

INSTITUTIONAL EVOLUTION AND CHARACTERISTICS OF THE INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS (IOSCO)

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Agencies regulating financial services and markets from around the world met in London during the 40th annual conference of the International Organization of Securities Commissions (IOSCO) in June 2015 to discuss current global trends and challenges and to review their cooperation work. These meetings enabled national regulators to progress IOSCO's activities on a range of issues and to reach agreement on an organizational strategic direction to 2020. Since its establishment, IOSCO has become the key reference point for securities regulation worldwide and its influence on the global financial regulatory agenda has grown significantly. Taking the opportunity of its latest annual conference, this article provides a general overview of IOSCO and its institutional development, highlighting its characteristics as an atypical international organization operating within the confines of domestic and international law, private and public law.

La 40ième conférence annuelle de l'Organisation internationale des commissions de valeurs (OICV) s'est déroulée à Londres en juin 2015, permettant aux organismes de réglementation des services et marchés financiers de tous les coins du monde de discuter des tendances et défis de réglementation actuels et de leur travail de coopération. Depuis sa création, l'OICV est en effet devenue le principal point de référence mondial en matière de réglementation des valeurs mobilières et son influence sur le programme de réglementation financière au plan international s'est significativement accrue. Lors de leur réunions, les agences nationales membres progressèrent les activités de l'OICV dans divers domaines et s'entendirent sur la direction stratégique qu'elle devrait prendre jusqu'en 2020. Cet article profite de l'occasion de cette conférence pour procurer une vue d'ensemble de l'OICV et de son

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développement institutionnel, soulevant notamment ses caractéristiques en tant qu'organisation internationale atypique fonctionnant aux confins du droit national et international, public et privé.

I INTRODUCTION

The International Organization of Securities Commissions (IOSCO) is the primary international policy and cooperation forum for agencies that regulate part of the financial sector, namely the securities and futures markets, and enforce the related legislations, as well as other bodies with an appropriate interest in securities regulation. Facing the increasingly international nature of capital markets, regulators recognized from the outset that to discharge their mandates effectively, mutual benefits could be achieved in engaging and working with their foreign counterparts. Pierre-Hugues Verdier points out that IOSCO was formed because "securities regulators increasingly faced common problems, particularly in respect to cross-border transactions."¹ This contrasts for instance with the development of the Basel Committee on Banking Supervision (BCBS), an international financial regulatory body set up in response to the international impact of several collapsing banking institutions.²

IOSCO is governed by its own statutes, called By-Laws,³ establishing a governance structure by committees of members.

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- 1 Pierre-Hugues Verdier "The Political Economy of International Financial Regulation" (2013) 88 *Indiana Law Journal* 1405 at 1418.
 - 2 At 1416-1417 and 1418. See also David Zaring "International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations" (1998) 33 *Texas International Law Journal* 281 at 287 ["International Law by Other Means"].
 - 3 The By-Laws consist of the following: "Section 1 – By-Laws of IOSCO" [IOSCO By-Laws]; "Section 2 – 1996 Reform of By-Laws – Explanatory Memorandum" [1996 By-Laws Reform]; "Appendix 2 – Members of IOSCO"; "Appendix 3 – Proposal Presented to Presidents Committee in 2011 Explaining the Changes to the By-Laws to Reflect Changes in Structure" [2011 Proposal Explaining By-Laws Changes]; "Appendix 4 – Voting Arrangements Under By-Laws 28.1 and 28.2". See table of contents in IOSCO By-Laws available on IOSCO website <www.iosco.org> providing links to the above contents presented as separate documents.

The organization has been recognized as the global standard setter for securities regulation since the 1990s.⁴ With time, IOSCO has developed a large body of work.⁵ Published policy-related reports include: international data on regulatory practice collated through member surveys;⁶ guidance for best regulatory practice recommended to regulators⁷ and policy-makers, such as the international standards embodied in IOSCO's *Objectives and Principles of Securities Regulation* (IOSCO Principles);⁸ and mechanisms and practical tools developed for the use of securities regulators and supervisors. An example of a practical tool is IOSCO's *Multilateral Memorandum of Understanding Concerning Consultation, Cooperation and the Exchange of Information* (IOSCO MMOU).⁹ Other examples comprise a confidential database for sharing decisions on the application of the International Financial Reporting Standards (IFRS)¹⁰ and a confidential "model examination module [that] provides suggestions for IOSCO members to use when conducting

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- 4 See for example Antonio Marcacci "IOSCO: The World Standard Setter for Globalized Financial Markets" (2012) 12 *Richmond Journal of Global Law & Business* 23. For an earlier example, see Ethan B Kapstein "Shockproof. The End of the Financial Crisis" (1996) 75 *Foreign Affairs* 2 at 6: "Alongside the Basle Committee, other international bodies, such as the International Organization of Securities Commissions, have adopted similar capital adequacy and market risk regulations for investment banks, and such basic standards now apply to all banking institutions in the European Union".
- 5 IOSCO's website lists 495 public reports published between September 1989 and the end of July 2015, almost half of which (239) have been produced since the beginning of 2008: calculation from IOSCO public reports list <www.iosco.org>.
- 6 See for example the IOSCO report on *Risk Identification and Assessment Methodology for Securities Regulators*, that offers a "practical overview of the methods, approaches and tools that IOSCO and securities regulators have developed to identify and assess emerging and potential systemic risks": IOSCO "IOSCO Issues Report on Risk Identification and Assessment Methodologies" (Media Release, Madrid, 26 June 2014) <www.iosco.org>.
- 7 Zaring notes that examples of "current practices" are used to introduce IOSCO's core principles and provides some other examples of IOSCO urging best practice on its members: see David Zaring "Rulemaking and Adjudication in International Law" (2008) 46 *Columbia Journal of Transnational Law* 563 at 588 and note 100 ["Rulemaking and Adjudication"].
- 8 See below Part V.
- 9 See below Part VI.
- 10 See IOSCO "Regulators to Share Information on International Financial Reporting Standards" (Media Release, 4 October 2005) <www.iosco.org>. For more details, see "Appendix III: Update on International Financial Reporting Standards (IFRS) Database" in *IOSCO Annual Report 2006* (2007) at 24-25 [2006 Report]. See also Holger Erchinger and Winfried Melcher "Convergence between US GAAP and IFRS: Acceptance of IFRS by the US Securities and Exchange Commission (SEC)" (2007) 4(2) *Accounting in Europe* 123 at 137.

inspections of CRAs' [Credit Reporting Agencies] compliance with the IOSCO CRA Code provisions."¹¹

IOSCO's standard setting work has led scholars such as David Zaring to go so far as characterizing it as "international rulemaking":¹²

International rulemaking ... has functioned through harmonization, informality, and soft standardization through mechanisms like best practices, as exemplified by financial regulators like the Basel Committee on Banking Supervision and the International Organization of Securities Commissions (IOSCO). And sometimes international rulemaking is quite substantive.

In any event, as a member-led organization, IOSCO serves the needs of securities regulators worldwide by providing a forum for exchanging views and experiences, identifying and addressing common regulatory challenges as they emerge, and for developing and promoting implementation of best regulatory practice.¹³

Following a brief review of the membership base of the organization (Part II), this article examines its legal status (Part III). It then delves into the organization's member-led operating mode and structure (Part IV) before reviewing its principal achievements, namely the formulation and implementation of international regulatory standards (Part V) and international cooperation instruments (Part VI). Building on the previous parts, the article finally identifies some of the key institutional characteristics of the organization (Part VII) before offering a brief conclusion (Part VIII).

II NEAR UNIVERSAL MEMBERSHIP

According to its By-Laws, IOSCO comprises "securities commissions and similar bodies with responsibility for securities regulation ... joined together in ... [IOSCO] to better carry out their respective missions through the forum for discussions and cooperation provided by the Organization."¹⁴ Ordinary members are securities commissions or similar governmental bodies "with significant authority over securities or derivatives markets."¹⁵ Together, they constitute the Presidents

11 IOSCO Technical Committee "International Cooperation in Oversight of Credit Rating Agencies" (Note, March 2009) at 4-5 <www.iosco.org>.

12 Zaring "Rulemaking and Adjudication", above n 7, at 572.

13 Zaring uses IOSCO as one of his examples of "international financial regulatory organizations" alongside the BCBS, "because of the length of their pedigree and the high level of their accomplishments": see David Zaring "Informal Procedure, Hard and Soft, in International Administration" (2005) 5 *Chicago Journal of International Law* 547 at 549 ["Informal Procedure"].

14 By-law 1.1, IOSCO By-Laws, above n 3.

15 By-law 6, IOSCO By-Laws, above n 3.

Committee¹⁶ – essentially IOSCO's plenary body or general assembly – and have each one vote at meetings of the committees they belong to, including at the Presidents Committee's meetings.¹⁷

IOSCO's membership also comprises associate and affiliate members who are allowed to attend the Presidents Committee meetings, but not to vote.¹⁸ The associate membership category was created early on to enable regulatory bodies that were not eligible for ordinary membership to associate with IOSCO's work.¹⁹ According to Geoffrey Underhill, this was aimed at catering for "countries with more than one securities regulator, as in federal jurisdictions, but each country is only allowed one vote."²⁰ Until recently, the associate category mainly included "additional statutory authorities from particular jurisdictions"²¹ whereas the affiliate category comprised "self-regulatory organizations, (SROs), and international bodies with an interest in securities regulation."²² This latter category soon led to the constitution of a SRO Consultative Committee providing specialized input into IOSCO's work.²³ The aim was "to facilitate close dialogue between statutory regulatory authorities and SROs and international bodies; the objective of this is to provide for the injection of practitioner and other expertise into the deliberations of IOSCO."²⁴ Although, as noted below (in Part IV), the latest reforms have amended the criteria for the various membership categories, the only members with a voting right remain the ordinary members, a category still limited to governmental bodies. Suffice to note that the other two categories aim to facilitate dialogue and input into IOSCO's work. Each

16 See By-law 16, IOSCO By-Laws, above n 3.

17 By-law 27, IOSCO By-Laws, above n 3.

18 See By-laws 27, 30 and 30.1, IOSCO By-Laws, above n 3.

19 See Samuel Wolff "Recent Developments in International Securities Regulation" (1995) 23 *Denver Journal of International Law and Policy* 347 at 400 and note 368.

20 Geoffrey R D Underhill "Keeping Governments out of Politics: Transnational Securities Markets, Regulatory Cooperation, and Political Legitimacy" (1995) 21 *Review of International Studies* 251 at 261 and note 40, mentioning the case of Canada, where the Ontario and Quebec regulatory agencies had each a vote, as an exception for historical reasons.

21 "Annex: Background to G-7 Finance Ministers on International Cooperation in the Regulation and Supervision of Financial Institutions and Markets: The Work of the International Organization of Securities Commissions (IOSCO)" in BCBS & IOSCO *Response of the Basle Committee on Banking Supervision and of the International Organization of Securities Commissions to the Request of the G-7 Heads of Government at the June 1995 Halifax Summit* (Montreal, May 1996) 73 at 73 para 2 <www.iosco.org> ["IOSCO Background to G-7 Finance Ministers"].

22 At 73 para 2.

23 See Wolff, above n 19, at 401 note 371.

24 "IOSCO Background to G-7 Finance Ministers", above n 21, at 75.

ordinary and associate member is also a member of a Regional Committee, where only ordinary members have a voting right.²⁵

Since its creation in 1974-1983,²⁶ IOSCO's membership has continuously expanded and now includes the governmental or statutory securities market regulatory and supervisory agencies of nearly all capital markets,²⁷ including those of all G-20 economies.²⁸ Today, IOSCO's members from more than 110 countries²⁹ together regulate more than 95 per cent of the world's securities markets.³⁰ This makes the organization a truly global body with a widely diverse membership, comprising the regulators of all major financial centres as well as a great many nascent, developing or emerging markets.³¹

The near universal membership of IOSCO has led scholars to distinguish the organization from other transnational bodies involved in international financial regulation or supervision. For instance, Zaring differentiates between the large membership of IOSCO and the International Association of Insurance Supervisors (IAIS), the international standard setter for the supervision of the insurance sector,³² and other "informal international regulatory bodies or networks" that only include regulators from developed markets.³³ In the same vein, the inclusion of "developing countries" in IOSCO's membership has been noted by Tony Porter, who, in this respect, has contrasted IOSCO with the "G-10 Committees" based in the Bank of

25 See By-laws 22, 27, 55 and 59, IOSCO By-Laws, above n 3, and list of members (voting and non-voting) of each IOSCO Regional Committee on IOSCO website <www.iosco.org>.

26 The organization was created in 1983 with the decision of an inter-American regional association (created in 1974) to transform itself into a global cooperative body. See "IOSCO Background to G-7 Finance Ministers", above n 21, at 73 para 1. IOSCO considers that its first annual conference was held in 1974 by its predecessor body: see IOSCO "Annual Conferences" link <www.iosco.org>. Regarding its forerunner, see Tony Porter *States, Markets and Regimes in Global Finance* (St Martin's Press, New York (NY), 1993) at 185 note 7 [*States, Markets and Regimes*].

27 See for example David Zaring "Finding Legal Principle in Global Financial Regulation" (2012) 52 *Virginia Journal of International Law* 683 at 694 ["Finding Legal Principle"]. See also Zaring "Informal Procedure", above n 13, at 562.

28 See list of ordinary members in IOSCO *Annual Report 2014* (2015) at 68-70 [*2014 Report*].

29 See IOSCO "Fact Sheet" (April 2015) at 2 <www.iosco.org>.

30 At 2.

31 See for example world map highlighting the spread of IOSCO membership: *2014 Report*, above n 28, at 4. See also list of members in *2014 Report*, above n 28, at 68-71.

32 For a summary description of the IAIS, see for example Chris Brummer "How International Financial Law Works (and How It Doesn't)" (2011) 99 *Georgetown Law Journal* 257 at 279 ["How International Financial Law Works"].

33 Zaring "Finding Legal Principle", above n 27, at 691 and 694.

International Settlements, including the BCBS.³⁴ Chris Brummer too distinguishes IOSCO's global membership from the "more finite membership" of the BCBS.³⁵ Another distinction noted by Zaring is the inclusion in IOSCO's membership, through the affiliate category, of "private securities regulators" that are not governmental agencies.³⁶ Interestingly, an open membership can be an important factor for the recognition of relevant financial standards in World Trade Organization (WTO) law. Referring to the provisions of the General Agreement on Trade in Services (GATS), Régis Bismuth has stated: "IOSCO and IAIS could be considered as relevant standard-setting bodies for the GATS since the membership of these institutions is open to financial regulatory authorities of all states" in contrast to the BCBS.³⁷

Importantly, IOSCO's membership represents a large variety of legal traditions and cultures, including civil and common law jurisdictions.

III LEGAL STATUS

Unlike traditional international organizations, IOSCO is not founded by an international treaty. Established as an association of securities regulatory organizations, it is incorporated under a private Act in Canada approved by the Québec legislature as a non-profit organization.³⁸ In 2001, IOSCO changed its domicile from Montreal to Madrid, where it is recognized by the Spanish Government by means of the Third Additional Disposition of Law 55/1999.³⁹

It is important to note that only ordinary members have a voting right at IOSCO and this membership category is limited to governmental bodies. Responsibility for

34 Porter also includes in these Bank of International Settlements "G-10 Committees" the Eurocurrency Standing Committee (ECSC), later renamed Committee on the Global Financial System, and the Committee on Payments and Settlements Systems (CPSS) (now renamed Committee on Payments and Market Infrastructures (CPMI)). See Tony Porter "Politics, Institutions, Constructivism and the Emerging International Regime for Financial Regulation" (2002) 19(1) *The Review of Policy Research* 53 at 61 and 59-60.

35 Brummer "How International Financial Law Works", above n 32, at 278.

36 Zaring "Informal Procedure", above n 13, at 562.

37 See Régis Bismuth "Financial Sector Regulation and Financial Services Liberalization at the Crossroads: The Relevance of International Financial Standards in WTO Law" (2010) 44 *Journal of World Trade* 489 at 501 and at 501 notes 75 and 76.

38 *Loi concernant l'Organisation internationale des commissions de valeur / An Act Respecting the International Organization of Securities Commissions LQ 1987 (Quebec) c 143.*

39 See *2014 Report*, above n 28, at 78. For the legal provisions (in Spanish), see LEY 55/1999, de 29 de diciembre, de Medidas fiscales, administrativas y del orden social, BOE núm 312 (Jueves 30 diciembre 1999) 46095 at 46137 (Disposición adicional tercera. *Régimen de la Organización Internacional de Comisiones de Valores*).

IOSCO's governance and standard setting activities thus rests on domestic governmental authorities. Bearing in mind that scholars have divergent views on the nature of the organization,⁴⁰ limiting the voting right to governmental agencies gives weight to IOSCO being viewed as a quasi-intergovernmental organization rather than a non-governmental organization. Porter has even suggested that "formal voting by a general membership on resolutions" confers upon IOSCO an element of "supranational international organization", albeit without "the authority to force its members to follow its injunctions."⁴¹ Although such an argument may perhaps hold from a non-legal perspective, providing a supranational character to an organization in international law would require states to explicitly confer upon it specific powers and agree that they be legally bound by its exercise of such powers, which is not the case for IOSCO.⁴²

Currently, the By-Laws state in their preamble that the member agencies are assembled through IOSCO's permanent structures:⁴³

[T]o cooperate in developing, implementing and promoting adherence to internationally recognised and consistent standards of regulation, oversight and enforcement in order to protect investors, maintain fair, efficient and transparent markets, and seek to address systemic risks;

[T]o enhance investor protection and promote investor confidence in the integrity of securities markets, through strengthened information exchange and cooperation in enforcement against misconduct and in supervision of markets and market intermediaries; and

40 Underhill, for example, has characterised IOSCO as "a non-governmental institution in the international domain": Underhill, above n 20, at 253. On the other hand, Porter has described IOSCO as an "interstate institution": Porter *States, Markets and Regimes*, above n 26, at 3. Kal Raustiala, for his part, states that organizations such as IOSCO "are not international organizations under international law" and supports Zaring's view that they "occupy a 'twilight' legal existence": Kal Raustiala "The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law" (2002) 43 *Virginia Journal of international Law* 1 at 23, notably referring to Zaring "International Law by Other Means", above n 2. Ross Cranston limits their definition as "specialist international bodies": Ross Cranston "Theorizing Transnational Commercial Law" (2007) 42 *Texas International Law Journal* 597 at 597.

41 Porter *States, Markets and Regimes*, above n 26, at 123.

42 See Malcolm N Shaw *International Law* (7th edition, Cambridge University Press, Cambridge, 2014) at 944. During the 2015 annual conference of IOSCO, members resolved to add in the IOSCO By-Laws a new part devoted to the organization's standard setting and related activities (Part 15) and to explicitly state in a new By-law 83, among other things, the non-legally binding nature of these activities: see IOSCO, Presidents Committee of the International Organization of Securities Commissions *Resolution to amend the IOSCO By-laws regarding Standard Setting and related activities* Resolution 1/2015 (June 2015).

43 Preamble, IOSCO By-Laws, above n 3.

[T]o exchange information at both global and regional levels on their respective experiences in order to assist the development of markets, strengthen market infrastructure and implement appropriate regulation.

The By-Laws also specify under their general provisions:⁴⁴

In particular, the objective of the Organization is to enable members to exchange information with a view to:

- (a) developing securities markets and improving their efficiency;
- (b) coordinating the enforcement of securities regulation; and
- (c) implementing common standards.

The purpose of the organization is thus clearly limited to the international exchange of information, coordination and cooperation.

The unorthodox legal basis of IOSCO has resulted in the organization being mostly disregarded in the public international law literature until it became obvious that its decisions had an impact on domestic laws despite their legally non-binding character.

IV MEMBER-LED ORGANIZATIONAL STRUCTURE

The By-Laws currently list the "organs" of IOSCO as follows:⁴⁵

- (a) the Presidents Committee;
- (b) the IOSCO Board;
- (b) (i) the Growth and Emerging Markets Committee;
- (c) the General Secretariat;
- (d) the Regional Committees; and
- (e) the Consultative Committees.

This part presents the structure of IOSCO according to the main role these organs play: organizational governance and decision-making, including as concerns policy development and standard setting, risk identification, capacity building, and monitoring and implementation of standards; the affiliate members' consultative role; regional input and advocacy; and administration.

A Governance and Decision-making

Whereas the Presidents Committee "has all the powers necessary or convenient to achieve the purpose of the Organization,"⁴⁶ a governing body comprised of

44 By-law 1.2, IOSCO By-Laws, above n 3.

45 By-law 15, IOSCO By-Laws, above n 3.

46 By-law 26, IOSCO By-Laws, above n 3.

ordinary members "takes all decisions and undertakes all actions necessary or convenient to achieve the objectives of the Organization," subject to the By-Laws.⁴⁷

Until recently, this governing body was the Executive Committee,⁴⁸ whose membership, appointed in a series of elections, expanded and diversified throughout successive reforms. When IOSCO adopted its initial By-Laws in the 1980s, the Executive Committee comprised eight members elected by the Presidents Committee.⁴⁹ As each of the Regional Committees became recognized, their chair elected from among the members of their respective committees also joined the Executive Committee *ex officio* as their constituents' representative.⁵⁰ In 1991, five more positions were added on the Executive Committee.⁵¹ The elected chairs of IOSCO's respective specialized working committees presented below, namely the Technical and Emerging Markets Committees, were added prior to the 1996 reforms, which led to a further expansion of the Executive Committee from 16-18 members to 19 members, notably with a second representative elected from each of the Regional Committees.⁵² Although recent reforms have disestablished the Executive Committee, its functions have been taken up by a newly established IOSCO Board,⁵³ which continues to be at least partly composed of elected members. Since October

47 By-law 40.1, IOSCO By-Laws, above n 3.

48 See for example IOSCO *Annual Report 2012* (2013) at 63 [2012 Report]. See also chart representing the previous organizational structure: IOSCO *Annual Report 2010* (2011) at 48 [2010 Report]. As another example, IOSCO had stated in 1996 that "[t]he Executive Committee ... is in effect its [IOSCO's] management and strategic planning committee": "IOSCO Background to G-7 Finance Ministers", above n 21, at 74.

49 See Douglas W Hawes "Internationalization Spreads to Securities Regulators" (1987) 9 University of Pennsylvania Journal of International Business Law 257 at 263 and note 19; Tony Porter "Inter-State and Private Regimes in Global Finance" (PhD in Political Science dissertation, Carlton University (Ottawa), 1992) at 241 and 243 ["Inter-State and Private Regimes"]. The statutes of the "International Association of Securities Commissions" predating the decision made in July 1986 to reform the organization's structure and set up a secretariat in Montreal were also mentioned in the press: David Marsh "Planned Reforms Sharpen IASC [International Association of Securities Commissions] Regulatory Teeth" *Financial Times* (London, 17 July 1986) at 36. The 1987 Act incorporating IOSCO also refers to existing statutes: See LQ 1987 (Quebec) c 143, above n 38, at ss 3, 5, 6 and 8.

50 See Hawes, above n 49, at 263 note 19; Porter "Inter-State and Private Regimes", above n 49, at 243 and at 212 note 15; and Porter *States, Markets and Regimes*, above n 26, at 121.

51 See Porter *States, Markets and Regimes*, above n 26, at 121.

52 See 1996 By-Laws Reform, above n 3, at 5-6.

53 In 2011, all references in the By-Laws to "Executive Committee" were replaced by the wording "IOSCO Board": see 2011 Proposal Explaining By-Laws Changes, above n 3, at 4. Hence part 5 of the By-Laws, previously titled "Executive Committee", is now titled "IOSCO Board": see IOSCO By-Laws, above n 3; and 1996 By-Laws Reform, above n 3, at 8.

2014,⁵⁴ the IOSCO Board comprises 18 members nominated by the Presidents Committee and 16 members elected by committees of IOSCO constituents.⁵⁵

Establishment of the IOSCO Board meant integrating the governance, standard setting and development functions of the organization within a single body.⁵⁶ The restructuring aimed to make IOSCO more effective and inclusive and ensure it could play a more influential role in shaping the global securities market regulatory framework by streamlining its governance and decision-making processes.⁵⁷

1 Policy development and standard setting

Before the recent reforms, IOSCO's policy development work was carried out by the Technical and Emerging Markets Committees.⁵⁸ These were set up by the Executive Committee to serve as specialized working committees:⁵⁹

[T]he Technical Committee ... is made up of 18 agencies that regulate some of the world's larger, more developed and internationalised markets. Its objective is to review major regulatory issues related to international securities and futures transactions and to coordinate practical responses to these concerns ...

... [T]he Emerging Markets Committee ... endeavours to promote the development and improved efficiency of emerging securities and futures markets by establishing principles and minimum standards, preparing training programmes for members' staff and facilitating the exchange of information as well as the transfer of technology and expertise.

When the Executive Committee created the Technical Committee in May 1987, the intention was to bring together "experts from member countries to review regulatory problems related to the issue and trading of international securities and

54 Elections for the IOSCO Board were held during the annual conference that took place from 28 September to 2 October 2014, in Rio, Brazil, with the IOSCO Board holding its first meeting on 2 October 2014. See IOSCO "Greg Medcraft of ASIC [Australian Securities and Investments Commission] re-elected IOSCO Board Chair" (Media Release, Rio de Janeiro, 2 October 2014) and IOSCO "Annual Conferences" link, above n 26.

55 See IOSCO *Resolution of the Presidents' Committee on the Composition of the IOSCO Board Resolution 5/2013* (September 2013) <www.iosco.org> [*IOSCO Resolution 5/2013*]. See also the IOSCO Board composition taking effect in conjunction with the 2016 annual meeting: IOSCO *Resolution of the Presidents' Committee on the composition of the IOSCO Board Resolution 5/2013 as amended by Resolution 2/2015* (June 2015) <www.iosco.org> [*IOSCO Resolution 5/2013 as amended by Resolution 2/2015*].

56 See for instance IOSCO *Annual Report 2011* (2012) at 51 [*2011 Report*].

57 *2012 Report*, above, n 48, at 63.

58 See *2010 Report*, above n 48, at 26.

59 At 47.

propose practical solutions to these problems."⁶⁰ As part of the recent reforms, the Technical Committee has been disestablished and its functions subsumed into the IOSCO Board. Moreover, almost all the members of the disestablished Technical Committee⁶¹ have now been nominated to the IOSCO Board based on their market size.⁶²

The Emerging Markets Committee was maintained and renamed in 2013 as the Growth and Emerging Markets (GEM) Committee⁶³ "to better reflect the nature of the markets in which its members operate."⁶⁴ Moreover, its influence within the organization is growing.⁶⁵ The By-Laws are silent on this Committee's role. The memorandum accompanying the reformed By-Laws of 1996 refers to part six of the By-Laws concerning the then Technical and Emerging Markets Committees and states that the latter act "as a forum in which members from emerging jurisdictions may discuss matters of common interest."⁶⁶ The By-Laws themselves only stipulate that the GEM Committee acts subject to the By-Laws,⁶⁷ reports to the IOSCO Board,⁶⁸ and may adopt its own rules and procedures provided these are consistent with the organization's By-Laws and Protocols.⁶⁹ Currently, the GEM Committee's

60 See IOSCO Technical Committee *International Equity Offers - Summary Report* (September 1989) at 2 <www.iosco.org>.

61 *2010 Report*, above n 48, at 47: "The members of the Technical Committee are the securities regulatory authorities of Australia, Brazil, China, France, Germany, Hong Kong, India, Italy, Japan, Mexico, the Netherlands, Ontario, Québec, Spain, Switzerland, [the] United Kingdom and the United States".

62 "IOSCO Board Members Nominated Based on Market Size" are the securities regulatory agencies of Australia, Brazil, China, France, Germany, Hong Kong, India, Italy, Japan, the Netherlands, Ontario, Québec, South Korea, Spain, Switzerland, the United Kingdom and the United States: see *IOSCO Resolution 5/2013*, above n 55, para 2(a) and Annex A. This list is to be reviewed every four years, with the first review scheduled prior to the 2018 annual meeting: See *IOSCO Resolution 5/2013* and *IOSCO Resolution 5/2013 as amended by Resolution 2/2015*, above n 55, at para 4.

63 See *IOSCO Resolution of the Presidents' Committee on Amendment to IOSCO's By-Laws regarding renaming the Emerging Markets Committee as Growth and Emerging Markets (GEM) Committee and the GEM Committee Chair becoming ex-officio Vice-Chairman of the IOSCO Board Resolution 3/2013* (September 2013) <www.iosco.org> [*IOSCO Resolution 3/2013*].

64 *IOSCO Annual Report 2013* (2014) at 12 [*2013 Report*].

65 See for example the press release following a 2012 meeting of the Emerging Markets Committee: IOSCO "IOSCO Emerging Markets Prepare for Bigger Role in the Global Economy" (Media Release, Santiago de Chile, 20 November 2012) <www.iosco.org>. See also *IOSCO Resolution 3/2013*, above n 63.

66 See 1996 By-Laws Reform, above n 3, at 9.

67 See By-law 48, IOSCO By-Laws, above n 3.

68 See By-law 49, IOSCO By-Laws, above n 3.

69 See By-law 50.1, IOSCO By-Laws, above n 3.

core priorities are three-fold: strengthening the capacity building of its members through education, training and technical assistance;⁷⁰ effectively identifying the main risks and vulnerabilities in emerging markets;⁷¹ and conducting regulatory policy work on issues that affect its members' markets.⁷² To drive these priorities, the GEM Committee has set up a Steering Committee of "16 leading emerging market regulators."⁷³

The recent reforms have seen the IOSCO Board establishing specialized policy working committees through a merger of the previous sub-committees of the then Technical and Emerging Markets Committees.⁷⁴ Indeed, the Technical and Emerging Markets Committees had each set up sub-committees on specific functional subject areas more or less mirroring each other.⁷⁵ Now working "under the aegis of the [IOSCO] Board" are eight policy committees specialized in the following respective areas: issuer accounting, audit and disclosure; regulation of secondary markets; regulation of market intermediaries; enforcement and the exchange of information; investment management; credit rating agencies; commodities derivatives markets; and retail investors.⁷⁶ Examining particular cross-cutting issues are specialized task forces set up by the IOSCO Board or the former Technical Committee with specific mandates. These currently relate to respectively: cross-border regulation;⁷⁷ financial benchmarks;⁷⁸ over-the-counter (OTC) derivatives regulation;⁷⁹ and audit quality.⁸⁰ The organization lists on its website the member agencies' staff comprising these policy committees and task forces.⁸¹ Also

70 See *2013 Report*, above n 64, at 13-14; and *2014 Report*, above n 28, at 10-11.

71 See *2013 Report*, above n 64, at 14; and *2014 Report*, above n 28, at 12.

72 See *2013 Report*, above n 64, at 14; and *2014 Report*, above n 28, at 11-12.

73 See *2013 Report*, above n 64, at 12.

74 At 22.

75 See for example *2006 Report*, above n 10, at 18.

76 See *2014 Report*, above n 28, at 20. See also IOSCO "IOSCO Board" link <www.iosco.org>.

77 See IOSCO "Task Force on Cross Border Regulation" link <www.iosco.org>; and *2014 Report*, above n 28, at 32-33.

78 See IOSCO "Board Level Task Force on Financial Benchmarks" link <www.iosco.org>; and *2014 Report*, above n 28, at 30-31.

79 See IOSCO "Task Force on OTC Derivatives Regulation" link <www.iosco.org>; and *2014 Report*, above n 28, at 31-32.

80 See *2014 Report*, above n 28, at 33.

81 For the composition of the policy committees and task forces, see IOSCO "Policy and Standard Setting" link <www.iosco.org>.

public is a consultation policy endorsed by the Executive Committee in 2005⁸² and Impact Assessment Guidelines drafted in 2011.⁸³ Intended as a tool to assist policy formulation and decision-making, these guidelines state:⁸⁴

... through its formal and informal consultation procedures, IA [impact assessment] makes regulatory policy more transparent and thus can help to make IOSCO more accountable. It is also a means of communication between IOSCO, the different national regulators involved, the regulated firms and other affected or interested parties. IA is therefore a key tool to develop IOSCO's Principles and Policies.

2 Risk identification

Amongst the deficiencies of the financial systems highlighted by the global financial crisis (GFC) was the paucity of information on systemic risk. Little was actually known as to how systemic risk develops in the markets and transmits from one financial sector to the other, as well as between countries. It soon became clear that securities regulators and supervisors did not possess the necessary tools to identify and mitigate systemic risk, but that they had a role to play in this regard. When members updated IOSCO's operational goals and priorities in 2010 for guiding its activities in the subsequent five years,⁸⁵ focus was put among other things on identifying "systemic risks to the fair and efficient functioning of markets" and addressing these risks.⁸⁶ This led to setting up a Standing Committee on Risk and Research, later renamed as the Committee on Emerging Risks,⁸⁷ comprising representatives of member regulatory agencies and reporting to the IOSCO Board. This committee, together with a small research department established within the General Secretariat of the organization, fulfils IOSCO's new research function notably by publishing an annual *IOSCO Securities Market Risk Outlook*.⁸⁸

82 See IOSCO Executive Committee *IOSCO Consultation Policy and Procedure* (April 2005) <www.iosco.org>. For a critical analysis of this policy document, see Régis Bismuth "The Independence of Domestic Financial Regulators: An Underestimated Structural Issue in International Financial Governance" (2010) 2 Goettingen Journal of International Law 93 at 103-104.

83 See IOSCO *Impact Assessment Guidelines: IOSCO* (July 2011) at 5 <www.iosco.org> [*Impact Assessment Guidelines*].

84 At 5.

85 See IOSCO *Resolution on IOSCO's Mission, Goals and Priorities* (July 2010) <www.iosco.org> [*IOSCO Resolution 2010 on Mission*].

86 See *IOSCO Resolution 2010 on Mission*, above n 85.

87 See *2013 Report*, above n 64, at 54.

88 At 54; and *2014 Report*, above n 28, at 58.

3 *Capacity building*

The IOSCO Board has also set up a Capacity Building and Resource Committee (CBRC)⁸⁹ that works with the General Secretariat of the organization to develop relevant work plans for building the regulatory capacity of members. The GEM Committee also plays a role in assisting the CBRC with the identification and prioritization of members' needs.⁹⁰ Considering and seeking the required resources for implementing these capacity building plans formed also part of this key strategic work stream, resulting in one-off additional contributions from nominated members of the IOSCO Board for capacity building initiatives.⁹¹

4 *Monitoring and implementation*

When members agreed on IOSCO's operational goals and priorities from 2010 onwards, a clear focus was put on "building members' regulatory capacity through the systematic implementation of the IOSCO Principles by its members and its training and education program."⁹² Although IOSCO had long promoted the implementation of the IOSCO Principles and had developed a technical assistance program to assist requesting members in this endeavour, the clear suggestion that implementing the IOSCO Principles would build the regulatory capacity of members was new. This resulted in establishing in 2012 an Assessment Committee under the aegis of the IOSCO Board "to promote full, effective and consistent implementation of IOSCO principles and standards across its membership."⁹³ Represented on this committee are 27 regulatory agencies, with the International Monetary Fund (IMF) invited to attend meetings as an observer.⁹⁴

B Affiliate Members' Consultative Role

In some jurisdictions, the regulatory system uses SROs that are given direct oversight responsibilities for their areas of competence, usually subject to the

89 See *2013 Report*, above n 64, at 59.

90 At 13.

91 At 14 and 59; and *2014 Report*, above, n 28, at 8, 11 and 19. See also IOSCO, Presidents Committee of the International Organization of Securities Commissions *Resolution on Funding Capacity Building Priorities for 2015* Resolution 2/2014 (October 2014) <www.iosco.org> [*IOSCO Resolution 2/2014*].

92 See *IOSCO Resolution 2010 on Mission*, above n 85.

93 See IOSCO "IOSCO confirmed as the Key Global Reference Point for Securities Regulation" (Media Release, Luxembourg, 18 September 2013) at 6 <www.iosco.org>. For the list of Assessment Committee members, see IOSCO "Assessment Committee" link <www.iosco.org>.

94 See *2013 Report*, above n 64, at 50. See also IOSCO "Assessment Committee Mandate" at 4 para 13, available from IOSCO "Assessment Committee" link, above n 93.

supervision of the government regulatory agency.⁹⁵ As mentioned earlier (in Part II), SROs that were affiliate members constituted a consultative committee to provide input into IOSCO's work. The By-Laws are very flexible as to consultative committees.⁹⁶ They state that "[t]he IOSCO Board [previously the Executive Committee] may establish a Consultative Committee by designating a group of members"⁹⁷ and that "[a] Consultative Committee acts as a forum in which a group of members may discuss matters of common interest."⁹⁸

The SRO Consultative Committee has now been renamed as the Affiliate Members Consultative Committee.⁹⁹ Since September 2013, the following bodies are eligible for affiliate membership:¹⁰⁰

- (a) self regulatory organizations (SROs);
- (b) securities exchanges;
- (c) financial market infrastructures (including clearing and settlement agencies);
- (d) international bodies other than governmental organizations with an appropriate interest in securities regulation;
- (e) investor protection funds and compensation funds; and
- (f) any other body with an appropriate interest in securities regulation that the IOSCO Board may decide for the purpose of furthering the objectives of the Organization.

Most of these affiliate members perform a regulatory role that is considered front-line and, due to their proximity to the markets, enabling them to provide valuable input into IOSCO's activities. Indeed, the Affiliate Members Consultative Committee is now playing a more influential role within the organization,¹⁰¹ notably

95 See principle 9 of the IOSCO Principles: "Where the regulatory system makes use of Self-Regulatory Organizations (SROs) that exercise some direct oversight responsibility for their respective areas of competence, such SROs should be subject to the oversight of the Regulator and should observe standards of fairness and confidentiality when exercising powers and delegated responsibilities". See IOSCO *Objectives and Principles of Securities Regulation* (June 2010) at 5 <www.iosco.org> [*IOSCO Principles 2010*].

96 See By-laws 65-71, IOSCO By-Laws, above n 3.

97 By-law 65, IOSCO By-Laws, above n 3.

98 By-law 67, IOSCO By-Laws, above n 3.

99 See IOSCO *Resolution of the Presidents' Committee on Amendment to IOSCO's By-laws regarding Membership and Voting Rights* Resolution 4/2013 (September 2013) at para 9 <www.iosco.org> [*IOSCO Resolution 4/2013*]; and By-law 66, IOSCO By-Laws, above n 3. See also *2013 Report*, above n 64, at 16.

100 IOSCO *Resolution 4/2013*, above n 99, at para 5; By-law 9.1, IOSCO By-Laws, above n 3.

101 See IOSCO "Affiliate Members Strengthen Consultative Role within IOSCO" (Media Release, Madrid, 16 December 2013) <www.iosco.org>. See also IOSCO "AMCC [Affiliate Members

with its chair now attending IOSCO Board meetings as an observer.¹⁰² The committee is represented in several of IOSCO's policy committees, with an affiliate member even assuming a leadership role in some of their projects.¹⁰³

The Affiliate Members Consultative Committee has established two working groups serving its members. One aims "to detect potential regulatory concerns at an early stage, exchange information on emerging risks and help [committee] members find solutions to problems as they arise."¹⁰⁴ The other aims at training the regulatory staff of its committee members.¹⁰⁵ After consultation with its members and the IOSCO General Secretariat, the committee has also launched three taskforces relating respectively to investment funds data, cyber threats and emerging risks for providing input into IOSCO work.¹⁰⁶

C Regional Input and Advocacy

Alongside the IOSCO Board¹⁰⁷ and contributing to its decision-making¹⁰⁸ are four regional committees (Africa-Middle East, Asia-Pacific, European, and Inter-American)¹⁰⁹ that enable all ordinary and associate members to discuss specific regional issues of relevance,¹¹⁰ although only ordinary members have voting rights.¹¹¹ Since September 2013,¹¹² eligibility for ordinary membership is limited to governmental bodies that are signatories to the IOSCO MMOU, but those who were

Consultative Committee] members continue to deepen their contribution to IOSCO work" (Media Release, Tokyo, 11 April 2014) <www.iosco.org>.

102 See *IOSCO Resolution 5/2013* and *IOSCO Resolution 5/2013 as amended by Resolution 2/2015*, above n 55. See also *2013 Report*, above n 64, at 19.

103 See *2013 Report*, above n 64, at 16-17. See also *2014 Report*, above, 28, at 14.

104 *2013 Report*, above n 64, at 17.

105 At 19.

106 At 16 and 19.

107 See *2010 Report*, above n 48, at 47 and at 48 (chart representing the structure of the organization) for link between the regional committees and the Presidents Committee.

108 See for instance the "Report of the Chair of the European Regional Committee (ERC)" in *2013 Report*, above n 64, at 44-47. As another example, the Inter-American Regional Committee has set up a "Working Group on Board Matters" so as "to coordinate and communicate in the most efficient manner the interests and concerns of the region to the IOSCO Board": "Report from the Chair of the Inter-American Regional Committee (IARC)" in *2013 Report*, above n 64, at 48-49.

109 See By-law 59, IOSCO By-Laws, above n 3; also for example *2013 Report*, above n 64, at 62.

110 See By-law 60, IOSCO By-Laws, above n 3; also for example *2013 Report*, above n 64, at 62.

111 See By-law 27, IOSCO By-Laws, above n 3.

112 See *IOSCO Resolution 4/2013*, above n 99.

already ordinary members as at 18 September 2013 retain their status.¹¹³ Now eligible for associate membership are associations of "public regulatory bodies"¹¹⁴ and also specifically:¹¹⁵

- (a) supranational governmental regulators;
- (b) subnational governmental regulators where there is a national governmental regulator;
- (c) intergovernmental international organizations and other international standard-setting bodies;
- (d) other governmental bodies with an appropriate interest in securities regulation; and
- (e) national governmental regulators who are not MMoU signatories and who are not ordinary members.

In recent years, the Asia-Pacific Regional Committee has become particularly active in voicing its members' concerns. It initiated in 2013 correspondence with the European Commission regarding "Recognition of Asia Pacific Central Counterparties (CCPs) under the European Market Infrastructure Regulation (EMIR)",¹¹⁶ and in 2014 with the United States Commodity Futures Trading Commission (CFTC) on the "Impact of the Core Principles and Other Requirements for Swap Execution Facilities (SEF Rule) on Asia Pacific OTC Derivatives Markets."¹¹⁷ Importantly, the Asia-Pacific Regional Committee has adopted a roadmap identifying the areas with respect to its region to focus on in future. These are regulatory capacity building, strengthening regulatory cooperation across

113 At para 1; and By-law 6, IOSCO By-Laws, above n 3.

114 See *IOSCO Resolution 4/2013*, above n 99, at para 2; and By-law 8.1, IOSCO By-Laws, above n 3.

115 *IOSCO Resolution 4/2013*, above n 99, at para 3; and By-law 8.2, IOSCO By-Laws, above n 3.

116 Letters from the Chairman of the IOSCO Asia-Pacific Regional Committee to European Commissioner for Internal Market and Services on the subject of "Recognition of Asia Pacific Central Counterparties (CCPs) under the European Market Infrastructure Regulation (EMIR)" dated 6 June and 22 November 2013, both available from IOSCO "Asia-Pacific Regional Committee" link <www.iosco.org>. See also response letter dated 20 December 2013 likewise available from the above mentioned link; "Report from the Chair of the Asia-Pacific Regional Committee (APRC)" in *2013 Report*, above n 64, at 42-43; and *2014 Report*, above n 28, at 43 mentioning a further letter from that Committee to the European Commission.

117 See Letter from the Chairman of the Acting IOSCO Asia-Pacific Regional Committee to the Acting Chairman of the United States' Commodity Futures Trading Commission on the subject of "Impact of the Core Principles and Other Requirements for Swap Execution Facilities (SEF Rule) on Asia Pacific Derivatives Markets)" dated 9 April 2014, available from IOSCO "Asia-Pacific Regional Committee" link, above n 116.

borders, addressing issues arising from the extraterritoriality of financial reforms in the United States and Europe, and strengthening capital markets.¹¹⁸

D Administration and Research

Finally, the organization is supported by a General Secretariat based in Madrid.¹¹⁹ The By-Laws state that the "[t]he Secretary General administers the General Secretariat" and list a number of particular functions including those assigned by the IOSCO Board.¹²⁰ Indeed, "[t]he Secretary General acts in accordance with the decisions of the IOSCO Board and the guidance of the IOSCO Board Chairman [previously the Executive Committee] as the representative of the IOSCO Board"¹²¹ although they "may also perform work for the [GEM] Committee" at the discretion of that committee's chair.¹²² Research to assist with efforts in the identification, monitoring and management of systemic risks was an important new function the membership assigned to the organization as part of its 2010-2015 strategic direction. This led to the development of a small research department at the General Secretariat alongside the now renamed Emerging Risk Committee of members mentioned above.¹²³ As for the size of the General Secretariat, this has grown with time,¹²⁴ notably since a secondment programme was introduced in 2008.¹²⁵ It now comprises close to 30 people, a third of whom are seconded from IOSCO members for a set period of time.¹²⁶

The organization is funded by the members' annual membership fee, which until 2012 was the same for all members.¹²⁷ As IOSCO needed increased resources and investments to support new and intensified activities, the membership agreed to a

118 See IOSCO Asia-Pacific Regional Committee "APRC Roadmap" (23 March 2015) <www.iosco.org>.

119 See for example *2014 Report*, above n 28, at 64.

120 See By-law 51, IOSCO By-Laws, above n 3.

121 By-law 52.1, IOSCO By-Laws, above n 3.

122 See By-law 52.2, IOSCO By-Laws, above n 3.

123 See *2011 Report*, above n 56, at 46.

124 See *2010 Report*, above n 48, at 24. In his report, the Secretary General indicates that the General Secretariat had only three permanent staff in 2000; by the end of 2010, this had grown to 18 permanent and seconded staff.

125 See IOSCO *Annual Report 2008* (2009) at 19 [*2008 Report*]. See also IOSCO "IOSCO's Secondments Policy" <www.iosco.org>.

126 See *2013 Report*, above n 64, at 21. See also *2014 Report*, above n 28, at 19.

127 Before the change in funding structure introduced in 2011, this was set at €15,000 for all members in any of the categories: see *2010 Report*, above n 48, at 48.

new funding structure. This provides for a differentiated membership fee, the level of which initially depended on a categorization of jurisdictions pre-determined by their gross domestic product and national per capita income levels, although this will soon also depend on their membership category and whether they are ordinary members nominated on the IOSCO Board.¹²⁸ Regarding funding sources, a previous idea of setting up a foundation floundered but a decision was taken "to accept a temporary increase in contributions from the permanent Board members in 2015 for capacity building purposes".¹²⁹

All in all, IOSCO is thus a rather decentralized body,¹³⁰ reliant on its member agencies.¹³¹ IOSCO's organizational structure has led Zaring to state that its "membership is organized in a somewhat complicated – but nonetheless unconstrained – way, with broad grants of authority more typical of corporate bylaws than the complex treaties governing international organizations."¹³²

V PRINCIPLES OF SECURITIES REGULATION

Building upon work carried out since its inception, the organization developed its core IOSCO Principles during the time of the Asian financial crisis and these were adopted by its membership in September 1998 following extensive public consultation.¹³³ Most importantly, this core policy document identified three objectives of securities regulation, namely: investor protection; ensuring that markets are fair, efficient and transparent; and the reduction of systemic risk.

¹²⁸ See IOSCO *Resolution of the Presidents Committee on Funding the new Strategic Direction* (April 2011) providing for five fee levels, set at €12,500, €15,000, €16,000, €21,000, and €30,000 respectively, taking effect from 2012. This means that some members have seen their fee reduced from the previous homogenous fee of €15,000 prevailing until 2012. The membership fee of particular international organizations was subsequently set to remain at their previous level of €15,000: see IOSCO *Resolution of the Presidents Committee On The annual contribution for the Organization for Economic Cooperation and Development, the Asian Development Bank, the International Bank for Reconstruction and Development and the International Monetary Fund* (May 2012) <www.iosco.org>. For the fee structure and their amounts from 2016 onwards, see IOSCO, Presidents Committee of the International Organization of Securities Commissions *Resolution On IOSCO's Strategic Direction from 2016 to 2020 And On Funding the Strategic Direction from 2016 to 2020* Resolution 3/2015 (June 2015) <www.iosco.org>.

¹²⁹ 2013 *Report*, above n 64, at 21. See also *IOSCO Resolution 2/2014*, above n 91.

¹³⁰ See Zaring "Informal Procedure", above n 13, at 552.

¹³¹ IOSCO *Annual Report 2007* (2008) at 19 [2007 *Report*].

¹³² Zaring "Informal Procedure", above n 13, at 563.

¹³³ See IOSCO "Final Communiqué of the 23rd Annual Conference of the International Organization of Securities Commissions" (Press Communiqué, Nairobi, 18 September 1998) <www.iosco.org>.

Moreover, it set out broadly defined principles to give effect to these regulatory objectives.¹³⁴

To complement the formulation of these high-level principles and as a further effort to enhance securities regulation worldwide, IOSCO also developed a *Methodology for Assessing Implementation of the IOSCO Objectives and Principles of Securities Regulation* (IOSCO Assessment Methodology), which its membership endorsed in October 2003.¹³⁵ The IOSCO Assessment Methodology provides a common understanding of what the IOSCO Principles mean in practice "and give guidance on the conduct of a self-assessment or third-party assessment of the level of Principles implementation."¹³⁶ As such, the IOSCO Principles and their related IOSCO Assessment Methodology have been widely used for internal and external assessments, including by the IMF and the World Bank in their Financial Sector Assessment Program (FSAP), and for training and technical assistance purposes.¹³⁷

As core policy documents, the IOSCO Principles and Assessment Methodology are "organic" in that they are updated and revised as necessary to remain current and relevant. Thus, the IOSCO Principles were re-published in 2002, 2003 and 2008, now referring to work the organization had undertaken since September 1998, with a similarly updated version of the IOSCO Assessment Methodology published in 2008. Then, in 2010, the organization endorsed a comprehensively updated and expanded version of its IOSCO Principles, with a new IOSCO Assessment Methodology adopted in 2011, and revised in 2013, to accompany them.¹³⁸

134 See initial version: *IOSCO Objectives and Principles of Securities Regulation* (September 1998) available from the IOSCO public reports list <www.iosco.org>.

135 See IOSCO "IOSCO Strengthens International Cooperation to Fight Illegal Securities and Derivatives Activities" (Press Release, Seoul, 16 October 2003) at 2 <www.iosco.org>; and IOSCO "Final Communiqué of the XXVIIIth Annual Conference of the International Organization of Securities Commissions" (Seoul, 14-17 October 2003) at 2 <www.iosco.org> [2003 Annual Conference Communiqué]. See also *IOSCO Methodology for Assessing Implementation of the IOSCO Objectives and Principles of Securities Regulation* (October 2003) <www.iosco.org>.

136 IOSCO "Key Regulatory Standards" link <www.iosco.org>.

137 See for example "Evaluating Financial Sector Supervision: Banking, Insurance, and Securities Markets" in International Bank for Reconstruction and Development (The World Bank) and International Monetary Fund *Financial Sector Assessment: A Handbook* (29 September 2005) 101 at 140 and at 143-149 <www.imf.org>. See also International Monetary Fund *A Macroeconomic Approach to Supervisory Standards Assessments* (18 August 2014) at 12 note 10; and IOSCO Emerging Markets Committee *Impact On and Responses of Emerging Markets to the Financial Crisis* (Final Report, September 2009) at para 36 <www.iosco.org>.

138 See *IOSCO Principles* 2010, above n 95; and *IOSCO Methodology For Assessing Implementation of the IOSCO Objectives and Principles of Securities Regulation* (September 2011 [Version Revised August 2013]) <www.iosco.org> [*IOSCO Assessment Methodology 2013*]. All previous editions and versions of both documents are also available from the list of IOSCO public reports <www.iosco.org>.

Noteworthy is the fact that the three objectives of securities regulation agreed to in 1998 have remained unchanged, with only the principles giving effect to them comprehensively reviewed in the aftermath of the GFC. In particular, the 2010 IOSCO Principles incorporate eight new principles that:¹³⁹

... cover specific policy areas such as hedge funds, credit rating agencies and auditor independence and oversight, in addition to broader areas including monitoring, mitigating and managing systemic risk; regularly reviewing the *perimeter* of regulation; and requiring that conflicts of interest and misalignment of incentives are avoided, eliminated, disclosed or otherwise managed.

The development and wide endorsement of the IOSCO Principles later accompanied by a related Assessment Methodology have been instrumental in the organization becoming the recognized international standard setter for securities regulation. The IOSCO Principles are part of the sets of international standards the implementation of which are considered key for sound financial systems.¹⁴⁰ As a World Bank lawyer stated: "IOSCO is the standard for securities market reform. Each country is evaluated in accordance of these standards so that we get consistency and reasonable benchmarks."¹⁴¹ Despite their legally non-binding nature, the standards embodied in the IOSCO Principles thus tend to be incorporated in the domestic legal and regulatory framework of most jurisdictions around the world. As mentioned earlier (in Part IV), the organization has also set up an Assessment Committee in a further effort to promote their implementation.¹⁴² That committee ensures that the IOSCO Principles and Assessment Methodology remain current and reviews the implementation of the organization's standards and resolutions,¹⁴³ thereby enabling IOSCO to also "contribute to meeting G20 calls for enhanced monitoring of implementation of financial sector reforms."¹⁴⁴

139 IOSCO "Global securities regulators adopt new principles and increase focus on systemic risk" (Media Release, Montreal, 10 June 2010) <www.iosco.org>.

140 See FSB "Key Standards for Sound Financial Systems" link <www.financialstabilityboard.org>.

141 Peter Kyle "Session Two: Legal Reform Processes (2006 International Law Review Association Colloquium: Law, Culture, and Economic Development)" (2006) 12 *Law and Business Review of the Americas* 459 at 460.

142 See IOSCO "Assessment Committee Mandate", above n 94, at para 4. See also IOSCO "Assessment Committee - Thematic Reviews Process Document" available from IOSCO "Assessment Committee" link, above n 93.

143 See IOSCO "Assessment Committee Mandate", above n 94, particularly paras 2-3 and 8-9.

144 At para 3.

VI INTERNATIONAL COOPERATION

IOSCO has long been recognized as a forum enabling the negotiation of cooperation agreements between securities regulatory agencies. According to Zaring, for example:¹⁴⁵

Both the Basle Committee [on Banking Supervision] and the IOSCO ... set the groundwork for other agreements between regulations, commonly known as Memoranda of Understanding ("MOUs"). ... IOSCO is particularly active in this regard. It serves as a forum in which bilateral MOUs on information sharing or other supervisory issues may be concluded.

In this regard, a key international cooperation instrument developed by the organization is the previously mentioned IOSCO MMOU.¹⁴⁶ Progress in achieving its implementation is particularly significant. In the globalization era, combating violations of securities and derivatives laws increasingly requires cross-border cooperation between regulators. The IOSCO MMOU has been defined as "an *understanding* among its signatories about how they will *consult, cooperate, and exchange information* for securities regulatory enforcement purposes."¹⁴⁷ It was developed in the aftermath of the events of 11 September 2001 and built on previous work and member commitments towards establishing an international benchmark for cooperation and information sharing for purposes of enforcing domestic laws and regulations.¹⁴⁸

Endorsed by members in 2002, the IOSCO MMOU has become "the international benchmark for enforcement-related cooperation and exchange of information."¹⁴⁹ Indeed, the network of signatories to this cooperative instrument now reaches 105

145 See Zaring "Informal Procedure", above n 13, at 554 note 23.

146 For the 2002 text of the IOSCO MMOU and the press release announcing its endorsement, see IOSCO *Multilateral Memorandum of Understanding Concerning Consultation, Cooperation and the Exchange of Information* (IOSCO Report, May 2002) <www.iosco.org> [*IOSCO MMOU 2002*]; and IOSCO "IOSCO Announces the endorsement of the First Multilateral MOU for Securities Regulators" (Press Release, 1 May 2002) <www.iosco.org> ["IOSCO MMOU Announcement"]. For the 2012 version of the IOSCO MMOU incorporating the required amendments as a result of the organizational restructuring, see IOSCO *Multilateral Memorandum of Understanding Concerning Consultation, Cooperation and the Exchange of Information* (IOSCO Report, May 2002 [Revised May 2012]) <www.iosco.org> [*IOSCO MMOU 2012*].

147 Rita Cunha (then MMOU Advisor at the IOSCO General Secretariat) "The IOSCO Multilateral Memorandum of Understanding (MMoU): an International Benchmark for Securities Enforcement" (2010) 15 *Uniform Law Review* (Revue de droit uniforme) 677 at 681.

148 See IOSCO "IOSCO MMOU Announcement", above n 146.

149 IOSCO *Resolution of the Presidents Committee on the International Benchmark for Enforcement Related Cooperation and Exchange of Information* (6 April 2005) <www.iosco.org>.

agencies in almost as many jurisdictions.¹⁵⁰ Another 18 member agencies are addressing identified issues to enable them to become signatories.¹⁵¹ Since 2013, and in accordance with a 2012 resolution of the Presidents Committee,¹⁵² IOSCO publicly tracks progress made by member agencies that have not yet become signatories.¹⁵³

Use of the IOSCO MMOU has also grown considerably with time. Whereas the number of signatories increased in the past decade more than four times (from 24 in 2003 to 99 in 2013),¹⁵⁴ information requests made amongst signatories pursuant to the IOSCO MMOU grew 47-fold during the same period (rising from 56 in 2003 to 2,658 in 2013).¹⁵⁵

In 2010, G-20 Leaders "acknowledged the significant work of ... [IOSCO] to facilitate the exchange of information amongst regulators and supervisors."¹⁵⁶ The successful experience with the IOSCO MMOU in relation to cross-border enforcement cooperation and political support has led IOSCO to also turn its attention to the development of cross-border supervisory cooperation mechanisms.¹⁵⁷ Thus, not only has the IOSCO MMOU and its widening implementation been hailed as one of the organization's key achievements,¹⁵⁸ it is

150 A list of current signatories is maintained on the IOSCO website: IOSCO "[MMOU] Current Signatories and Members Listed on Appendix B" link <www.iosco.org>.

151 See IOSCO "[MMOU] Current Signatories and Members Listed on Appendix B" link, above n 150: "Members listed on Appendix B have committed to seeking the legal authority necessary to enable them to become full signatories to the IOSCO MMoU (Appendix A)".

152 See IOSCO, Presidents Committee of the International Organization of Securities Commissions, *Resolution on IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information* (May 2012) <www.iosco.org>.

153 See IOSCO "2013 List of Non-signatories to the MMoU" link <www.iosco.org>.

154 See respectively 2003 Annual Conference Communiqué, above n 135, at 2; and *2013 Report*, above n 64, at 29.

155 See IOSCO "Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (MMoU)" link <www.iosco.org>. See also *2014 Report*, above n 28, at 57.

156 G-20 Leaders "The G-20 Toronto Summit Declaration, Annex II: Financial Sector Reform" (Toronto, 26-27 June 2010) at para 28.

157 See Antoine Van Cauwenberge "Developments Regarding Global Cooperation in Supervision of Financial Markets" in Eddy Wymeersch, Klaus J Hopt and Guido Ferrarini (eds) *Financial Regulation and Supervision. A Post-Crisis Analysis* (Oxford University Press, Oxford, 2012) ch 13.

158 See for example IOSCO "The MMoU: Ten years of Enhancing Cross-border Enforcement Cooperation" (Media Release, Beijing, 16 May 2012) <www.iosco.org> ["The MMoU: Ten years"]. For a scholarly reference, see for example Pierre-Hugues Verdier "Transnational Regulatory Networks and Their Limits" (2009) 34 *Yale Journal of International Law* 113 at 143.

also leading IOSCO towards becoming an operational body, in addition to being a standard setter.

An interesting feature of the IOSCO MMOU – and most likely contributing to its success – is the *ex ante* screening of the relevant domestic legal framework of the applicant agency's jurisdiction.¹⁵⁹ The IOSCO MMOU clearly states that its provisions "are not intended to create legally binding obligations or supersede domestic laws."¹⁶⁰ Its purpose is rather stated as follows:¹⁶¹

This Memorandum of Understanding sets forth the Authorities' intent with regard to mutual assistance and the exchange of information for the purpose of enforcing and securing compliance with the respective Laws and Regulations of the jurisdictions of the Authorities.

Therefore, before being invited to become signatories to the IOSCO MMOU, applicants undergo a stringent screening process through which they have to demonstrate to an IOSCO team of experts in the field of enforcement and related confidential exchange of information their legal authority to fully comply with the provisions of the MMOU. Any identified deficiency has to be remedied before that applicant can re-apply; and this may imply the need for amending applicable legislation or new legislation.¹⁶²

Since 2005, IOSCO has been using a variety of peer pressure mechanisms on member agencies to become signatories, ranging from gentle persuasion and assistance where requested, to more recently limiting the ability of non-signatories to take part in the decision-making processes of the organization. Hence, in spite of the fact that becoming a signatory remains a voluntary process since IOSCO resolutions, recommendations and cooperation instruments are not legally binding, the number of signatories has nevertheless grown from 24 in October 2003¹⁶³ –within the first year of the IOSCO MMOU being endorsed by all members – to 29 at end 2005¹⁶⁴ – the year in which the first pressure mechanisms were endorsed by the

159 For an in-depth analysis of the IOSCO MMOU, see Van Cauwenberge, above n 157, at 393-413.

160 *IOSCO MMOU 2002* and *IOSCO MMOU 2012*, above n 146, at para 6 (a).

161 *IOSCO MMOU 2002* and *IOSCO MMOU 2012*, above n 146, at para 6 (a).

162 The screening and decision-making processes are detailed in Appendix B of the IOSCO MMOU. See "Appendix B: Procedures Under the Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information" in *IOSCO MMOU 2012*, above n 146, at 11-14 [*IOSCO MMOU 2012 Appendix B*].

163 See 2003 Annual Conference Communiqué, above n 135, at 2.

164 See *IOSCO Annual Report 2005* (2006) at 8 [*2005 Report*].

membership – to 105 as at end of July 2015.¹⁶⁵ As the then Executive Committee chair reminded in her 2005 report, the IOSCO MMOU "does not create legally binding obligations or supersede domestic laws. Rather, it enables domestic laws to be enforced in an international context that is becoming ever more complex."¹⁶⁶ Most likely, this fact explains in large part the interest of member agencies in becoming signatories to this IOSCO multilateral enforcement cooperation instrument, with the growing pressure helping to politically persuade jurisdictions to make the necessary efforts to comply.

Another feature of the IOSCO MMOU is its inclusion of an *ex post* monitoring mechanism that is collectively exercised by all signatories in the first instance. If necessary, a decision taken collectively by the signatories in case of non-compliance by one of them is referred to a higher level of the IOSCO governance structure for determination of an appropriate decision.¹⁶⁷ Convening as a "monitoring group", signatories hold "periodic consultation about certain significant, enumerated matters of common concern to the [IOSCO MMOU] signatories with a view to improving operation of the [IOSCO MMOU]."¹⁶⁸ This constitutes a form of compliance mechanism: a demonstrated change in the willingness or ability of a signatory to abide by the provisions of the IOSCO MMOU can result in possible consequences for that signatory.¹⁶⁹

VII KEY INSTITUTIONAL CHARACTERISTICS

IOSCO develops international standards of regulation and promotes their implementation. Its standards are essentially developed by experts from its member agencies working together in technical policy committees organized by key subject area, voluntarily engaged through collaborative learning processes. Proposed standards are usually published as consultation drafts for public comment before being finalized, and are finally endorsed at a broader and higher technical level and now, since the new IOSCO Board has absorbed the functions of the disestablished Technical Committee, at the level of the governing body of IOSCO. Core policy documents, such as the IOSCO Principles and the IOSCO MMOU, have been endorsed by all member governmental agencies through resolutions of the Presidents

165 See list of IOSCO MMOU signatories, above n 150.

166 "Report from the Chairman of the Executive Committee" in *2005 Report*, above n 164, at 3.

167 See *IOSCO MMOU 2012 Appendix B*, above n 162, at III (a)-(g).

168 At III (b).

169 At III (c)-(f).

Committee.¹⁷⁰ Since the regulatory standards IOSCO produces are legally non-binding, they are considered to constitute "soft law."¹⁷¹ Given that no authority or power is vested on IOSCO at the international level, they can only be implemented voluntarily through domestic mechanisms. However, the organization actively promotes implementation of its standards by various means of moral suasion¹⁷² and peer pressure, as well as organizing training seminars for members and providing technical assistance upon request. As mentioned above (in Part V), compliance with key standards is assessed by third party assessments, notably by the IMF and the World Bank as concerns the IOSCO Principles, and now increasingly also by IOSCO peer reviews through its new Assessment Committee. These compliance mechanisms, to which jurisdictions submit voluntarily in general, give a harder edge to the soft law standards developed by the organization,¹⁷³ and so do G-20 commitments¹⁷⁴ and endorsement or use by relevant specialized institutions within the United Nations system, namely the IMF and the World Bank.

Several institutional features tending to reinforce each other contribute to these organizational achievements.

170 As concerns adoption of the IOSCO Principles, see IOSCO *A Resolution of the Presidents' Committee on IOSCO Adoption of the Objectives and Principles of Securities Regulation* (September 1998) <www.iosco.org>. The 2010 revised set of IOSCO Principles, including eight new principles, was also adopted by the Presidents Committee: see IOSCO "Final Update 35th Annual Conference of the International Organization of Securities Commissions" (Media Statement, Montreal, 10 June 2010) <www.iosco.org>. As concerns adoption of the IOSCO MMOU, see IOSCO *A Resolution of the Presidents' Committee on the IOSCO MOU* (May 2002) <www.iosco.org>.

171 For a general introduction and discussion on soft law, see for example Dinah L Shelton "Soft Law" in David Armstrong (ed) *Routledge Handbook of International Law* (Routledge Press, Abingdon (Oxon), 2009) ch 4. See also Chris Brummer "Why Soft Law Dominates in International Finance—And Not Trade" (2010) 13 *Journal of International Economic Law* 623 ["Why Soft Law Dominates"]. See also Jacob E Gersen and Eric A Posner "Soft Law: Lessons from Congressional Practice" (2008) 61 *Stanford Law Review* 573.

172 The practice of "moral suasion" can be considered an alternative mode of enforcement or compliance mechanism: see Pierre-Hugues Verdier "Mutual Recognition in International Finance" (2011) 52 *Harvard International Law Journal* 55 at 67 note 41. See also Zaring "International Law by Other Means", above n 2, at 289 note 47.

173 See for example Douglas W Arner and Michael W Taylor "The Global Financial Crisis and the Financial Stability Board: Hardening the Soft Law of International Financial Regulation?" (2009) 32 *University of New South Wales Law Journal* 488.

174 See Suyash Paliwal "The Binding Force of G-20 Commitments" (2014) 40 *Yale Journal of International Law Online* 1.

First, IOSCO is a broad- and consensus-based organization¹⁷⁵ pursuing inclusiveness¹⁷⁶ in its debates. IOSCO explains for example that its "new streamlined governance structure and decision-making process was aimed at making IOSCO more effective and inclusive, helping position the organization for a larger role in shaping the global framework for securities market regulation."¹⁷⁷ Pursuant to the recent reforms, for instance, more members are elected to the IOSCO Board through the Regional Committees. Moreover, since 2014, more members are also elected to the IOSCO Board through the now renamed GEM Committee including their office-holders.¹⁷⁸ Furthermore, the organization proudly states:¹⁷⁹

IOSCO is the only international standard setter that has a Committee solely responsible for emerging market issues. This inclusiveness increases IOSCO's effectiveness and positions it to play a bigger part in shaping the global regulatory framework: IOSCO has been allocated an extra seat at the Financial Stability Board Plenary for the Chairman of the GEMC [GEM Committee]. The GEMC also has a seat on the IFRS Foundation Monitoring Board.

Already in 2009, membership of the then Technical Committee, which merged into the IOSCO Board as a result of the recent reforms, was expanded to include the securities regulators of Brazil, China and India, enabling it to be more representative of the evolving global marketplace.¹⁸⁰ At the time, the chair of that committee expressed her belief that "by expanding the membership, the Technical Committee will be better able to represent the views of securities regulators from all corners of the globe."¹⁸¹

Second, IOSCO's standard setting work relies on the best expertise available within its membership¹⁸² and this is complemented as appropriate by input or feedback from consultation with stakeholders and other bodies with a

175 See Preamble, IOSCO By-Laws, above n 3.

176 See for example regarding enhancing the inclusiveness of emerging markets members: IOSCO "IOSCO to progress reform agenda under new leadership" (Media Release, Sydney, 1 April 2013) at 3 <www.iosco.org>.

177 *2013 Report*, above n 64, at 61.

178 See *IOSCO Resolution of the Presidents Committee on transitional arrangements for the IOSCO Board* (April 2011) <www.iosco.org>; *IOSCO Resolution 5/2013*, above n 55; and *IOSCO Resolution 5/2013 as amended by Resolution 2/2015*, above n 55.

179 IOSCO "Fact Sheet", above n 29, at 4.

180 See IOSCO "IOSCO Technical Committee invites Brazil, China and India to join its Membership" (Media Release, Madrid, 19 February 2009); and *2008 Report*, above n 125, at 13.

181 See "Report from the Chairman of the Technical Committee" in *2008 Report*, above n 125, at 13.

182 See *2007 Report*, above n 131, at 19.

complementary mission. IOSCO is a member of the Financial Stability Board (FSB) (and previously of the Financial Stability Forum which preceded it).¹⁸³ The Asian Development Bank (ADB), the Organisation for Economic Co-operation and Development (OECD), the IMF, and the International Bank for Reconstruction and Development (World Bank) had long been IOSCO affiliate members¹⁸⁴ and are now associate members since recent reforms altered the criteria for associate membership.¹⁸⁵ The European Commission too has moved from being an affiliate member to becoming an associate member.¹⁸⁶ Also participating in IOSCO as associate members are the European Securities and Markets Authority and the Union of Arab Securities Authorities.¹⁸⁷

Third, the organization endeavours to maintain an apolitical stance.¹⁸⁸ The IOSCO Principles state that "[t]he Regulator should be operationally independent and accountable in the exercise of its functions and powers."¹⁸⁹ This requires domestic regulators to be independent from external political interference as well as from commercial or other sectoral interests in their day-to-day operations.¹⁹⁰ It can be inferred that IOSCO, as a consensus-based forum of member regulatory agencies that value their operational independence and accountability at domestic level, and seek to implement the IOSCO Principles, would not be able to get the support of its members without them being satisfied of the organization's independence.

Fourth, resolutions are adopted by the Presidents Committee, where all ordinary members and associate members are represented at their respective agencies' highest

183 See FSB membership list <www.financialstabilityboard.org>.

184 See Jane Diplock (IOSCO Executive Committee Chairman) "Who should do what in the global financial architecture ... the art of the possible" (Speech at the Centre for European Policy Studies, Brussels, 22 April 2009) <www.iosco.org>.

185 See list of associate members: *2013 Report*, above n 64, at 66. For the new membership criteria, see *2013 Report*, above n 28, at 63. For the criteria previously applying, see for example *2011 Report*, above n 56, at 52-53.

186 See *2013 Report*, above n 64, at 44.

187 At 66.

188 See IOSCO Executive Committee *Analysis of The Application of IOSCO's Objectives And Principles of Securities Regulation For Islamic Securities Products* (September 2008) at 6 <www.iosco.org>: "IOSCO is a secular institution with no religious or political affiliation".

189 Principle 2 of the IOSCO Principles: see *IOSCO Principles 2010*, above n 95, at 4.

190 For details on the organization's interpretation of principle 2, see *IOSCO Assessment Methodology 2013*, above n 138, at 25-29.

level¹⁹¹ and each ordinary member has an equal vote¹⁹² as a matter of principle. This representation at the highest level of member agencies in the decision-making process ensures ownership of decisions not by technical experts as such but rather by regulatory leaders familiar with the political environment in which their respective agency operates. A former securities regulator, Roberta Karmel, noted the lack of enforcement capabilities of IOSCO as a voluntary organization, but also highlighted:¹⁹³

... the voluntary nature of IOSCO membership and obligations is in some ways a plus, because by the time the members reach a consensus on an issue, there seems to be the will to go back to a home country and adopt these standards.

Fifth, the organization promotes implementation of the IOSCO Principles and IOSCO MMOU by various means. Zaring remarks that IOSCO started limiting its membership in 1994, notably by requiring future applicants to confirm their ability and willingness to adhere to its standards.¹⁹⁴ Indeed, a membership application requires among other things a statement confirming endorsement of existing resolutions.¹⁹⁵ The organization provides technical or other assistance to its members, at their request, and through the development and provision of purpose-built educational seminars and training workshops.¹⁹⁶ Since 2005, IOSCO has also resolved to put in place increasingly stringent measures for actively encouraging members to become signatories to the IOSCO MMOU. Through the Presidents Committee, members agreed initially to set a deadline for applying to become a signatory, then to create a public watch list for members who had not yet applied. This was followed by a resolution "designed to assist these non-signatories in overcoming the obstacles they often encounter in securing support from their governments or legislatures for implementing the legal and regulatory changes

191 See By-law 20.1, IOSCO By-Laws, above n 3, stating: "Each ordinary member is represented at the meetings of the Presidents Committee by the president of the commission or body, or by any other person within the commission or body appointed by them".

192 See By-law 27, IOSCO By-Laws, above n 3. See also *2013 Report*, above n 64, at 63. As regards voting rights, recent amendments providing for a maximum of three (shared) votes for the regulatory bodies of country subdivisions where these have exclusive jurisdiction over securities only apply to elections. For policy matters, for instance, all ordinary members retain an equal vote. See *IOSCO Resolution 4/2013*, above n 99.

193 "Capitalism in Transition - The Role of International Law: Remarks by Roberta Karmel" (1995) 89 *American Society of International Law Proceedings* 109 at 111.

194 See Zaring "International Law by Other Means", above n 2, at 292.

195 See By-law 11(c), IOSCO By-Laws, above n 3.

196 See for example *2014 Report*, above n 28, at 41, 57, 60 and 65 (in respect of technical assistance) and at 14, 17, 19, 20, 40, 43, 48, 60-62 and 65 (in respect of educational and training programmes).

required for compliance"¹⁹⁷ with the terms of the MMOU. Most recently, members "resolved to introduce Graduated Additional Measures taking effect from 30 September 2013, with an aim to encourage non signatory-members to sign the MMoU."¹⁹⁸ IOSCO has also embarked on assessing implementation of the IOSCO Principles and resolutions by its members.

The features identified above are inter-related and reinforcing. As an association of members, IOSCO is accountable to its member government agencies, themselves domestically accountable for discharging their mandates. Recognition of IOSCO as a specialized standard setting body by the international financial community is thus heavily dependent on its credibility, expressed through the legitimacy and effectiveness of the work it produces; and the organization's credibility is itself linked to its expertise and independence of opinion. In her 2008 report, the then Technical Committee chair highlighted the value of independence in its standard setting work and the provision of expertise:¹⁹⁹

As an independent standard setting body of securities regulators, the Technical Committee will be an important resource for the FSB and will be able to provide expertise to the FSB in order to promote financial stability, maintain the openness and transparency of the financial sector and implement international financial standards, including IOSCO's Objectives and Principles of Securities Regulation.

Taken together, these features have enabled the organization to play an increasing role in the international financial architecture. Zaring views IOSCO and the BCBS as forming the first generation of "international financial regulatory organizations"²⁰⁰ and as serving as models to, notably, the International Accounting Standards Board (IASB), the IAIS, the Financial Stability Forum (of which IOSCO was a founding member and which has been transformed into the FSB following the GFC), the Joint Forum (formed by IOSCO and its sister standard setting bodies for the banking and insurance sectors), and the Financial Action Task Force on Money Laundering

197 IOSCO "The MMoU: Ten years", above n 158, at 3 <www.iosco.org>.

198 IOSCO "Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (MMoU)" link, above n 155. For the latest graduated measures, see IOSCO, Presidents Committee of the International Organization of Securities Commissions *Resolution on the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information* Resolution 1/2014 (October 2014) <www.iosco.org>

199 "Report from the Chairman of the Technical Committee" in *2008 Report*, above n 125, at 13.

200 Zaring "International Law by Other Means", above n 2, at 285; and Zaring "Informal Procedure", above n 13, at 549.

(FATF).²⁰¹ Another commentator, Kal Raustiala, believes that "[t]he success of the IOSCO model has led to regional spinoffs."²⁰²

It is also noteworthy that since the GFC, the G-20 has gradually institutionalized the FSB by "establishing it as an association under Swiss law to vest it with legal personality."²⁰³ Thus like IOSCO, the FSB is now also incorporated under a national law as a non-profit association.²⁰⁴

Whereas IOSCO and its work have inspired doctoral candidates and scholars in political science and related disciplines since the early 1990s,²⁰⁵ what intrigues legal scholars is the emergence of "international financial law" or "global financial regulation" through non-legally binding instruments developed by non-treaty based bodies. Raustiala notes that "[g]roups like IOSCO fit none of the traditional categories of public international law."²⁰⁶ Viewing IOSCO's regulatory standards as a key source of "international financial law," Brummer states:²⁰⁷

International financial law is in many ways a surprising instrument for establishing a global economic order. Unlike international trade and monetary affairs, where global coordination efforts are led by formal international organizations, international financial law is promulgated by inter-agency forums with (at best) ambiguous legal status. Furthermore, the commitments made by participating regulatory agencies have no legal effect, but are instead non-binding as a matter of international law. This divergence is perplexing both from a comparative perspective and from the standpoint of international legal theory, especially when comparing international financial law to international trade. Both trade and finance are clearly key areas addressed by 'international economic law', and their rules have important consequences for global markets. In addition, they relate to market access, embrace non-discrimination and potentially have asymmetric distributive implications for special interests in affected jurisdictions.

201 See Zaring "Informal Procedure", above n 13, at 585-589.

202 Raustiala, above n 40, at 31 note 136.

203 FSB "Our History" link <www.financialstabilityboard.org>.

204 See FSB "Our History" link, above n 203.

205 See Porter "Inter-State and Private Regimes", above n 49. For a more recent thesis example, see David Kempthorne "Governing International Securities Markets: IOSCO and the Politics of International Securities Market Standards" (PhD in Global Governance dissertation, University of Waterloo (Ontario, Canada), 2013). See also Underhill, above n 20.

206 Raustiala, above n 40, at 23.

207 Brummer "Why Soft Law Dominates", above n 171, at 623-624.

Attempting to define the legal principles underpinning "global financial regulation", Zaring argues:²⁰⁸

Global financial regulation now works like a legal system, even as it is propounded by institutions that do not claim to be acting with the force of law. It has legal principles and is rife with lawyers and lawyering; the point is not only that legal analysis is critical for understanding the system, but also that these new ways of dealing with global problems are distinctively legal ones.

From a private law perspective, Ross Cranston considers that IOSCO, alongside a range of other international bodies, is driving the development of a "new transnational commercial law."²⁰⁹

In any event, IOSCO's work and impact on the world of financial markets is likely to continue to inspire scholarly theorizing, with its institutional evolution increasingly scrutinized.

VIII CONCLUSION

With IOSCO recently holding its 40th annual conference, it appeared timely to review the institutional development and characteristics of this atypical international organization operating within the confines of domestic and international law, private and public law. Indeed, during their annual IOSCO conference meetings in June 2015 in London, member securities regulatory agencies from around the world approved the organization's strategic direction to 2020. This aims to strengthen IOSCO's "position as the key global reference point for securities regulation" by building on its past achievements and intensifying activities across all its programmes.²¹⁰

IOSCO is essentially a member-led organization serving the needs of securities regulators from around the world. Its near universal membership base comprises ordinary, associate and affiliate members from over 110 countries with different legal traditions and cultures, diverse market size, and varying levels of market development. The fact that only governmental agencies constituting the ordinary membership have voting rights suggests that IOSCO can be considered as a quasi-intergovernmental organization. However, unlike more traditional international organizations founded by treaty, IOSCO is established as an association of securities regulatory organizations incorporated under a private Act as a non-profit entity and

208 Zaring "Finding Legal Principle", above n 27, at 685.

209 Cranston, above n 40, at 597.

210 See IOSCO "IOSCO: Meeting the Challenges of a New Financial World" (Media Release, London, 17 June 2015) <www.iosco.org>.

is governed by its own By-Laws. Its unorthodox legal basis has resulted in IOSCO being mostly disregarded in the public international law literature until more recently, when it became clear that its decisions, despite being legally non-binding, impacted on domestic laws.

Although the organization's structure has undergone reforms, it remains a rather decentralized body relying heavily on its members. The reforms, however, have enabled an enlarged governing body, the IOSCO Board, to oversee the different functions of the organization while enabling all categories of constituents to provide input into its work. The regulatory standards the organization has developed are embodied in its IOSCO Principles and its IOSCO MMOU. The latter serves as a cooperation instrument to facilitate the enforcement of domestic securities and derivatives laws in a globalized environment involving cross-border transactions and its widening implementation has been hailed a major achievement.

A number of institutional characteristics help explain IOSCO's evolution and its growing role in the international financial architecture. With continued interest of scholars of various disciplines in IOSCO's development and work, the organization's institutional arrangements are likely to come under increased scrutiny in the future.