd/2009/govref/032409.pdf> (“[U]ntil the Fund is viewed as legitimate and appropriate for the discussion and resolution of global macroeconomic issues, it will remain peripheral and unable to achieve the overall stability mandate envisaged by its founders and shareholders.”). See also, e.g., *IMF Invites Civil Society Input Into Governance Reform*, INT’L MONETARY FUND (June 26, 2009), <http://www.imf.org/external/pubs/ft/survey/so/2009/NEW062509A.htm>.

agreement on standards within their own networks, rather than on ensuring a broader acceptance of their work. In practice, public participation in consultations by transnational financial standard-setters is limited.⁹⁷ And, whereas public participation by citizens of developed countries is limited, citizens of less developed countries are even less likely to participate.⁹⁸

There are a number of reasons for the low levels of public participation. For example, many domestic consultations on financial regulation, transnational consultations on standards are framed in a way that makes the views of non-experts seem irrelevant. In addition, and perhaps in contrast to domestic consultations, they are not designed to be visible and/or accessible. The Basel Committee's work is not reliably front page news. A recent article in the *New York Times* business section described Nout Wellink as "chairman of a prominent panel that is rewriting global banking regulations."⁹⁹ And the Basel Committee does not go out of its way to make it easy for commenters to make their views known. For example, although the press release announcing the publication of the Basel Committee/IADI's "Consultative Document" on Core Principles for Effective Deposit Insurance Systems did indicate where comments could be sent,¹⁰⁰ the consultative document itself did not contain requests for comments, or even any indication as to where comments could be sent.¹⁰¹ This does not seem to be an

97. See, e.g., Barr & Miller, *supra* note 26, at 26 ("The role of the broader public was relatively muted, which reflected in part the technical nature of the Basel Committee's work and the fact that for most public-interested organizations, the connection between banking standards and broader social concerns was not pronounced.")

98. Cf. Chimni, *supra* note 27, at 800-01 ("[A]t the international level a participatory structure has meaning only if third world states and relevant NGOs are provided with the financial and technical assistance necessary to effectively participate in the work of an international body.")

99. Jack Ewing, *A Banker Unafraid to Disagree*, N.Y. TIMES, Nov. 2, 2010, at B4.

100. Press Release, BIS, Basel Committee and IADI Issue Core Principles for Effective Deposit Insurance Systems for Public Consultation (Mar. 12, 2009), <http://www.bis.org/press/p090312a.htm>.

101. See Basel Comm. on Banking Supervision & Int'l Ass'n of Deposit Insurers, *Consultative Document: Core Principles for Effective Deposit Insurance Systems* (Mar. 2009), available at <http://www.bis.org/publ/bcbs151.pdf>. *Contra*, e.g., IOSCO Technical Comm., *Regulatory Implementation of the Statement of Principles Regarding the Activities of Credit Rating Agencies*, 2-3 (May 2010), available at

enthusiastic general invitation to comment. The Basel Committee also has not typically recognized comments in its final articulations of standards. However, in the wake of the financial crisis the Basel Committee has published comment letters on its website.¹⁰² Transnational standard-setters have not adopted standard practices with respect to publicizing the results of their consultations, and incorporating the results of consultations into announcements of final standards.

It should be noted that the lack of standard practices for publication of comments and reflection of comments in final standards at the supranational level has an effect. It demonstrates a lack of uniform practice which is visible in domestic regulatory systems. Agencies in the US are working towards transparency,¹⁰³ but there is still some visible variation. Whereas the SEC has published comments on proposed rule-makings on its website for some time, the Federal Reserve Board only publishes comments on some of its regulatory proposals on its website.¹⁰⁴ Citizens have the right to access comments that are part of the rule-making docket, but it can take effort to achieve access. In their final rules, agencies do not necessarily disclose even the identity of commenters.¹⁰⁵ The UK's Financial Services Authority summarizes responses to consultations in its policy documents.¹⁰⁶

<http://www.iosco.org/library/pubdocs/pdf/IOSCOPD319.pdf> (identifying three possible means of communicating views on the document).

102. See Basel Comm. on Banking Supervision, *Comments Received on the Consultative Documents "Countercyclical Capital Buffer Proposal,"* BANK FOR INT'L SETTLEMENTS (last visited Feb.20, 2011), <http://www.bis.org/publ/bcbs172/cacomments.htm>.

103. See, e.g., the [regulations.gov](http://www.regulations.gov) website at <http://www.regulations.gov/search/Regs/home.html#home>.

104. See FED. RESERVE BD., <http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm> (last visited Feb. 17, 2011) (allowing for comments to be made to certain proposals only).

105. See, e.g., Electronic Fund Transfers, 75 Fed. Reg. 66644, 66645 (Oct. 29, 2010) ("The Board received two comments on the interim final rule from a credit union trade association and a bankers' trade association. Both commenters generally supported the interim final rule. The bankers' trade association suggested that the Board exercise its exception authority to eliminate in-store disclosures where cards sold meet the final gift card rule's substantive fee and expiration date protections. This commenter also requested an extension of the delayed effective date. No other comments were received. The final rule adopts the interim final rule as issued, with minor non-substantive edits.")

106. See, e.g., FSA, *Effective Corporate Governance: Significant Influence Controlled Functions and the Walker Review*, 9–35, PS10/15 (Sept. 24, 2010),

The transnational standard-setters could take advantage of some of the work of the EU Commission, which regularly reviews its consultation practices with a view to improving them.¹⁰⁷ The EU Commission has recently attempted to make some consultations more visible by publishing citizen summaries of consultations (although it is not clear that this has been very effective),¹⁰⁸ and has even dedicated financial resources to the development of effective stakeholder groups.¹⁰⁹ The EU's internal focus on developing effective consultations with stakeholders may effectively pressurize transnational standard-setters to reform their own consultation practices. For example, the Commission has noted that because transnational consultation processes (like domestic consultations) may not effectively reflect the views of all stakeholders, governments may decide that it is their function to represent the public interest.¹¹⁰

available at http://www.fsa.gov.uk/pubs/policy/ps10_15.pdf (summarizing feedback and responses).

107. See, e.g., *Smart Regulation*, *supra* note 88, at 3 (“What concrete improvements could the Commission make to ensure that all relevant stakeholders are aware of and able to participate in consultations? Are there particular forms of consultation which you found useful when taking part in the Commission consultations (open internet questionnaires, stakeholder meetings, public hearings)?”).

108. See, e.g., European Union Comm'n, *Communication on an EU Framework for Cross-border Crisis Management in the Banking Sector*, COM (2009) 561 final (Oct. 20, 2009), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0561:FIN:EN:PDF> [hereinafter *Crisis Management Consultation*]; see also European Union Comm'n, *Citizens' Summary, Commission Communication on an EU Framework for Cross-Border Crisis Management in the Banking Sector* (Oct. 2009), http://ec.europa.eu/internal_market/bank/docs/crisis-management/0910_20_citizens_summary_en.pdf. The full consultation document raised some quite technical policy issues and is seventeen pages long. The summary is two pages long, and seems to be designed to persuade citizens that the EU is taking action rather than about trying to solicit meaningful comments from the public.

109. This strategy is not uncontroversial. See, e.g., Andrew Rettman, *EU-funded Think Tanks Defend Their Credibility*, *EU OBSERVER* (Jan. 29, 2010), <http://euobserver.com/9/29368>.

110. European Union Comm'n, *Internet Governance: The Next Steps*, at 4, COM (2009) 277 final (Jun. 18, 2009), available at http://ec.europa.eu/informat ion_society/policy/internet_gov/docs/communication/comm2009_277_fin_en.pdf (“Private-sector leadership in the construction and day-to-day management of the Internet that we know today has worked well. As noted before, this **private-sector initiative must be maintained**. But non-governmental stakeholders must recognise that Internet users worldwide—most of whom do not participate and are not otherwise represented in Internet governance

One major way in which transnational consultations differ from domestic consultations is that the transnational standard-setters do not necessarily seek to communicate with stakeholders in the stakeholders' own languages. Whereas governments of multi-lingual populations communicate with their citizens and residents in their own languages (although probably more frequently with respect to the provision of services¹¹¹ than with respect to consultation), transnational consultations on proposed standards are usually conducted in a limited number of languages,¹¹² if not solely in English. Although the EU makes efforts to communicate with EU citizens in their own languages, such efforts are costly, and even EU institutions publish consultation documents in a limited number of languages.¹¹³ Commentators on the IMF's transparency policy urged that the IMF should translate more of its documents into languages other than English.¹¹⁴ ISDA may be able to communicate its views in Romanian,¹¹⁵ but

fora—have a **legitimate expectation** that their governments will guarantee that any current or future governance arrangements will reflect the **public interest of society as a whole** and will not be subject to capture by narrow commercial or regional interests. **Private-sector leadership and effective public policies are not mutually exclusive.**"

111. And even in the context of service delivery agencies may not provide adequate language assistance services. See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-91, SELECTED AGENCIES CAN IMPROVE SERVICES TO LIMITED ENGLISH PROFICIENT PERSONS 12 (2010), available at <http://www.gao.gov/new.items/d1091.pdf> ("Because SBA provides both business development services as well as disaster-recovery assistance that require different language access services, SBA should use DOJ's guidance to help it complete its LEP plan and recipient guidance consistent with SBA's specific requirements.").

112. The BIS publishes some documents in languages other than English. See BANK FOR INT'L SETTLEMENTS, *BIS—Other Publications*, <http://www.bis.org/publ/other.htm> (last visited Feb. 20, 2011) (listing a number of documents in languages other than English).

113. The European Securities and Markets Authority (ESMA), for example, consults in English. See EUROPEAN SEC. AND MARKETS AUTH., *Consultations*, <http://www.esma.europa.eu/index.php?page=consultation&mac=0&id=> (last visited Feb. 20, 2011) (listing the details of consultations as well as responses in English).

114. IMF, *Consultation Roundtable on IMF Transparency: Summary of Comments from Civil Society Organizations* (Feb. 11, 2010), <http://www.imf.org/external/np/pdr/trans/2009/052809.htm> ("There should be more translation of documents into languages other than English.").

115. See ISDA, *Susținerea reformei legislative în România privind compensarea bilaterală (netting) și garanțiile financiare* (Oct. 29, 2010), http://www.isda.org/speeches/pdf/RO_ISDA_Ltr_NBR_Oct10.pdf (Rom.).

Romanians may not all be capable of communicating their views on financial regulation in English.

Consultations are targeted at particular groups in a number of different ways. Consultation documents may be sent to particular people, signaling that their responses will be valued, and roundtables and meetings may be set up to encourage particular people and firms to give their feedback. In a less intrusive way, drafters of consultation documents sometimes identify specific categories of potential respondents as stakeholders,¹¹⁶ or they may construct different consultation documents or response forms for different groups. These documents may ask different questions of different groups. For example, when the IMF sought views about its transparency policy it required commentators to categorize themselves as civil society organizations, financial markets participants or “think tanks, academics and other stakeholders.” The questionnaires were different for the different groups. For example, whereas civil society organizations and think tanks were asked their views about whether IMF transparency should be improved by making reports easier to understand, more timely, more frank, or easier to access, financial markets participants were not asked this question.¹¹⁷

The identification of specific stakeholders in consultation documents may imply that there may be others (non-stakeholders) whose views are less important. As such, a consultation document which refers to stakeholders as those who are subject to a regulatory regime, rather than those whom it should benefit, seems to imply that the views of the beneficiaries of the regime are unimportant.¹¹⁸

116. See, e.g., DEPARTMENT FOR BUSINESS, INNOVATION AND SKILLS, CIVIL SANCTIONS PILOT: A CONSULTATION ON THE PILOT OPERATION OF CIVIL SANCTION POWERS FOR CONSUMER LAW ENFORCERS, URN 10/706, at 2, <http://www.bis.gov.uk/assets/biscore/corporate/docs/c/10-706-civil-sanctions-pilot.pdf> (U.K.) (“This consultation is relevant to: consumer representative bodies; businesses; business representative bodies; consumer law enforcers.”).

117. See IMF, *IMF Seeks Views on its Transparency Policy* (Feb. 11, 2010), <http://www.imf.org/external/np/pdr/trans/2009/index.htm> (providing opinion questionnaires for civil society organizations, financial market participants, and think tanks only).

118. See, e.g., MINISTRY OF JUSTICE ET AL., *Debt Management Schemes—Delivering Effective and Balanced Solutions for Debtors and Creditors*, CP09/09, at 10, available at <http://www.justice.gov.uk/consultations/docs/debt-management-schemes.pdf> (“In developing these proposals, we have listened to the views of a wide range of stakeholders from the credit and advice sectors,

Although much of financial regulation is complex and technical there are aspects of financial regulation which involve combinations of issues which are technical and of little interest to consumers, and issues which are directly relevant to consumers.¹¹⁹ Whether transnational standard-setters emphasize the technical aspects or the consumer aspects may have a significant impact on consumers' interests. Transnational consultations which are framed as technical exercises through a combination of the specific questions which are asked and the identification of particular groups of relevant stakeholders tend to undermine the legitimacy of the consultation as an element in the production of standards, especially those standards which eliminate discretion in implementation. Consumers and the organizations which represent their interests are more likely than financial firms to be excluded from effective participation in supranational standard-setting due to the combined effects of opaque processes, framing, and lack of resources.

The approaches of transnational standard-setters to publicizing the results of consultations vary. Although some Basel Committee publications do not give much information at all about responses to consultations,¹²⁰ the BIS has begun to publish comment letters on its website.¹²¹ IOSCO generally prefers to characterize the comments it receives,¹²² although it

current operators from both the not-for-profit and commercial sectors and other Government Departments. This consultation provides the opportunity to comment further.”).

119. Some issues are of high salience for consumers. See, for example, Federal Reserve, Notice of Study and Request for Information, 69 Fed. Reg. 29308, May 21, 2004, and the comments submitted in response to this request for information about debit card fees, which are available at http://www.federalreserve.gov/generalinfo/foia/index.cfm?doc_id=OP%2D1196&doc_ver=1&ShowAll=Yes.

120. See, e.g., Basel Comm. on Banking Supervision & Int'l Ass'n of Deposit Insurers, Core Principles for Effective Deposit Insurance Systems (June 2009), available at <http://www.bis.org/publ/bcbs156.pdf>.

121. See, e.g., Basel Comm. on Banking Supervision, *Comments Received on the Consultative Documents "Strengthening the Resilience of the Banking Sector" and "International Framework for Liquidity Risk Measurement, Standards and Monitoring,"* BANK FOR INT'L SETTLEMENTS (last visited Feb. 20, 2011), <http://www.bis.org/publ/bcbs165/cacomment.htm>.

122. See, e.g., IOSCO Technical Comm., Regulatory Implementation of the Statement of Principles Regarding the Activities of Credit Rating Agencies, 8 (June 2009), available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD292.pdf> [hereinafter IOSCO Hedge Funds Report] (“Having considered the public

does sometimes refer to commenters by name.¹²³ Respondents may (and often do) publish their responses on their own web sites.¹²⁴ In domestic regulatory systems courts may review the record on which regulators act, but this type of review does not exist in the context of transnational standard-setting. This lack of a mechanism for judicial review of transnational standard-setting (especially the setting of standards which allow for limited discretion in implementation) suggests that the procedures for setting standards should be even more transparent and open than domestic law-making procedures which are subject to review. Transnational consultation systems where standard-setters voluntarily set their own principles for consultation and for the reporting of the results of consultation with no accountability to voters or through judicial review are problematic, particularly when they produce standards which limit domestic rule-makers' discretion.

V. CONCLUSIONS: IMPROVING CONSULTATION

Fixing transnational consultation is not easy, and it will be costly, but it is important to ensure that consultation of citizens

comments received on the Consultation Report, the IOSCO Technical Committee has developed the six high level principles below which should be applied to the regulation of hedge funds.”). In addition the IOSCO Hedge Funds Report has an annex reporting on the results of the consultation, and conclusions in light of responses. *Id.* at 17–23. In some cases the IOSCO Hedge Funds Report refers to the responses of specific entities with attribution. *Id.* at 19 (“Considering the international dimension of the hedge funds activities, all respondents supported the need for more convergence on the regulation of hedge fund managers in order to minimise the risk of regulatory arbitrage and ensure better level playing field. See, e.g., *International Council of Securities Associations’ Public Response to the IOSCO Consultation Report on Hedge Funds Oversight*.”). But comments are not always attributed to particular respondents. *Id.* at 20 (“One respondent challenged that the wider publication of details on business plan and fees charged could create commercial problems for the managers.”).

123. See, e.g., IOSCO Hedge Funds Report, *supra* note 122, at 19 (“Considering the international dimension of the hedge funds activities, all respondents supported the need for more convergence on the regulation of hedge fund managers in order to minimise the risk of regulatory arbitrage and ensure better level playing field. See, e.g., *International Council of Securities Associations’ Public Response to the IOSCO Consultation Report on Hedge Funds Oversight*.”).

124. See, e.g., Letter from Jonathan Taylor & Duncan Fairweather, Chairmen at the ICSA, to Greg Tanzer, Secretary General of IOSCO (Apr. 30, 2009), available at <http://www.icsa.bz/pdf/ICSA-Letter-IOSCOreHedgeFunds-Apr09.pdf>.

about the rules which affect their lives is not a mere formality. One of the most difficult issues relates to language diversity. English-only or limited language consultations exclude those who do not know the languages of consultation. But, as the EU has found, translation involving large numbers of languages can be very expensive. Apart from the translation issue, some techniques which can increase publicity for proposals about regulation at the domestic level may work differently at the transnational level. Open meetings¹²⁵ benefit those with the resources to travel, and international travel is often more expensive than domestic travel. Standard-setters and international organizations can decide to commit financial resources to facilitate participation in consultation by groups representing those without adequate means. For example, the EU finances NGOs, and there is a codex alimentarius trust fund to enable developing country participation.¹²⁶

Taking steps to help consumers and consumer groups to participate in consultations as stakeholders may not in fact enhance the legitimacy of the process if consumers' views are only sought with respect to issues identified in advance as consumer issues or where the standard-setter assumes that consumer stakeholders will be relatively uninformed so that their views can be discounted. And whereas limiting the ways in which stakeholders can respond to consultations makes it easier and cheaper for standard-setters to process responses,¹²⁷

125. See, e.g., *Crisis Management Consultation*, *supra* note 108, at 17 ("The Commission plans to organise a public hearing in early 2010 in order to present the results of the consultation and to set out how it intends to proceed. This will feed into the preparation of a roadmap of follow up initiatives in the areas of early intervention, resolution and insolvency in order to build a crisis management framework that would ensure that, in future, all competent authorities effectively coordinate their actions and have the appropriate tools for intervening quickly to manage the failure of a bank.").

126. Cf. Chimni, *supra* note 27, at 815 ("While the Trust Fund is certainly a step in the right direction, it remains to be seen whether it will have enough resources to meet its objectives. India, for example, has expressed concern that the broad goals of the Trust Fund, which include the transformation of domestic practices rather than simply promoting greater participation of developing countries, may, given the Fund's meager resources, mean that the objective of promoting greater participation may suffer.").

127. See, e.g., European Union Comm'n, *Consultation Document: Review of Directive 2002/87/EC on the Supplementary Supervision of Credit Institutions, Insurance Undertakings and Investment Firms in a Financial Conglomerate*, 1, http://ec.europa.eu/internal_market/financial-conglomerates/docs/20091106_questionnaire_fed_revier.pdf ("The Commission services would

it is not the most effective way of legitimating the resulting standards. So effective consultation of citizens may require rethinking the drafting of consultation documents and avoiding structured response forms. Again, the desirable changes involve costs.

like to ask you to respond to the specific questions that were designed to supplement the responses you may have given to the JCFC's consultation of its draft Advice . . . In order for your contributions to be timely and properly evaluated, when submitting your replies, please maintain the structure of the questionnaire provided in this document.”).