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Informal Procedure, Hard and Soft, in
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***INFORMAL PROCEDURE, HARD AND SOFT, IN INTERNATIONAL
ADMINISTRATION***

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Abstract

Informal international regulatory cooperation is changing into recognizable forms of international administration. This paper surveys some of those forms.

The forms range from hard procedural law to soft harmonization-through-example. They include: 1) hard international rules that constrain institutions in developed countries; 2) softer principles of supervision which bureaucrats in developing countries may emulate; and 3) models for regulators in adjacent issue areas.

It is in attempting to adopt hard rules that we see an escalating procedural formality to regulatory cooperation. We also see a softer proselytization of unobjectionable, easy (for already sophisticated regulators, at least) standards throughout the developing world. Finally, the horde of organizations that have copied the form and agendas of established regulatory cooperation mechanisms also play a part in emerging international administration. The principal case studies for the paper come from international financial regulation.

I. Introduction*

Administration has, in many of its most important subject areas, become internationalized. This transformation has removed the regulation of goods and services from domestic rulemaking and transformed it into a matter for supranational agreement. It has taken review away from the courts and made administration an exercise in bureaucratic collaboration.

And it has occurred quietly, not through laws passed by legislatures, treaties agreed to by executives, or mandates laid down by international organizations such as the United Nations. Instead, the internationalization of regulation has happened informally, and the primary impetus for its development has been domestic bureaucracies themselves.¹

Even though areas of rulemaking that affect millions have changed, the phenomenon as a form of procedure remains largely unexamined.² It is not a part of the curricula of administrative law syllabi, nor is it taught in many international law courses. Scholars have examined particular issue areas of harmonization with an eye to their substance while neglecting their process, and efforts to look at global administrative practice as a coherent body of lawmaking are still nascent.³

As for international lawyers, they now recognize that this collaboration exists, and have sensed its potential. But they have not drawn any confident conclusions about what the organizations might achieve.

In this article, I seek not just to site regulatory cooperation in the framework of international rulemaking, but also to identify the direction in which this cooperation might be

* Acting Assistant Professor, New York University School of Law. Thanks to Bob Ahdieh, Francesca Bignami, Matt Bodie, Peggy Davis, Amanda Frost, Reinier Kraakman, Youngjae Lee, Bernadette Meyler, Ernestine Meijer, Anne-Marie Slaughter, Dick Stewart, the financial regulators who agreed to be interviewed for this article, and commenters at the NYU Lawyering Faculty Workshop and Juniors Summer Writing Group. Thanks also to Eli Broverman and Anand Ramesh for research assistance, and to the Filomen D'Agostino and Max E. Greenberg Faculty Research Fund for financial support.

¹ Anne Marie Slaughter, in particular, has identified, described, and classified this transformation. See Anne-Marie Slaughter, *A NEW WORLD ORDER*, (2004); see also Anne-Marie Slaughter, *Governing the Global Economy through Government Networks*, in *THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW* 177 (Michael Byers ed., 2000) (discussing development of transgovernmental regulatory organizations); Anne-Marie Slaughter, *Government Networks: The Heart of the Liberal Democratic Order*, in *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW* 199 (Gregory H. Fox & Brad R. Roth eds., 2000).

² In addition to Anne-Marie Slaughter, Kal Raustiala has successfully avoided this problem. See, e.g., Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 *VA. J. INT'L L.* 1 (2002); Kal Raustiala, *Compliance & Effectiveness in International Regulatory Cooperation*, 32 *CASE W. RES. J. INT'L L.* 387, 399, 409-11 (2000).

³ One happy exception to this rule may be found at NYU Law School, where I teach. At NYU Benedict Kingsbury and Dick Stewart have started a program designed to explore the dimensions and theory of global administrative law. See Benedict Kingsbury, Richard Stewart, and Nico Krisch, *Administrative Law and Global Governance: Research Project Outline* (June 2003) (on file with author); <http://www.law.nyu.edu/kingsburyb/spring04/globalization/program.html> (colloquium designed to ask, inter alia, whether we are heading "Towards A Global Administrative Law?"); see also Richard B. Stewart, *Administrative Law In The Twenty-First Century*, 78 *N.Y.U. L. REV.* 437, 455 (2003).

going. I analyze some of the successes of regulatory cooperation. I also identify the real problems with the phenomenon: they do not lie, as many observers have argued, with a democratic deficit and a bias in favor of the United States. Instead, the problems with these organizations lie in their treatment of developing countries.

These problems, as well as successes, arise from the way that regulatory cooperative organizations make rules. Regulatory cooperation's accomplishments – at least in my case study – appear to be proceeding in three different, albeit not inconsistent, ways. One is law like and formal, one will be familiar to scholars accustomed to the unspecific pronouncements in which many (but of course not all) traditional international organizations engage, and one is emblematic of the vibrancy of this new form of international cooperation. In each of these ways, civil society in the First World is engaged and involved. But in all of them, developing countries enjoy much less participation.

Nowhere is internationalization of administration more clear than in the area of financial regulation. Agencies like the SEC and the Federal Reserve Board now play roles as international lawmakers, and, in turn, are increasingly constrained by international agreement. Some observers think that the informal agreements that these agencies have made over the past two decades prevented the international financial crises of the past ten years from spreading beyond too many borders.⁴ Others believe that those agreements contributed to the worldwide recession of the early 1990s.⁵

I study two of these international financial regulatory organizations (I call them, unprettily, IFROs) as my principal examples because of the length of their pedigree and the level of their accomplishments.⁶ The Basle Committee on Banking Supervision and the International Organization of Securities Commissions (IOSCO) both began in the 1970s, are important players in both international and American financial regulation, and now participate in a number of second generation IFROs that have been formed in their image.

Of course, financial regulatory cooperation is but one example of an informal international phenomenon. Similar regulatory cooperation in antitrust,⁷ food and drug

⁴ See infra notes ?? and accompanying text

⁵ See infra notes ?? and accompanying text.

⁶ I have written about these organizations before. See David Zaring, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*, 33 TEX. INT'L L.J. 281 (1998). I have also considered a domestic variant of cross-jurisdictional regulatory cooperation, focusing on horizontal connections between trial courts that can create uniform national standards. See David Zaring, *National Rulemaking Through Trial Courts: The Big Case and Institutional Reform*, 51 UCLA L. REV. 1015 (2004).

⁷ The International Competition Network is the mechanism for regulatory cooperation most like the Basle Committee and IOSCO. It is “focused on improving worldwide cooperation and enhancing convergence through dialogue.” <http://www.internationalcompetitionnetwork.org/aboutus.html>. In the network, “[m]embership is voluntary and open to any national or multinational competition authority entrusted with the enforcement of antitrust laws.” *Id.* For a particularly helpful

regulation,⁸ telecommunications,⁹ aviation,¹⁰ and other areas has resulted in an epidemic of standardization.¹¹ Joseph Weiler calls this cooperation a “fourth strata” in the geology of international law, a strain of the field in which informal regulatory regimes and self-regulating governance mechanisms, rather than treaties, formal international organizations, or diplomats hold sway.¹²

However, my argument is that these IFROs, rather than remaining the informal entities that they were at their founding, have, over the last decade, increasingly developed recognizable forms of international administration.

Call it hard and soft international administrative procedure. I interpret the phrase broadly, to cover the three principal achievements of international financial regulatory cooperation.

These achievements range from hard procedural law to soft harmonization-through-example. They include: 1) hard international rules that constrain financial institutions in developed countries; 2) softer principles of supervision which bureaucrats in developing countries may emulate; and 3) models for regulators in adjacent issue areas.

It is in attempting to adopt hard rules that we see the escalating procedural formality of these organizations – their growing law-like nature. I take, by way of example of this process,

discussion of other aspects of regulatory cooperation in antitrust, and a call for the selective internationalization of the field, see Eleanor M. Fox, *Antitrust and Regulatory Federalism: Races Up, Down, and Sideways*, 75 N.Y.U. L. REV. 1781, 1785-87, 1802-07 (2000). For recent discussions of antitrust cooperation, see Anu Piilola, *Assessing Theories Of Global Governance: A Case Study Of International Antitrust Regulation*, 39 STAN. J. INT'L L. 207 (2003); Julian Epstein, *The Other Side of Harmony: Can Trade and Competition Laws Work Together in the International Marketplace?*, 17 AM. U. INT'L L. REV. 343, 358-59 (2002).

⁸ The Codex Alimentarius Commission is one of the primary, but not only, organizations around which labeling and food safety standards are harmonized. For information, see <http://www.codexalimentarius.net>. The FDA and the USDA both send representatives to the Codex process, with the USDA's Food Safety and Inspection Service being in charge of coordinating the participation of American regulators on the process. See <http://www.fsis.usda.gov/OA/codex/>. For a critical perspective on how the Codex interacts with the other international efforts to regulate one particular issue of considerable importance: ownership of plant genetic resources, see Kal Raustiala & David G. Victor, *The Regime Complex for Plant Genetic Resources*, ?? INT'L ORG. ??? (forthcoming 2005). For a perspective on how the Codex commission and other international regulatory efforts are involved in the WTO's Sanitary and Phytosanitary Agreement (SPS), see David G. Victor, *The Sanitary And Phytosanitary Agreement Of The World Trade Organization: An Assessment After Five Years*, 32 N.Y.U. J. INT'L L. & POL. 865 (2000). For an overview of other harmonization projects from the perspective of the FDA, see Sharon Smith Holston, *An Overview Of International Cooperation*, 52 FOOD & DRUG L.J. 197 (1997). See also Joseph G. Contrera, Comment, *The Food and Drug Administration and the International Conference on Harmonization: How Harmonized Will International Pharmaceutical Regulations Become?*, 8 ADMIN. L.J. AM. U. 927, 927-29 (1995); Rosemarie Kanusky, Comment, *Pharmaceutical Harmonization: Standardizing Regulations Among the United States, The European Economic Community, and Japan*, 16 HOUS. J. INT'L L. 665, 667 (1994); David W. Jordan, Note, *International Regulatory Harmonization: A New Era in Prescription Drug Approval*, 25 VAND. J. TRANSNAT'L L. 471, 491 (1992).

⁹ For a brief overview of interactions between U.S. and EU regulatory authorities in telecommunications regulator cooperation, see George Berman, *Regulatory Cooperation Between the European Commission and U.S. Administrative Agencies*, 9 ADMIN. L.J. AM. U. 933, 968 (1996).

¹⁰ See George A. Bermann, *Regulatory Cooperation with Counterpart Agencies Abroad: The FAA's Aircraft Certification Experience*, 24 LAW & POL'Y INT'L BUS. 669, 774 (1993).

¹¹ See Stewart, *supra* note ?? at 455 (“Such coordination helps to reduce barriers to trade and commerce created by differing national regulations and to address transnational regulatory problems that exceed purely domestic capabilities. For example, national regulators may agree to accept each others' product regulatory standards as mutually equivalent or pool information and coordinate antitrust measures with the practices of multinational firms.”)

¹² Joseph Weiler, *Towards a Geology of 20th Century International Law: The Paradox of Law Making and Enforcement*, Speech at Duke Law School (Feb. 12, 2001), quoted in Don Suh, Note, *Situating Liberalism In Transnational Legal Space*, 12 DUKE J. COMP. & INT'L L. 605, 612 (2002).

the Basle Committee's revision of its capital adequacy accord, which governs the reserve levels of most of the banks in the world. I argue that the additional process offered by the committee as it has revised the accord – which is dramatically different from the process it used only a few years earlier – is due to a self-imposed interest in attaining *legitimacy* for committee regulation.

The second principal achievement of these organizations is a softer one of *proselytization*. I show how IFROs spread unobjectionable, easy (for already sophisticated regulators, at least) standards throughout the developing world, and I use, as an example, IOSCO's primary achievement thus far: the promulgation of uniform principles of securities supervision. In some ways this proselytization represents a "best practices" approach to harmonization that is almost dialectical in its purity, whereby practices are compared and debated at organization meetings, after which the most attractive ones are selected and then recommended to regulators across the globe. In other ways, because these practices are devised by the developed world and spread to the developing world, the proselytization achievement of IFROs is, as Jonathan Macey puts it, nakedly imperialistic.¹³

Third, IOSCO and the Basle Committee have begotten a hoard of similar IFROs. They also have served as the host for a large number of bilateral arrangements between regulators. I sketch some of these successor organizations and arrangements briefly, to give readers a sense of the breadth of their development. While some observers might conclude that the proliferation of imitators of the Basle Committee and IOSCO amounts to little more than the meaningless colonization of increasingly scarce regulatory acronyms, I cautiously turn to neo-functional theory to explain the phenomenon. That theory predicts a congealing of international actors through a progressive enmeshment in trans-border cooperation. I argue that neo-functionalism can provide us with some insights into why these developments in regulatory cooperation might offer the most important long-range implications for the nature and development of an international system of administration.

In Part II of this article, I describe the origins and structure of the Basle Committee and IOSCO. As we will see, both IFROs look rather nontraditional to both classically trained international lawyers and to domestic administrative law practitioners used to formal agency process. As Benedict Kingsbury has put it, the way these regulators interact with one another and with other actors in international life "are not well captured in standard international legal typologies (e.g., the sharp sources-based distinction often drawn between binding and non-

¹³ Jonathan R. Macey, *Regulatory Globalization as a Response to Regulatory Competition*, 52 EMORY L.J. 1353, 1353-54 (2003);

binding norms).”¹⁴ Nor are domestic analogies, which turn on the important roles played by legislatures and courts, well-suited to an international system that has a strong version of neither.¹⁵

For example, the Basle Committee and IOSCO were founded by regulators themselves, who comprise the entirety of the membership.¹⁶ They are informal, governed not by treaties or treaty-type documents, but instead by unconstraining and flexible by-laws. They are decentralized, claim small budgets, and permit regulators from the wealthiest countries to play outsized roles in the development of rules – there is none of the formal equality that marks the United Nations or other mid-20th century international organizations like it. The organizations have traditionally been secretive, but, at least in the case of the Basle Committee and IOSCO, have recently found it difficult to remain so.

In my descriptions of these organizations, I pay particular attention to how their efforts have been received by American regulators. I do so because, as Dick Stewart has put it, “[t]he future evolution of administrative law in the United States must also confront the international aspects of regulation, a subject that will assume great significance in the coming decades.”¹⁷

So: the Basle Committee and IOSCO, and their kin in other regulatory issue areas, are not typical agencies,¹⁸ nor typical international organizations.¹⁹ In part III of this article, I identify the paradigmatic ways in which these organizations operate.

¹⁴ Benedict Kingsbury, *The Concept Of Compliance As A Function Of Competing Conceptions Of International Law*, 19 MICH. J. INT’L L. 345, 368 (1998).

¹⁵ See Stewart, *supra* note ?? at 459 (The challenge posed to administrative law by regulatory governance is significantly greater in the international than in the domestic context. Domestically, regulatory agencies generally operate at one remove from elected legislatures. As we have seen, a central issue for administrative law is how to ground the administrative exercise of regulatory authority in electorally based representative government. International regulatory networks and organizations operate at an even further remove and involve many nations as well as nonstate actors.”)

¹⁶ With a caveat. IOSCO permits members to be self-regulatory organizations, such as stock exchanges, in the absence (or in occasion in tandem with) a government regulator. It also permits affiliate membership of organizations that include members of the regulated industry. See *infra* notes ?? and accompanying text.

¹⁷ Richard B. Stewart, *Administrative Law In The Twenty-First Century*, 78 N.Y.U. L. REV. 437, 455 (2003).

¹⁸ It is not my intention here to define with precision what a “proper” agency is (such an effort would be unhappily formalistic), except to note that the intergovernmental organizations offered by the Basle Committee and IOSCO do not look anything like the bureaucracies that compose their membership in size, budget, rulemaking procedure, statutory guidance, and so on. See *infra* part ?? for details on each of these issues. Of course, under the traditional conception of American administrative law, “agencies” have been defined broadly. The Administrative Procedure Act simply adopted the term “agency” to mean “each authority of the Government of the United States, whether or not it is within or subject to review by another agency,” with the exception of Congress, the courts, the governments of the “territories or possessions of the United States” and the Armed Forces, among others. 5 U.S.C. § 551(1). The Freedom of Information Act clarified that the APA’s definition of agency, at least for the purposes of the open information law “includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.” 5 U.S.C. § 552(e); see also 5 U.S.C. § 2302(a)(2)(C) (“agency” for the purposes of labor relations “means an Executive agency and the Government Printing Office,” with a list of exceptions, most related to national security). Courts have long tried to avoid defining the term with too much precision. See, e.g., *Washington Research Project v. Department of HEW*, 504 F.2d 238, 245-46 (D.C.Cir. 1974) (“[R]ecent cases have made it clear that any general definition can be of only limited utility to a court confronted with one of the myriad organizational arrangements for getting the business of government done.”).

¹⁹ For a discussion of the usual legal prerequisites of international organizations, see *infra* notes ?? and accompany text.

Finally, in part IV, I conclude with some observations about what IFROs mean to theories of international regulation. As I explain, their existence is yet another vindication for the disaggregated approach to international law taken by liberal theorists such as Anne-Marie Slaughter. However, in practice, the agencies that enjoy their own subjectivity in the international arena, certainly act consistently with rationalist paradigms of regime theory.

I also engage the recent controversy over the vibrancy of “soft law” raised by writers such as Kal Raustiala and Andrew Guzman. IFROs would seem to epitomize soft law, and their existence suggests that the concept may retain some value – but not if it is inseparable with high degrees of compliance, which the consensus-based organizations enjoy.

I conclude with some brief observations about what regulatory cooperation might mean in a world with both a hegemonic power and with persistent concerns about the democratic deficit inherent in international agreement – particularly in the informal form of international agreement practiced by IFROs. I argue that IFROs offer some good news to those concerned about both issues.

A caveat: in this article, I focus on the law-like rules and institutions generated by IFROs (and consider the implications thereof for administrative practice more generally). But these products are not the only ones generated by international regulatory cooperation. The organizations provide informal introductions and access to regulators, and generate advice through the publication of reports and surveys.²⁰ I have discussed these interesting aspects of cooperation elsewhere; here I focus on the more administrative and procedural products of the process of regulatory cooperation.²¹

²⁰ Both the Basle Committee and IOSCO, in addition to serving as models for other organizations, also set the groundwork for other agreements between regulators, commonly known as Memoranda of Understanding (MOUs). MOUs are agreements between regulators; one of IOSCO’s functions is to collect these documents. <http://www.iosco.org/library/index.cfm?whereami=mou>. It has also recently issued a framework for MOUs between securities regulators. <http://www.iosco.org/library/index.cfm?whereami=pubdocs&publicDocID=126>. The United Nations Treaty Reference Guide, <http://untreaty.un.org/English/guide.asp>, sets forth basic definitions of the “international instruments binding at international law: treaties, agreements, conventions, charters, protocols, declarations, memoranda of understanding, modus vivendi, and exchange of notes.” IOSCO is particularly active in this regard. It serves as forum in which bilateral Memoranda of Understanding (MOUs) on information-sharing or other supervisory issues may be concluded. Hundreds of these MOUs have been drafted under the organization’s auspices, and it has formed a repository for them. For a complete list of all of the bilateral MOUs completed under IOSCO’s aegis, see <http://www.iosco.org/library/index.cfm?whereami=mou> (site last visited ???). The Basle Committee has “always encouraged contacts and cooperation between its members and other banking supervisory authorities.” <http://www.bis.org/bcbs/aboutbcbs.htm>. It has also suggested that its members enter into MOUs with other banking supervisors. Basle Committee on Banking Supervision, *Supervisory Guidance on Dealing with Weak Banks, Report of the Task Force on Dealing with Weak Banks*, March 2002, paragraph 59. <http://www.bis.org/publ/bcbs88.pdf#xml=http://search.atomz.com/search/pdfhelper.tk?sp-o=19,100000,0>.

²¹ See Zaring, *supra* note ??.

II. The Organizations Themselves: Two Case Studies and a Model

In this section, I describe the organizations, and trace their extremely informal origins to their more established and bureaucratic present. My aim is to describe how organizations like IFROs usually operate; what follows will be an accordingly technical investigation into the structure and rulemaking functions of the organizations, followed by a more general descriptive typology of their genus. This typology can serve as a model of international regulatory cooperation.

A. *The Basle Committee on Banking Supervision*

Prompted by three large international bank failures in 1974,²² the central bank governors of the G-10, Luxembourg, and Switzerland agreed to establish the Basle Committee on Banking Supervision.²³ The central bankers declared, via a press release, that the primary purpose of the committee would be to provide its members with a regular forum for airing cooperative approaches to the supervision of multinational banks.²⁴ Since its founding, the committee, pursuant to this mandate, has served both as the venue for the exchange of information about supervisory practices, and as the mechanism for the promulgation of hard standards to which all members of the committee must subscribe.

The Basle Committee's organizational structure is fluid and it acts informally. It rotates its chairmanship and operates through consensus.²⁵ Although the committee has recently held a number of comment periods for matters related to the revision of its capital accord, it has not subjected itself to open-meeting requirements or submitted its promulgations for review by an international adjudicative tribunal.²⁶ It has traditionally maintained a low profile.²⁷ As former committee chairman Huib J. Muller observed, "We don't like publicity. We prefer, I might say, our hidden secret world of the supervisory continent."²⁸ In fact, the details of the Basle

²² On June 26, 1974, German regulators forced the Bank Herstatt into liquidation, which left a number of banks that had released payment of marks to Herstatt in Frankfurt in exchange for dollars that were to be delivered in New York without remedy. http://www.riskglossary.com/articles/basle_committee.htm (last visited ??). The British-Israel Bank, based in the United Kingdom, and the Franklin National Bank, based in the United States, also failed. ETHAN KAPSTEIN, *SUPERVISING INTERNATIONAL BANKS: ORIGINS AND IMPLICATIONS OF THE BASLE ACCORD* 4 (1991) (discussing the history surrounding the establishment of the Basle Committee).

²³ The Committee's members come from Belgium, Canada, France, Germany, Italy, Japan, Luxembourg, the Netherlands, Spain, Sweden, Switzerland, United Kingdom and United States. <http://www.bis.org/bcbs/aboutbcbs.htm> (last visited ??).

²⁴ See Press Communiqué of the Bank for International Settlements (Feb. 12, 1975); Joseph J. Norton, *Trends in International Bank Supervision and the Basle Committee on Banking Supervision*, 48 *CONSUMER FIN. L.Q.* 415, 415 n.1 (1994).

²⁵ Joseph J. Norton, *Privatization Of Public Pension Systems In Developing Nations: A Call For International Standards*, 64 *BROOK. L. REV.* 817, 857 (1998); TONY PORTER, *STATES, MARKETS, AND REGIMES IN GLOBAL FINANCE* 66 (1993).

²⁶ As one employee of the Federal Reserve Board said, "the Basle Committee is not subject to any administrative procedure" requirements. Telephone Interview with Federal Reserve Board lawyer (Jan. 9, 2004) (on file with author).

²⁷ See Zaring, *supra* note ?? at 288-89; Norton, *supra* note ?? at 177 [Supervisory Standards].

²⁸ Huib J. Muller, Address to the 5th International Conference of Bank Supervisors (May 16, 1988), quoted in TONY PORTER, *STATES, MARKETS, AND REGIMES IN GLOBAL FINANCE* 66 (1993).

Committee's 1975 founding agreement were not released to the public until over five years after the central bankers adopted it.²⁹

Times have changed – to some extent. Now the committee does publicly circulate many of its decisions, as well as research conducted under its aegis, although it has been cagey about detailing its governing instruments.³⁰ However, its meetings, which occur four times per year in Basle, remain closed to the public,³¹ although the committee has adopted the practice of issuing ex post brief press releases describing the approximate agenda of these gatherings.³² It has also announced the opening of comment periods on consultative documents, also by press release, accompanied by a rough schedule for further action.³³

For example, for its new capital adequacy accord, which I discuss in more detail below, the committee has welcomed comments, which it has concluded “will be helpful to the Committee as it makes the final modifications to its proposal for a new capital adequacy framework.”³⁴ When issuing statements about the progress of the accord, the Committee has also tended to issue a timetable: for the capital accord, “[t]he goal of the Committee is ... implementation to take effect in member countries by year-end 2006.”³⁵

The use of press releases to announce an organization’s purpose and activity is rather far removed from a conventional international legal treaty and accompanying annals of drafting, and it illustrates how far the Basle Committee is from a formally constituted international organization. It has promulgated no by-laws, its founding instrument is sparse, and it has no

²⁹ See General Accounting Office, *supra* note ??, at 41.

³⁰ As the Committee’s website makes clear. See, e.g., <http://www.bis.org/bcbs/publ.htm> (last visited ??); see also Heath Price Tarbert, *Rethinking Capital Adequacy: The Basle Accord And The New Framework*, 56 Bus. Law. 767, 781 (2001) (“Most publications and Consultative Papers are available to the members of the general public via the Basle Committee's portion of the Bank of International Settlements' Internet site.”)

³¹ Charles Freeland, *The Work of the Basle Committee*, in 2 CURRENT LEGAL ISSUES AFFECTING CENTRAL BANKS 231, 232 (Robert C. Effros ed., 1994).

³² See, e.g., <http://www.bis.org/press/p030311a.htm> (last visited ??).

³³ See, e.g., <http://www.bis.org/press/p030429.htm> (June 28, 2003). The committee suggests that “[c]omments ... should be submitted to relevant national supervisory authorities and central banks.” *Id.* However, the committee also has made provision for direct comments to it: “comments may be sent to the Basel Committee on Banking Supervision at the Bank for International Settlements, CH-4002 Basel, Switzerland. Comments may also be sent by e-mail: BCBS.Capital@bis.org or by fax: 41 61 280 9100 and should be directed to the attention of the Basel Committee Secretariat.” *Id.* One recent example of the sort of schedule that the committee has taken to issuing may be found in an October, 2003 press release (the committee continues to do much of its communication through press releases:

All members of the Committee agreed on the importance of finalizing the New Accord expeditiously and in a manner that is technically and prudentially sound. Such an Accord should offer considerable benefits over the existing system. Moreover, it is important in the near term to provide banks with as much certainty as possible while they plan and prepare for the adoption of the new rules. Committee members committed to work promptly to resolve the outstanding issues by no later than mid-year 2004.

<http://www.bis.org/press/p031011.htm>.

³⁴ <http://www.bis.org/publ/bcbsca.htm> (site last visited ??); see also <http://www.bis.org/press/p010625.htm> “The Committee intends to continue promoting an open dialogue as its work continues and believes that such efforts will help to ensure that the new Accord meets its objectives.”)

³⁵ <http://www.bis.org/publ/bcbsca.htm>.

facilities of its own.³⁶ The *Economist* has characterized it as nothing more than an “international club for banking regulators.”³⁷ The Committee does not even have its own staff: its secretariat is comprised of twelve professional supervisors on temporary secondment from member banks to the Bank for International Settlements (BIS) – a private bank mostly owned and operated by the central banks of 31 countries, including the Federal Reserve³⁸ -- in Basle.³⁹ (The BIS was begun after World War I “to promote the co-operation of central banks and to provide additional facilities for international financial operations.”⁴⁰)

Moreover, many of the Basle Committee’s promulgations do not look very law-like. In striking comparison to the length of domestic banking regulations, its initial concordat was less than ten pages long, its first capital accord 28 pages long.⁴¹ Promulgations such as its Principles of Banking Supervision are worded unspecifically and flexibly.⁴²

The committee itself avows that it “does not possess any formal supranational supervisory authority, and its conclusions do not, and were never intended to, have legal force.”⁴³ Instead, it “reports to the central bank Governors of the Group of Ten countries and seeks the Governors’ endorsement for its major initiatives.”⁴⁴

Moreover, in the Basle regime, monitoring noncompliance is a decentralized, largely self-reported task. Neither the BIS nor any other international organization takes on a monitoring role, although the Committee has vowed in the past that it “intends to monitor and review the application of ... [its agreements] in the period ahead with a view to achieving ever greater consistency” and now surveys its members on their progress with implementation.⁴⁵

³⁶ See Norton, *supra* note ??, at 177.

³⁷ Getting Closer? May 25, 1996 *ECONOMIST* at 82.

³⁸ See Bank for Int’l Settlements, *The Bank for International Settlements: A Profile of an International Organization 2* (June 1995); <http://www.bis.org/bcbs/aboutbcbs.htm>. Interestingly, the predecessor to the European Central Bank, deemed one of the major achievements of the unification of Europe, were the loosely organized Committee of Central Bank Governors, which met, like the Basle Committee does now, under the auspices of the BIS in Basle, beginning in 1964. See Kathleen R. McNamara, *Where Do Rules Come From? The Creation of the European Central Bank*, in *THE INSTITUTIONALIZATION OF EUROPE* 155, 165-66 (Alec Stone Sweet, Wayne Sandholtz, & Neil Fligstein eds. 2001).

³⁹ The members of the Basle Committee, with the exception of the representatives of Canada, Luxembourg, the Netherlands, and Sweden, are identical to the charter members of the BIS. See Marilyn B. Cane & David A. Barclay, *Competitive Inequality: American Banking in the International Arena*, 13 *B.C. INT’L & COMP. L. REV.* 273, 320 n.323 tbl.D (1990). See also <http://www.bis.org/bcbs/aboutbcbs.htm> (describing the twelve BIS staffers who serve as the committee’s secretariat).

⁴⁰ *Statutes of the Bank for International Settlements, Jan. 20, 1930*, reprinted in *BANK FOR INT’L SETTLEMENTS, BANK FOR INTERNATIONAL SETTLEMENTS: BASIC TEXTS* 11 (1993).

⁴¹ <http://www.bis.org/publ/bcbsc313.pdf> (Basle Concordat); <http://www.bis.org/publ/bcbs04A.pdf> (original Basle Accord); John D. Hawke, *Basel II: A Brave New World for Financial Institutions?*, Address Before the American Academy in Berlin (Dec. 15, 2003) at 3-4, available at <http://www.occ.treas.gov/ftp/release/2003-99a.pdf> (noting the unspecific nature of the first accord).

⁴² See *infra* notes ?? and accompanying text.

⁴³ <http://www.bis.org/bcbs/aboutbcbs.htm> (site last visited ??).

⁴⁴ <http://www.bis.org/bcbs/aboutbcbs.htm> (site last visited ??).

⁴⁵ Basle Comm. on Banking Supervision, *International Convergence of Capital Measurements and Capital Standards* (1988) (amended 1995), reprinted in 1 *COMPENDIUM OF DOCUMENTS PRODUCED BY THE BASLE COMMITTEE* 58-82, at Para. 6 (1997) [hereinafter *International Convergence*].

Do, then, the members of the committee experience the agreements reached therein as binding? The reports of some participants suggest that they do. Former supervisor Charles Freeland claims that "[w]ithout in any way approaching the legal status of a treaty . . . [an] agreement is considered to be binding on its members."⁴⁶ BIS supervisor Andrew Crockett similarly concludes that even though Basle Committee recommendations "have no legal force," because "they have been adopted by consensus," they have been "applied in all countries represented on the Committee" and "almost universally applied in non-member countries."⁴⁷

For example, American banking regulators⁴⁸ have generally treated the Committee's theoretically voluntary proposals as the basis for quick domestic regulatory action.⁴⁹ The banking regulators have quickly adopted rules implementing the Basle Committee's capital accord for American banks and bank holding companies.⁵⁰

For example, in September 1996, U.S. bank regulators issued a final rule based on the Basle Committee's January 1996 amendment to the Basle Accord. That rule required that banks use their own internal models to provide a measure of the institutions' "value at risk," subject to regulatory modeling criteria.⁵¹ Here's how domestic banking regulators characterize the impact of the Basle Committee process:

In December 1995, the G-10 Governors endorsed the Basle Committee's amendment to the Accord (effective by year-end 1997) to incorporate a measure for exposure to market risk (market risk amendment) into the capital adequacy assessment. On September 6, 1996, the [federal banking supervision] agencies

⁴⁶ Freeland, *supra* note ?? at 233. The General Accounting Office (GAO) has also concluded that "the committee must continue to rely on moral suasion rather than legal authority to encourage adoption of its standards and monitor their implementation." See General Accounting Office, *supra* note ??, at 34.

⁴⁷ Lecture by Andrew Crockett, General Manager of the BIS and Chairman of the Financial Stability Forum, at the Cass Business School, City University, London, 5 February 2003. <http://www.bis.org/speeches/sp030205.htm> (site last visited ??). Crockett concludes that this is "a telling example of the power of peer pressure and market forces to promote the adoption of best practice and to enforce what I have elsewhere called "soft law"." *Id.* John Braithwaite and Peter Drahos theorize that this sort of regulatory interaction can result in "develop dialogic webs" in which "praise and shame are institutionalized," which can, create an impetus to harmonization. JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* 555 (2000). Of course, the Committee itself has recognized that implementation depends on a great deal of factors, and that there is a difference between having a regulation in place and having the regulation effectively implemented, as well as the difficulties inherent in some jurisdictions having qualified staff to fully implement the Core Principles and having a framework setting limits on concentration of lending and on connected lending. GAO/GGD 99-157 (surveying the Basle Committee's effectiveness).

⁴⁸ To enact Basle requirements domestically, the four agencies principally charged with banking regulation – the Federal Reserve, the OCC, the FDIC, and the OTS – announce co-authored rulemakings in the Federal Register.

⁴⁹ Heath Price Tarbert, *Rethinking Capital Adequacy: The Basle Accord And The New Framework*, 56 *BUS. LAW.* 767, 792 (2001) ("When the Basle Accord was assembled in 1988, members of the "club of giants" likely had no idea that their capital adequacy standards would become so far-reaching. This is especially remarkable for standards that were simply a gentlemen's agreement among a small group of central bankers and never ratified into international law. Even though the Basle countries are not legally bound, the Basle Accords' methodology now applies to virtually all financial institutions worldwide." (quotation marks, citation omitted)).

⁵⁰ See 63 Fed. Reg. 59362, 59384 (November 3, 1998); the rules were: Federal Reserve System, Docket No. R-0884; Department of the Treasury, Office of the Comptroller of the Currency, Docket No. 96-18; Federal Deposit Insurance Corporation, RIN 3064-AB64 (Sept. 6, 1996), 61 Fed. Reg. 47358 (September 6, 1996). The Basle standard was adopted by the Federal Reserve on March 15, 1989 at 12 C.F.R. §§ 208.1.127 & app. A-B (1991); 12 C.F.R. 160-88 app. A-B (1991).

⁵¹ U.S. Gen. Acct. Off. Rep. GAO/GGD/AIMD-97-8, *Financial Derivatives: Actions Taken or Proposed Since May 1994* (Nov. 1996), 56, available at <http://www.gao.gov/archive/1997/g197008.pdf> (last visited June 9, 2004).

issued revisions to their risk-based capital standards implementing the Basle Committee's market risk amendment (market risk rules)...In September 1997, the Basle Committee modified the market risk amendment and on December 30, 1997, the agencies issued an interim rule implementing that modification....⁵²

Thus, the American banking regulators themselves have described how they have turned Basle pronouncements into hard regulations within a year of the international agreement to do so. And nor are the implementation of modifications to the accord unique.⁵³ Recently, the Fed, the OCC, and the other domestic banking agencies with memberships on the committee act in unison, with one comment period, a collective response, and quick domestic implementation of the international rule.

The widespread implementation of the capital accord has been both acclaimed for its real impact and accused of the usual sorts of inefficiencies laissez-faire aficionados attribute to hard regulations. Andrew Crockett, General Manager of the BIS and Chairman of the Financial Stability Forum, believes that “the absence of significant difficulties in the banking systems of Europe and America in the past couple of years, despite significant economic shocks, owes much to the strengthening of risk management that has taken place under the aegis of the Basle Committee's standards.”⁵⁴

Others agree that the committee has affected banking supervision, but argue that it has done so in insalubrious ways. Hal Scott has contended that the uniform rules of the Accord have been bad for competition.⁵⁵ Jonathan Macey similarly believes that the sort of regulatory globalization required by the accord has done little good to the financial markets. Instead, he argues that it is simply a reflection of the inclinations of bureaucrats to maximize power.⁵⁶

B. *International Organization of Securities Commissions (IOSCO)*

IOSCO is a regulatory organization that developed out of the Interamerican Association of Securities Commissions and Similar Agencies in 1984, when the members of that body passed

⁵² 64 Fed. Reg. 19034, 19035 (April 19, 1999).

⁵³ See, e.g., *Bank One Corp. v. C.I.R.*, 120 T.C. 174, 222-23 (2003) (discussing “the OCC's acceptance of a 1986 recommendation of the Basel Committee on Banking Supervision (Basel Committee) that banks should build a cautious bias into their estimates of the replacement costs of off-balance-sheet instruments.”).

⁵⁴ Lecture by Andrew Crockett, General Manager of the BIS and Chairman of the Financial Stability Forum, at the Cass Business School, City University, London, 5 February 2003. <http://www.bis.org/speeches/sp030205.htm> (site last visited ???).

⁵⁵ Hal S. Scott, *The Competitive Implications of the Basle Capital Accord*, 39 ST. LOUIS UNIV. L. J. 885 (1995).

⁵⁶ Macey accordingly believes that

efforts to achieve regulatory globalization occur in the following three contexts: (1) in order to permit regulators to act in a cartel-like fashion, so as to prevent regulatory arbitrage, which occurs when firms migrate to foreign jurisdictions to avoid the grasp of a domestic regulator (“regulatory cartelization”); (2) in circumstances where governmental actors or regulators can increase their power by persuading or forcing other countries to adopt regulations favored by the first country (“regulatory imperialism”); and (3) in circumstances where an administrative agency lacks domestic political support for a favored policy, and uses regulatory globalization to make it more difficult for local political rivals to block that policy (“regulatory policy lever”).

Jonathan R. Macey, *Regulatory Globalization as a Response to Regulatory Competition*, 52 EMORY L.J. 1353, 1353-54 (2003).

by-laws transforming it from a regional group founded a decade earlier into a global collection of securities regulators.⁵⁷ IOSCO's members have agreed

to cooperate together to promote high standards of regulation in order to maintain just, efficient and sound markets; to exchange information on their respective experiences in order to promote the development of domestic markets; to unite their efforts to establish standards and an effective surveillance of international securities transactions; to provide mutual assistance to promote the integrity of the markets by a rigorous application of the standards and by effective enforcement against offenses.⁵⁸

IOSCO is a much less selective organization than the Basle Committee – it claims 168 members, overseeing almost all of the world's capital markets.⁵⁹ However, in other matters of form, the two organizations are very similar. As does Basle, IOSCO combines informal structure, no claims that its pronouncements rise to the level of law, and internal opacity. As the *Economist* has done with the Basle Committee, the *Financial Times* has characterized IOSCO as the “club of the world's securities regulators.”⁶⁰

Still, few international organizations, including even the Basle Committee, can claim origins as humble and informal as those of IOSCO, which was incorporated by a private bill of the Quebec National Assembly.⁶¹ It has since created and funded a small permanent secretariat, which in 2001 moved from Montreal to Madrid.⁶² IOSCO does not limit membership to prosperous countries, or even government agencies, the way the Basle Committee does – among its many affiliate members are private securities regulators such as the London Stock Exchange, the Chicago Mercantile Exchange, and the International Securities Market Association, an organization of “600 financial entities,” including investment banks and securities brokers.⁶³

⁵⁷ See Paul Guy, *Regulatory Harmonization to Achieve Effective International Competition*, in REGULATING INTERNATIONAL FINANCIAL MARKETS: ISSUES AND POLICIES 291, 291 (Franklin R. Edwards & Hugh T. Patrick eds., 1992). The bylaws of IOSCO declare that “[t]he securities commissions or similar agencies of the countries of the American Continent, as well as the Commission des valeurs mobilières du Québec and the Ontario Securities Commission, are charter members of the Organization.” See By-Laws of the International Organization of Securities Commissions pt. 2, Para. 2

⁵⁸ 2001 Annual Report at 16.

⁵⁹ See http://www.iosco.org/lists/display_members.cfm?memid=1.

⁶⁰ *Listing to Port*, May 28, 1998 FIN. TIMES at 13; see also Heath Price Tarbert, *Rethinking Capital Adequacy: The Basle Accord And The New Framework*, 56 BUS. LAW. 767, 782 (2001) (“some commentators have glibly referred to this new genre of legal species as “club” law” (citing Christos D. Hadjiemmanuil, *Central Bankers' "Club" Law and Transitional Economies: Banking Reform and the Reception of the Basle Standards of Prudential Supervision in Eastern Europe and the Former Soviet Union*, in EMERGING FINANCIAL MARKETS AND THE ROLE OF INTERNATIONAL FINANCIAL ORGANIZATIONS 179, 184 (Joseph J. Norton & Mads Andeans eds., 1996))).

⁶¹ See Guy, *supra* note ??, at 291; see also 2001 Annual Report at 25.

⁶² Int'l Org. of Sec. Comm'ns, 2002 Annual Report 33 (stating that “during 2001 the organization changed its domicile to Madrid) available at http://dev.iosco.org/annual_report/PDF/IOSCO_2002.pdf; Kathryn M. Trkla, *Financial Stability: Major Focus of IOSCO Conference*, FI Magazine, June/July 1999, (stating that the IOSCO Presidents' Committee approved relocation of the IOSCO General Secretariat from Montreal to Madrid) at <http://www.futuresindustry.org/fimagazi-1929.asp?a=576>.

⁶³ See http://www.iosco.org/lists/display_members.cfm?memid=1 (listing members, 102 of which are ordinary members, that is, the principal securities regulators of a particular jurisdiction, such as the SEC, 9 are associate members, including other government regulators such as the CFTC, and 57 are affiliate members, such as the NYSE). For the membership of the International Securities Markets Association, see <http://www.isma.org/about1.html> (site last visited June 10, 2003).

This membership is organized in a somewhat complicated, but nonetheless unconstrained way, with broad grants of authority more typical of corporate by-laws than the complex treaties governing international organizations. IOSCO's Presidents' Committee, for example, which is comprised of the presidents of each of the member agencies (but not the private non-government members), meets annually and "has all the powers necessary or convenient to achieve the purpose of the Organization."⁶⁴ Its 19 member Executive Committee oversees IOSCO's operations, and "subject to the By-Laws of the Organization, takes all decisions and undertakes all actions necessary or convenient to achieve the objectives of the Organization."⁶⁵

IOSCO's General Secretariat "coordinates" the organization's activities, and responds to requests for information and assistance from members and from the organization's committees.⁶⁶ The Secretariat consists of eight employees.⁶⁷ The organization is financed by membership dues of \$6,750 per member per year.⁶⁸ In 2001, IOSCO's revenues amounted to \$2,670,051 – approximately 40% of which was a subsidy from the Government of Spain "to cover expenses incurred to relocate its General Secretariat from Montreal (Canada) to Madrid (Spain)."⁶⁹ By contrast, the World Trade Organization's 2003 budget was 154 million Swiss francs (approximately \$107 million),⁷⁰ The United Nation's budget for 2002-03 was \$2.6 billion,⁷¹ and the SEC's annual budget for fiscal 2004 has been proposed at \$841.5 million.⁷²

Like the Basle Committee, IOSCO now provides a lot of material on its website. In 2002, for example, it issued 15 "public documents," including reports on "sound practices" and statements of "principles of supervision."⁷³ It also issues an annual report, sells records of some of the sessions of its annual conference, and catalogs press releases, memoranda of understanding, and IOSCO resolutions in its on-line library.⁷⁴

Most of these principles were developed in IOSCO's Technical Committee, which is where the sort of regulatory action most comparable to that of the Basle Committee may be

⁶⁴ 2001 Annual Report at 16.

⁶⁵ 2001 Annual Report at 16; *see also* Isaac C. Hunt, Jr., *It's A Small World After All: The Sec's Role In Securities Regulation Globalization*, 51 ADMIN. L. REV. 1105, 1107-08 (former SEC Commissioner Isaac Hunt's perspective on the organization of IOSCO, and the place of the executive committee in it). . The Executive Committee is comprised of 19 members: the chairs of the organization's Technical and Emerging Markets Committees, the chairs of its four Regional Committee, one ordinary member elected by each Regional Committee from among the ordinary members of that region, and ordinary members elected by the Presidents' Committee. See id.

⁶⁶ 2001 Annual Report at 13-14.

⁶⁷ IOSCO's 2003 Annual Report lists eight people on its list of contacts.

⁶⁸ 2001 Annual Report at 19.

⁶⁹ 2001 Annual Report at 22, 26.

⁷⁰ http://www.wto.org/english/thewto_e/thewto_e.htm (site last visited ???).

⁷¹ <http://www.un.int/usa/fact3.htm> (site last visited ???).

⁷² *House Approves Measure to Speed Staffing of SEC*, June 18, 2003 WALL ST. J. at C5 (the amount would be nearly double its fiscal 2002 level).

⁷³ <http://www.iosco.org/library/index.cfm?whereami=pubdocs&year=2002> (site last visited ???).

⁷⁴ <http://www.iosco.org/library/index.cfm?whereami=library> (site last visited ???). As of this writing, the organization lists approximately 50 resolutions and 120 other public documents in its on-line library. *Id.*

found.⁷⁵ Like the Basle Committee, the Technical Committee is limited in membership to the world's most advanced financial regulators (IOSCO's Technical Committee has 16 members, while the Basle Committee is limited to regulators from 12 countries).⁷⁶ The Technical Committee, which was established by IOSCO in 1987, and then reorganized at the behest of the SEC in the early 1990s, receives the lion's share of the agency's attention in the world's financial press: the Toronto *Globe and Mail* has characterized the Technical Committee as "the central policy-making group at" IOSCO.⁷⁷ It is the source of IOSCO promulgations that have required the SEC and CFTC to engage domestic rulemaking.⁷⁸

Although many of IOSCO's promulgations remain undisclosed, like Basle, the organization's output has increasingly become available for public scrutiny. The presidents still operate secretly at IOSCO meetings – under its by-laws, "[o]bservers and special guests may not attend meetings of the Presidents Committee unless invited by the Chairman with the concurrence of a majority of the members."⁷⁹ Now, however, IOSCO "recognizes the importance of maintaining a close dialogue with" the self-regulatory organizations and interest groups "that make up its affiliate membership and of allowing them to make a constructive input in the work of the Organization."⁸⁰

Like the Basle Committee, IOSCO's administrative procedures are ad hoc and flexible. It comes up with informal agreements on financial regulation and tells its members to go home and implement them.⁸¹ It holds comment periods, but is not subject to open meeting laws⁸² or judicial review or any other APA-like criteria – for comment, it appears to rely on the participation of its affiliate membership. IOSCO has not announced ways for nonparticipants to make comments in the way that has the Basle Committee has.⁸³

⁷⁵ A.A. Somer, for example, interviewed a number of leading officials in the SEC, and concluded that "The committee which might be said to do the "grunt work" with respect to the most developed markets is the Technical Committee." A. A. Somer, *Iosco: Its Mission And Achievement*, 17 NW. J. INT'L L. & BUS. 15, 18 (1995).

⁷⁶ 2001 Annual Report at 16.

⁷⁷ Richard Blackwell, OSC head to lead international group, March 23, 2002 TORONTO GLOBE & MAIL at B3. See also Nancy Worth, *Harmonizing Capital Adequacy Rules For International Banks And Securities Firms*, 18 N.C. J. INT'L L. & COM. REG. 133, 134 n.1 (1992) (citing IOSCO's Annual Reports from 1989-91); Karen Cooper, *World Watchdog For Securities*, August 8, 1987 SYDNEY MORNING HERALD 38, 1987 WL 6023724 (describing initial founding of the Technical Committee); Somer, *supra* note ?? at 18 (describing the role of the SEC and Richard Breeden, then its chairman).

⁷⁸ See *infra* notes ?? and accompanying text.

⁷⁹ IOSCO By-Laws, pt. 4, Para. 23.

⁸⁰ 2001 Annual Report at 17. To this end, "the SRO Consultative Committee has designated contact persons with the Technical Committee Standing Committees and Project Teams and is therefore able to provide substantive input related to their regulatory initiatives." *Id.*

⁸¹ Even American regulators say that they benefit from the best practices style exploration of options that characterize some of the recommendations of the international organization. Telephone Interview with CFTC Lawyer (Jan. 23, 2004), *supra* note ??.

⁸² Indeed, IOSCO holds its meetings in secret. See Somer, *supra* note ?? at 19 (observing that "all committee meetings of IOSCO are closed").

⁸³ see *supra* notes ??.

Also, like the Basle Committee, however, IOSCO aspires to achieve its goals of regulatory harmonization through consensus.⁸⁴ In the words of the SEC, "IOSCO is an organization that operates on the basis of consensus, rather than majority votes. Its resolutions are non-binding on its member organizations."⁸⁵ However, unlike the Basle Committee, and perhaps in order to achieve that consensus, IOSCO defines harmonization broadly. German Stock Exchange Federation Executive Vice President Ruediger von Rosen emphasized at one IOSCO meeting that, whatever the merits of harmonization, "value should be attached to the possibility of giving issuers and investors a choice between quite different rules and regulations."⁸⁶ Thus, when IOSCO passes a resolution, the SEC has announced that "each IOSCO member would have to determine whether and how to consider adoption of these standards at a domestic level."⁸⁷ IOSCO's general principles argue that "[t]here is often no single correct approach to a regulatory issue."⁸⁸

So what about standardization in America? Both the SEC and the CFTC have played a role in the organization's membership since its inception – and both have clearly acted pursuant to those IOSCO resolutions that have required work from them. For example, the recent revisions to the SEC's treatment of auditor independence were occasioned by the passage of domestic legislation – the Sarbanes-Oxley Act – but also, as the agency acknowledged, "with the Principles of Auditor Independence and the Role of Corporate Governance in Monitoring an Auditor's Independence issued by ... IOSCO ... in October 2002 in mind."⁸⁹

The SEC has "fundamentally conformed the non-financial statement disclosure requirements for foreign private issuers to the non-financial statement disclosure requirements adopted by ... [IOSCO]."⁹⁰ It has also referred foreign investors considering investments in

⁸⁴ See Guy, *supra* note ?? at 296.

⁸⁵ Report on Promoting Global Preeminence of American Securities Markets Pursuant to Section 509(5) of the National Securities Markets Improvement Act of 1996, *October 1997*, <http://www.sec.gov/news/studies/acctgsp.htm#sec5> (site last visited ???).

⁸⁶ See "Convergence," *More than Harmonization, Is Key Word in Cautious Working Group Sessions*, 2 INT'L SEC. REG. REP. (BNA) NO. 20, at 8, 8 (Sept. 27, 1989). IOSCO has gingerly pursued regulatory cooperation in the context of national differences since its inception. In 1988, it resolved that "despite the national differences, which are narrowing, cooperation among the countries should be encouraged by IOSCO." See *Regulators Agree to Move Cautiously on Enforcement, Information Exchanges*, 20 SEC. REG. & L. REP. (BNA) 1861 (Dec. 9, 1988). Why tolerate such differences? Traditionally, observers have pointed to a distinction between public shareholder (i.e., U.S. and U.K.) and creditor (i.e., German and French) perspectives, in determining how to handle accounting questions. Andrew Crockett, <http://www.bis.org/speeches/sp020227.htm>.

⁸⁷ Report on Promoting Global Preeminence of American Securities Markets Pursuant to Section 509(5) of the National Securities Markets Improvement Act of 1996, *October 1997*, <http://www.sec.gov/news/studies/acctgsp.htm#sec5> (site last visited ???). Guy also argues that "harmonization does not necessarily mean that regulations must be identical." Guy, *supra* note ??, at 297. Guillermo Harteneck, the president of Argentina's security commission, similarly told IOSCO that the implementation of harmonizing agreements "may change from country to country." *Harmonization Key for World Capital Markets, Officials at IOSCO Declare*, 63 BANKING REP. (BNA) No. 15, at 609 (Oct. 20, 1994).

⁸⁸ Objectives and Principles of Security Regulation at 2,

⁸⁹ 67 Fed. Reg. 76780, 76780 (December 13, 2002).

⁹⁰ 67 Fed. Reg. 35620, 35637 (May 20, 2002).

American stocks to IOSCO for information about the process,⁹¹ and has praised the organization for “mov[ing] regulators around the globe to work more closely together.”⁹²

Perhaps most tangibly, the SEC has adopted the International Disclosure Standards developed by IOSCO for non-financial statement information.⁹³ As one SEC official has put it, the standards “represent an international consensus on the type of disclosure that should be provided when foreign issuers make a public offering of equity securities or list their equity securities on a foreign exchange.”⁹⁴ IOSCO issued these standards in 1998; in 1999, the SEC promulgated changes to its Form 20-F, the “lynchpin of its foreign integrated disclosure system, to fully incorporate the Standards.”⁹⁵

Finally, the SEC conducts self assessments to monitor its compliance with IOSCO’s concise and broadly defined Core Principles, as well as with specific initiatives such as the International Disclosure Standards.⁹⁶

The SEC’s stated support of IOSCO has a lengthy pedigree. In 1988, the SEC issued a policy statement that noted that “all securities regulators should work together diligently to create sound international regulatory frameworks that will enhance the vitality of capital markets.”⁹⁷ To be sure, the agency does not change its standards to reflect every particular of IOSCO’s – Beth Simmons is particularly skeptical of the closeness of the relationship between the international

⁹¹ *The Fleecing of Foreign Investors: Avoid Getting Burned by "Hot" U.S. Stocks*, <http://www.sec.gov/investor/pubs/fleecing.htm> (SEC release) (“Are the Broker and the Firm Licensed? Contact your securities regulator to find out. The International Organization of Securities Commissioners (IOSCO) provides contact information for most securities regulators on its website.”) (site last visited ???).

⁹² Annette L. Nazareth, Director, SEC Division of Market Regulation, Remarks at the PLI Conference on International Securities Markets May 9, 2003, <http://www.sec.gov/news/speech/spch050903aln.htm> (site last visited ???) (“Our active participation in the work of IOSCO in the areas of credit rating agencies and analyst conflicts of interest is evidence of the fact that events here in the U.S. have moved regulators around the globe to work more closely together.”).

⁹³ International Disclosure Standards, Securities Act Release No. 7745, [1999-2000 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 86,208, at 82,365 (Sept. 28, 1999); 65 Fed. Reg. 8896, 8897 (February 23, 2000); *International Disclosure Standards For Cross-Border Offerings And Initial Listings By Foreign Issuers* (1998), available at <http://www.iosco.org>. Recently, the SEC has admitted that its “decision to adopt the International Disclosure Standards was based on our conclusion that the standards were of high quality and that their adoption would provide information comparable to the amount and quality of information that U.S. investors receive today.” 65 Fed. Reg. 8896, 8897 (February 23, 2000).

⁹⁴ Felicia Kung, *The Rationalization Of Regulatory Internationalization*, 33 LAW & POL’Y INT’L BUS. 443, 467 (2002). IOSCO’s standards “cover the gamut of expected disclosure topics, including description of an issuer’s business, operating and financial review and prospects, compensation paid to an issuer’s directors and officers, and the identification of major shareholders and related party transactions.” *Id.* I interviewed an SEC official on the standards, who characterized the standards as an important tangible change in the way the SEC conducts its regulatory business. Telephone Interview with SEC official, Jan. 22, 2004 (notes on file with author).

⁹⁵ Kung, *supra* note ?? at 468; International Disclosure Standards, Securities Act Release No. 7745, [1999-2000 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 86,208, at 82,365 (Sept. 28, 1999). For a very detailed example of the congruence between American law and IOSCO principles for funds regulation, see Robert W. Helm, *Creating, Managing And Distributing Offshore Investment Products: A Legal Perspective*, 1360 PLI/Corp 243, 392-398 (concluding that there is almost identical congruence in many, but not in all, fields).

⁹⁶ 2002 Annual Report at 20 <http://www.sec.gov/pdf/annrep02/ar02full.pdf> (site last visited ???); *Report On Implementation Of International Disclosure Standards, Report Of The Technical Committee Of The International Organization Of Securities Commissions* 1 (2000), available at <http://www.iosco.org>. I discuss the Core Principles in greater detail *infra*.

⁹⁷ 65 Fed. Reg. 8896, 8897 (February 23, 2000).

organization and the agency⁹⁸ - but it deems itself to be in compliance with the IFRO's Core Principles and harmonized its international disclosure requirements to conform to those of IOSCO.

The CFTC has also cited IOSCO as the authority and basis for agency action. The futures regulator, an associate member of IOSCO and, like the SEC, subject to APA review of its rulemakings, has also cited IOSCO's pronouncements as bases for its promulgations.⁹⁹ The CFTC has "amended our non-financial statement disclosure requirements for offerings by foreign issuers to conform to the international disclosure standards adopted by IOSCO in 1998."¹⁰⁰ And it has cited guidelines issued by IOSCO as "appropriate" ones for automated clearing systems,¹⁰¹ screen-based trading systems,¹⁰² and electronic trading systems.¹⁰³ One CFTC employee has told me that the agency does most of its cooperative regulatory work with foreign regulators through IOSCO.¹⁰⁴

The CFTC has also used IOSCO standards in specific rule applications, as well as in rulemaking. For example, in evaluating whether a Norwegian clearing house could operate on the International Maritime exchange, the agency "evaluated the oversight activities undertaken by [the clearinghouse's Norwegian regulator] in the context of the Principles and Objectives of Securities Regulation issued by the International Organization of Securities Commissions."¹⁰⁵

⁹⁸ See Beth A. Simmons, *The International Politics of Harmonization: The Case of Capital Market Regulation*, 55 INT'L ORG. 589, 595 (2001).

⁹⁹ *First American Discount Corp. v. Commodity Futures Trading Com'n*, 222 F.3d 1008, 1015 (D.C. Cir. 1998).

¹⁰⁰ 65 Fed. Reg. 76008, 76029 (citing "International Disclosure Standards," Exchange Act Rel. No. 41936 (Sept. 28, 1999) [64 Fed. Reg. 53,900])

¹⁰¹ 66 Fed. Reg. 45604, 45613 (August 29, 2001) ("The Commission believes that the guidelines issued by the International Organization of Securities Commissions (IOSCO) in 1990 and adopted by the Commission on November 21, 1990 (55 Fed. Reg. 48670), as supplemented in October 2000, are appropriate guidelines for an automated clearing system to apply.")

¹⁰² 66 Fed. Reg. 42256, 42275 (August 10, 2001) ("The Commission believes that the guidelines issued by the International Organization of Securities Commissions (IOSCO) in 1990 (which have been referred to as the "Principles for Screen-Based Trading Systems"), and adopted by the Commission on November 21, 1990 (55 Fed. Reg. 48670), as supplemented in October 2000, are appropriate guidelines for an electronic trading facility to apply to electronic trading systems.")

¹⁰³ 64 Fed. Reg. 46356, 46358-46359 (August 25, 1999) ("The Commission notes that its review of newly created electronic trading systems has been, and continues to be, based on principles developed by the international regulatory community-- specifically the International Organization of Securities Commissions ("IOSCO"). Should the Commission's review of electronic trading systems be based on standards other than or different from those contained in the IOSCO principles?")

¹⁰⁴ Telephone Interview with CFTC Lawyer, Jan. 23, 2003 (on file with author). However, cooperative enforcement work also involves the regulators who have signed on to the so-called "Boca Declaration," which was coordinated by the CFTC in 1997. *Id.* The declaration itself is available at <http://www.cftc.gov/oia/oiabocadec0398.htm>. For a description of its intent, see Int'l Conference on Fin. for Dev., Policy Text, *Causes, Effects and Regulatory Implications of Financial and Economic Turbulence in Emerging Markets* n.71 (stating that "the Declaration on Co-operation and Supervision of International Futures Exchanges Clearing Organizations, jointly signed by 55 derivatives exchanges and clearing houses signed in Boca Raton, Florida in March 1996, defines specific events that will trigger a request for information from another exchange or clearing house. These events include a large decrease in a member's capital position, large cash flows in proprietary or customer accounts, or a concentration of positions in any futures or options contract.") available at <http://esa.un.org/ffd/policydb/PolicyTexts/IOSCO-1.htm>.

¹⁰⁵ 67 Fed. Reg. 2419, 2420 (January 17, 2002).

The CFTC accordingly did “not ma[ke] any independent investigation or assessment of the Norwegian regulatory program.”¹⁰⁶

C. A Model of Regulatory Cooperation

We can now identify some common features of the Basle Committee and IOSCO, features that are shared by the successor organizations of them both.

Membership of Regulators The organizations are comprised of regulators, not states. The SEC, the CFTC, and the stock exchanges are members, of varying degrees, of IOSCO. The United States is not. And the Federal Reserve, OCC, FDIC (along with OTS and the Federal Reserve’s New York branch), not the State Department, represents this country in the Basle Committee.¹⁰⁷ The American officials who attend these meetings are not diplomats and have not been trained as Foreign Service officers; instead, they are banking supervisors who began their careers working on ordinary matters of domestic supervision.¹⁰⁸

Informally Constituted IFROs are not created by treaties made between countries duly signed and ratified. Their founding documents would not be recognized by the Vienna Convention on the law of treaties,¹⁰⁹ because in international law all treaties apply only to states.¹¹⁰ Moreover, the documents that do create the IFROs, and any governing by-laws or rules constraining the organization, tend to be broad and flexible, not specific, detailed, and constraining as are many treaties that create traditional international organizations – the UN is an example here.¹¹¹ It is thus quite clear that IFROs do not meet the standards of classic international law as international organizations subject to its strictures. To list just two divergences, the Restatement suggests that an international organization “is created by an international agreement and has a membership consisting entirely or principally of states”¹¹² and that “statehood . . . is generally a minimum qualification for membership in international

¹⁰⁶ *Id.*

¹⁰⁷ See *supra* note ?? and accompanying text; Telephone Interview with Federal Reserve official (Jan. 18, 2004).

¹⁰⁸ Telephone Interview with Federal Reserve Board Attorney (Jan. 9, 2004).

¹⁰⁹ Vienna Convention on the Law of Treaties, opened for signature May 23, 1969 (entered into force January 27, 1980), 1155 U.N.T.S. 331.

¹¹⁰ See, e.g., Nguyen Quoc Dinh, *DROIT INTERNATIONAL PUBLIC* 618 (Patrick Daillier & Alain Pellet eds., 5th ed. 1994). Eleanor Kinney calls these networks “networks of national regulators . . . that evolved outside of formal frameworks” which “are generally comprised of domestic regulators that meet without treaty or executive authorization.” Eleanor Kinney, *The Emerging Field Of International Administrative Law: Its Content And Potential*, 54 ADMIN. L. REV. 415, 426 (2002). She cites the Basle Committee as a principle example of these networks. See *id.*

¹¹¹ The UN’s rules and regulations are vast, and possibly unwieldy. See Detlev Vagts & Frederic Kirgis, *Book Review*, 83 AM. J. INT’L L. 674, 675 (1989) (“Amerasinghe’s two volumes are not for everyone interested in international law. They should be invaluable, though, to the researcher or practitioner concerned with the specialized field of international (or even national) civil service law.”) (reviewing C.F. Amerasinghe’s two volume treatise on international civil service rules).

¹¹² Restatement at § 221. Non-Americans also insist that traditionally defined international organizations be created by states. 1 HENRY G. SCHERMERS, *INTERNATIONAL INSTITUTIONAL LAW* 6-7 (1972) (positing that “[t]he founding agreement must be an agreement between States.”)

organizations."¹¹³ But bureaucrats from the SEC, the CFTC, and the Federal Reserve attend IFRO meetings as representatives of their agencies rather than their nation.¹¹⁴ To the Restatement, the term "organization" in international organization is to be given a "restrictive" reading – international organizations must have a headquarters, staff, and budget to truly qualify as international subjects.¹¹⁵ IFROs barely possess these attributes.¹¹⁶ Instead, as Sol Picciotto has observed, “they are informal in nature: even where they are publicly visible, they are often not founded on conventional legal instruments, such as treaties, but rather on "gentlemen's agreements," which may be semi-secret.”¹¹⁷

Lightly Institutionalized IFROs have little permanent presence. Their secretariats, if they exist at all, are very small. They have few, if any, employees. Their annual budgets are minute. And other than regular meeting schedules, there is little permanent presence to the entities. The Basle Committee does not have its own secretariat: it relies on another international organization, the Bank for International Settlements, in Basle, to meet this need, which itself relies for governance on 12 banking supervisors from member countries on temporary secondment.¹¹⁸ The IOSCO Secretariat in Madrid administers an annual budget dwarfed by that of the UN and 1% the size of the WTO’s.¹¹⁹

Little Substantive Equality Although gauging influence within a quietly run institution is difficult, this informality of organization means that it is possible for particularly important financial regulators play a particularly influential role in the organizations. Thus, in IOSCO, the SEC has traditionally thought to be a particularly important player, although the organization now operates in a European milieu,¹²⁰ while in the Basle Committee the Fed and the Bank of England have been thought driving forces.¹²¹ American regulators are thought to play a similar role in the Financial Action Task Force, another second generation IFRO, which, in the view of Beth Simmons, would not exist absent heavy American interest in money laundering.¹²²

Secret Decision-making, But Open to Input IFROs generally operate through closed meetings and how they deliberate and agree on common supervisory standards is difficult to discern. However, one recent development in the administrative process of the Basle Committee

¹¹³ Restatement, *supra* note 23, § 222 cmt. A. For a further discussion, see Zaring, *supra* note ?? at note 201.

¹¹⁴ See *supra* note ?? and accompanying text; Zaring, *supra* note ?? at notes 202-03 and accompanying text.

¹¹⁵ See Restatement, *supra* note 23, § 221 cmt. b.

¹¹⁶ See *supra*, notes ?? and accompanying text.

¹¹⁷ Picciotto, *supra* note ??, at 1047

¹¹⁸ Zaring, *supra* note ??, at 287-88.

¹¹⁹ See *supra* notes ?? and accompanying text.

¹²⁰ See *supra* notes ?? and accompanying text.

¹²¹ See, e.g., Picciotto, *supra* note ??, at 1040; Porter, *supra* note ??, at 122-23; Gary N. Klieman, *Better Forum Needed to Negotiate Terms of Foreign Competition*, AM. BANKER, Jan. 4, 1996, at 5.

¹²² Beth A. Simmons, *The International Politics of Harmonization: The Case of Capital Market Regulation*, 55 INT’L ORG. 589, 595 (2001).

and IOSCO, such as it is, is that both organizations now make an effort to invite comment from interested parties on their most significant regulatory efforts.

IOSCO has done so in part through its large class of affiliate members, which includes some representatives of private market participants, and through comment periods. Moreover, the organization has created an easily accessible public library, which contains releases about what happened in the private meetings of the organization and its committees, any resolutions made by the IFRO, a variety of white papers, and annual reports. All of these documents are available on the internet.

The Basle Committee has similarly invited a number of rounds of comments on its proposed revisions to its capital accord, and it also makes a substantial number of documents available in its public library, many of which, again, are available on line.

The second wave of IFROs – those successor organizations to the Basle Committee and IOSCO that I discuss *infra* – also have internet presences and a commitment to make a variety of documents, including, in most cases, any founding or governing documents, available to nonmembers.

Proselytizers One reason for this commitment to public availability lies in the proselytizing roles these organizations play. In attempting to spread best practices to fellow regulators, and, particularly, to non-members, IFROs have generated a blizzard of materials, frequently beginning with a set of core standards to which all members must commit.¹²³

III. Three Products of the New Procedure

In this section, I divide the accomplishments of IOSCO and the Basle Committee into three categories: hard achievements creating standardization among sophisticated regulatory jurisdictions, soft agreements on common principles and occasional recommended approaches to financial regulation, best understood as the development of standards for developing jurisdictions; and finally, the feat of modeling, by which I mean that the Basle Committee and IOSCO serve as the progenitors of, and fora for, an increasingly complex web of financial regulatory cooperation. I examine case studies of each of the three accomplishments, and then I place them in analytical context.

¹²³ See *infra* notes ?? and accompanying text for a discussion of the implications of this proselytization.

Hard Rules and the Turn to Formal Process

One aspect of the evolution of the organizations has been, surprisingly, an increased formality to the procedures employed by the organizations for those actions that threaten to impact regulated industry the most. The Basle Committee is an example.

1. A Case Study

The Basle Committee's most tangible achievement thus far has been the 1988 Capital Accord. That informal agreement – running “little more than two dozen pages and ... adopted within seven months after the Committee's first(and only) consultative paper was published for comment,” as one American regulator has observed¹²⁴ – provided for the implementation of a credit risk measurement framework for all banks. The framework provided for a minimum capital standard of 8% of roughly risk-weighted assets (riskiness was assessed in four “buckets,” under which bank loans to the private sector had to be covered by the most capital and loans to OECD governments, which were deemed to be safer, by the least).¹²⁵ The capital adequacy standards promulgated in the 1988 Accord were fully implemented by all the committee member countries by 1992 – to notable effect on the banks in those countries.¹²⁶ The implementation of the accord required American banks to add \$10 to \$15 billion to their capital reserves, French banks, \$13 billion, and Japanese banks, \$26 to \$50 billion.¹²⁷ In fact, some observers have concluded that the implementation of the 1988 Basle Accord forced Japanese banks to raise so much cash that the country's domestic markets were flooded with assets that depressed prices and the value of collateral, forcing more sales, and creating a “vicious circle” that contributed to that country's recession of the 1990s.¹²⁸

¹²⁴ See John D. Hawke, *Basel II: A Brave New World for Financial Institutions?*, Address Before the American Academy in Berlin (Dec. 15, 2003) at 3-4, available at <http://www.occ.treas.gov/ftp/release/2003-99a.pdf>.

¹²⁵ January 20, 2001 *ECONOMIST*, 2001 WL 7317321. “Basle required banks to hold capital equal to at least 8% of their risk-weighted loans to the non-bank private sector. Government debt from OECD countries required no capital, because these supposedly bore no credit risk. Non-OECD sovereign debt had some capital requirements, but fewer than for any private-sector loans. Loans between banks also entailed modest capital requirements.” January 20, 2001 *ECONOMIST*, 2001 WL 7317310; 62 Fed. Reg. 26355, 26355-56 (May 13, 1997) (“The risk-based capital guidelines establish a framework for imposing capital requirements generally based on credit risk. Under the risk-based capital guidelines, balance sheet assets and off-balance sheet items are categorized, or “risk-weighted,” according to the relative degree of credit risk inherent in the asset or off-balance sheet item. The risk-based capital guidelines specify four risk-weight categories--zero percent, 20 percent, 50 percent, and 100 percent. Assets or off-balance sheet items with the lowest levels of credit risk are risk-weighted in the lowest risk weight category; those presenting greater levels of credit risk receive a higher risk weight. Thus, for example, securities issued by the U.S. government are risk-weighted at zero percent; one- to four-family home mortgages are risk-weighted at 50 percent; unsecured commercial loans are risk-weighted at 100 percent.”); see also Barbara C. Matthews, *Capital Adequacy, Netting, and Derivatives*, 2 *STAN. J.L. BUS. & FIN.* 167, 170 (1995) (describing how the accord works).

¹²⁶ See General Accounting Office, *supra* note ??, at 4.

¹²⁷ See Zaring, *supra* note ??, at 283 (citing Peter Norman, *Capital Ratio Is Set by Banks of 12 Nations*, *Wall St. J.*, July 12, 1988, at 3, 7.)

¹²⁸ Kristen Nordhaug, *The Political Economy Of The Dollar And The Yen In East Asia*, January 1, 2002, *J. CONTEMP. ASIA* at 517.

Moreover, the committee's work on the capital accord has been challenged as an example of agencies on the loose.¹²⁹ Tony Porter has concluded that U.S. banking regulators have used the Basle Committee to justify the imposition of standards on its own banks, even when those banks opposed implementation of the standards.¹³⁰ As a former chair of the Basle Committee has noted, in the preliminary agreements to the capital adequacy accord "[t]he U.S. authorities were anxious to move forward their proposals in the face of opposition on a number of points from their banks."¹³¹ Indeed, in Porter's view "[t]he 1988 accord was also used by the US as a basis to impose standards on firms that the accord itself had exempted because they were not primarily international."¹³²

For example, the Basle Committee released its final version of the 1988 Capital Accord on July 15, 1988.¹³³ At that point all of the members of the Committee, including the U.S. banking regulators, had committed themselves to the implementation of the Accord. But some U.S. regulators released the Accord for comment at home on December 15, 1988.¹³⁴ By receiving comment on the Accord after they had promulgated it, U.S. bank regulators placed would-be commentators in the position of only being able to comment on the implementation of the Accord, rather than the wisdom of agreeing to it. Similarly, six months after announcing that a Basle Committee announcement had been "endorsed by the G-10 governors," American banking regulators proposed it as a rule in the United States and requested comment.¹³⁵

Ordinarily, the supervisory decisions of the Federal Reserve, as well as those of other Federal banking regulators, are subject to a familiar sort of administrative law review. Within the executive branch, the decisions must be approved by the Office of Management and Budget before publication in the Federal Register.¹³⁶ After being issued as a final rule, "[a]ny party aggrieved by an order of the Board" – including prospective competitors – may seek review in the federal courts of appeals.¹³⁷ Moreover, FDIC, OCC, and Federal Reserve rules are reviewable pursuant to the APA. But in light of the way the Fed has integrated rules

¹²⁹ Pace Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies, And Disaggregated Democracy*, 24 MICH. J. INT'L L. 1041, 1052 (2003) (coining the term "agencies on the loose").

¹³⁰ Porter, *supra* note ?? at ??

¹³¹ W.P. Cooke, *International Convergence of Capital Adequacy Measurement and Standards*, in THE FUTURE OF FINANCIAL SYSTEMS AND SERVICES: ESSAYS IN HONOUR OF JACK REVELL 310, 325 (Edward P. M. Gardener ed., 1990).

¹³² See Porter, *supra* note ??, at 70.

¹³³ See ETHAN KAPSTEIN, GOVERNING THE GLOBAL ECONOMY 118 (1994).

¹³⁴ See *Regulating Capital Requirements for Insured Institutions*, 53 Fed. Reg. 51,800, 51,800 (Dec. 15, 1988) (to be codified at 12 C.F.R. pt. 561, 563) for the Federal Home Loan Bank Board's release of the "proposed rule."

¹³⁵ See *Risk-Based Capital Standards; Market Risk; Internal Models Backtesting*, 61 Fed. Reg. 9114 (March 7, 1996); See *Capital Requirements for Market Risk*, 60 Fed. Reg. 38,142, 38,142 (July 25, 1995) (codified at 12 C.F.R. chap. 11).

¹³⁶ Executive Order 12,291 mandated that agencies submit all proposed and final regulations to OMB's OIRA for review before publication in the Federal Register. Exec. Order No. 12,291 pmb., 3 C.F.R. § 3(f), 3 C.F.R. at 128-30.

¹³⁷ Review may be had pursuant to the Bank Holding Company Act, 12 U.S.C. §§ 1848, 1850, or the Administrative Procedure Act, 5 U.S.C. § 702, *et seq*; Telephone Interview with Federal Reserve attorney; Telephone Interview with OCC Official (Jan. 25, 2004).

promulgated by the Basle Committee, it is not clear that this domestic judicial review would occur in a way meaningfully related to the crucial regulatory event – agreement at Basle.

After a decade of experience with the 1988 Accord, the Basle Committee decided to try to improve it.¹³⁸ In January, 2001, it issued a proposal for a New Basle Capital Accord, scheduled to be fully implemented in 2006, that will replace the 1988 accord.¹³⁹ As the committee has explained, the New Basle Capital Accord will focus on: 1) new minimum capital requirements, with a more sophisticated weighting of the soundness of types of assets in assessing capital adequacy; 2) common standards of “supervisory review of an institution's capital adequacy and internal assessment process,” and 3) “effective disclosure” that will, in theory, encourage “market discipline.”¹⁴⁰ The Accord is designed to reap “important public policy benefits” by “improving the capital adequacy framework along two important dimensions. First, by developing capital regulation that encompasses not only minimum capital requirements, but also supervisory review and market discipline. Second, by increasing substantially the risk sensitivity of the minimum capital requirements.”¹⁴¹ This risk sensitivity places much of the responsibility for weighting the riskiness of bank assets on banks themselves, through three different models, one a complex set of requirements that obligates banks to calculate the probability of default of each loan, the loss given default, the exposure at default, and a number of other risk weights.¹⁴²

Substantively, there is no doubt that the draft accord is important.¹⁴³ It has been the subject of a lead editorial in the *Economist*, and has prompted warnings by the BIS that some lenders will need to spend \$50-\$100 million to put into place systems that can adequately assess their capital adequacy under the new scheme – an amount that some predict will put small lenders out of business.¹⁴⁴ The proposed regulations run hundreds of pages, many times the size

¹³⁸ The eight percent standard, for example, has been criticized as an unwarrantedly hard and fast rule, with little specific justification. See 1/20/01 *ECONOMIST*, 2001 WL 7317310. Moreover, as Roland Kirstein has explained, it creates distorting incentives for banks: “if the credit cost burden is the same for high and low risks, and banks charge higher interest rates for more risky loans, then profit-maximizing bank managers are tempted to replace low-risk customers with high risk customers.” Roland Kirstein, *The New Basle Accord, Internal Ratings, and the Incentives of Banks*, 21 *INT'L REV. L. & ECON.* 393, 394 (2002). In addition, the Basle Committee found itself repeatedly amending the accord – it did so seven times between 1993 and 1996 – to handle unforeseen developments at the time of the Accord's passage. For a discussion, see Raj Bhala, *Equilibrium Theory, The FICAS Model, And International Banking Law*, 38 *HARV. INT'L L.J.* 1, 19-20 (1997) (noting and discussing Basle's 1993 Market Risk Proposal, 1993 Netting Proposal, 1993 Interest Rate Risk Proposal, 1994 Netting Amendment, 1995 Netting Amendment, 1995 Market Risk Proposal, and 1996 Market Risk Amendment).

¹³⁹ See Press Release, Bank for International Settlements, Continued Progress Toward Basel II (Jan. 15 2004), available at <http://www.bis.org/press/p040115.htm>; see also Press Release, Bank for International Settlements, Update on the New Basel Capital Accord (June 25 2001), available at <http://www.bis.org/press/p010625.htm>.

¹⁴⁰ <http://www.bis.org/publ/bcbsca.htm> (site last visited ???).

¹⁴¹ Basel Committee on Banking Supervision Consultative Document Overview of The New Basel Capital Accord Issued for comment by 31 July 2003 (April 2003), available at <http://www.bis.org/bcbs/cp3ov.pdf>.

¹⁴² Appendix to Testimony of John D. Hawke, Comptroller of the Currency, before the Housing Banking Services Committee, June 19, 2003 at 21[web site tk].

¹⁴³ One Federal Reserve Board employee described it to me as a “really big deal.” FRB interview, supra, note ??.

¹⁴⁴ See Louis Beckerling, *New Basle Capital Accord Seen Taking Heavy Toll On Small Lenders*, December, 12, 2002, S. CHINA MORNING POST at 5; Karen Krebsbach, *Risk Management: Braving Basel II Storm*, U.S. BANKER, Sept. 2, 2003 (

of the first accord.¹⁴⁵ Moreover, they look much more similar to eye-glazing domestic regulations than to international treaties.¹⁴⁶ American regulators have worried that applying the most complicated models proposed in the regulations to all of their banks would be needlessly complicated and expensive; on the other hand, the chair of the FDIC has testified that “Basel II will confer some degree of regulatory capital benefits on the ... banks that qualify, in exchange for their substantial investments in systems and infrastructure intended to improve risk management.”¹⁴⁷

But the most interesting aspect of the second accord for lawyers is how procedurally different it is from the first one. The second accord has been opened to serial waves of comments, 250 of which were received on the first public draft, including comments from banks, self-regulatory organizations, and other regulators¹⁴⁸ and 200 on a consultative paper about the accord in 2003.¹⁴⁹ Moreover, as Anne-Marie Slaughter has predicted, the Basle Committee has continually updated its progress on reaching a new accord on the internet.¹⁵⁰ As have its members. The Fed has devoted an entire section on its web site to updating interested parties on developments in the revised accord. In fact, the Fed’s discussion of “Basel II” shares space – and is given equal stature – with the broadest possible categories of supervisory responsibilities on the agency’s Banking Information and Supervision site: including “Actions and Applications,” “Regulations,” “Supervision,” and “Banking Structure.”¹⁵¹ The OCC and FDIC have made the congressional testimony of their officials on the Basel II process available on their websites as well.¹⁵²

2. Analysis

Thus, in the development of a new capital accord, we see an attempt to obtain *legitimacy* for increasingly substantive regulation through *process*. To be sure, this new procedural

“European banks expect to spend between \$50 million and \$100 million each to comply with Basel II” while Credit Suisse First Boston has concluded that it will cost “\$70 million to \$100 million to implement the accord”); Testimony of Benton E. Gup on the New Basel Accord, June 19, 2003 at ??? [web site tk] at 3.

¹⁴⁵ As one American regulator has complained. See Testimony of John D. Hawke, Comptroller of the Currency, before the Housing Banking Services Committee, June 19, 2003 at ??[web site tk].

¹⁴⁶ See *id.*

¹⁴⁷ Hon. Donald E. Powell, A Review of the New Basel Capital Accord, Statement Before the U.S. Senate Comm. on Banking, Hous., and Urban Affairs (June 18, 2003), available at <http://banking.senate.gov/index.cfm?Fuseaction=Hearings.Testimony&HearingID=42&WitnessID=145&suppresslayouts=true>.

¹⁴⁸ <http://www.bis.org/bcbs/cacomments.htm> (site last visited ??). IOSCO has also submitted its comments to the Basle Committee on the proposed revisions to the Basle Accord.

¹⁴⁹ <http://www.bis.org/bcbs/cp3comments.htm>. Moreover, 188 banks from Basle Committee countries, with 177 banks from 30 other countries, participated in the study that went with the consultative paper. See Basle Committee on Banking Supervision, *Quantitative Impact Study 3 – Overview of Global Results* at 2/33, (May 5, 2003) available at <http://www.bis.org/bcbs/qis/qis3results.pdf>.

¹⁵⁰ Pace Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies, And Disaggregated Democracy*, 24 MICH. J. INT’L L. 1041, 1052 (2003) (coining the term “agencies on the loose”).

¹⁵¹ <http://www.federalreserve.gov/generalinfo/basel2/default.htm>

¹⁵² See www.fdic.gov; www.occ.gov.

formality is not identical to the sorts of procedure to which domestic regulators ordinarily subject themselves. For example, Harm Schepel contends that “[s]standardization procedures have developed into a remarkably consistent set of truly global principles of ‘internal administrative law.’”¹⁵³ His rather European-, and private-sector-influenced view posits that these principles include:

1. Elaboration of draft standards in technical committees with a balance of represented interests (manufacturers, consumers, social partners, public authorities).
2. A requirement of consensus on the committee before the draft goes to.
3. A round of public notice and comment, with the obligation on the committee to take received comments into account.
4. A ratification vote, again with the requirement of consensus rather than a mere majority, among the constituency of the standards body.
5. The obligation to review standards periodically.¹⁵⁴

The Basle Committee’s with its capital accord meets most, but not all of these criteria. Most notably, the committee does not provide for a corporatist-style inclusion of represented interests in its accord working committees. This makes its consensus requirements and willingness to review its standards periodically substantially less onerous as the review and consensus comes solely from bureaucrats and not those affected by the regulation.

Nor is it identical to American domestic regulation, most crucially because such regulation includes the possibility of judicial review.¹⁵⁵

Nonetheless, I find this development to be striking, for both promising reasons and troubling ones. Most surprisingly, there is every indication that the regulators who first devised these organizations prized their informality. Originally, a financial regulator interested in persuading other regulators to use a common standard, perhaps to solve problems of externalities or to gain the advantages of network effects, or perhaps for ideological reasons, might go about the task in two stylized ways. The regulator could prevail upon his government to go to the United Nations, or to convene a multilateral treaty conference, in an effort to develop a centralized body to which all nations that consented to the regime would be obliged to follow its standards. Then, the regulator could persuade the regime to adopt its preferred standard. Or, the regulator could, in conjunction with other regulators, form an informal regulatory organization. If we think of these organizations as informal nexuses through which national regulators meet to

¹⁵³ Harm Schepel, *The Constitution of Private Governance. Product Standards in the Regulation of Integrating Markets*, Chapter 7.1. Ph.D. Thesis EHI Florence 2003.

¹⁵⁴ *Id.*

¹⁵⁵ *See supra*, notes ?? and accompanying text.

collaborate on international problems, we can guess at an understanding of why they were so attractive to regulators in the 1970s and 80s.

Now, regulatory cooperation, at least in Basle, is much less flexible, and more open to public participation. The voluntary adoption of norms of comment and reasoned decision-making places IFROs within a zone of comparability with the decision-making processes of agencies with which we are more comfortable. The view of many lawyers is that some procedure is better than none; if so, financial regulatory cooperation has exhibited a notable impetus towards the proceduralization of its products.

I do not want to be overly whiggish about this evolution. It is worth noting how uneasy this turn to formalization as a means of obtaining legitimacy is. IFROs remain much less formal than their counterparts in developed states.¹⁵⁶ The usual problems of democratic deficits apply, as does, notably, the lack of a supranational check that serves the equivalent of domestic judicial review.¹⁵⁷

Finally, of course, it isn't clear that the development of procedural niceties by the Basle Committee should assuage those concerned with its substantive work. As domestic scholars have noted time and again – Laurence Tribe is an apposite example – it is difficult to draw normatively rich conclusions about the substantive outcomes of a procedurally legitimate decisions.¹⁵⁸ “[P]erfecting the processes of governmental decision is radically indeterminate and fundamentally incomplete. The process theme by itself determines almost nothing unless its presuppositions are specific and its content supplemented, by a full theory of substantive rights and values.”¹⁵⁹ There is no indication that these international organizations, or their American members, have defined the values that collaboration through IFROs is designed to vindicate.

¹⁵⁶ This sort of mobilization of stakeholders in an arena in which consensus, as far as possible, is sought is reminiscent of another venerable, but rarely actualized concept in administrative law: regulatory negotiation. In 1990, Congress enacted the Negotiated Rulemaking Act, which essentially codified an informal practice employed by agencies to form a consensus among interested parties prior to initiating the notice-and-comment procedure. 5 U.S.C. § 561 *et seq.* Under negotiated regulation or “neg-reg.,” “[t]he agency selects a facilitator to convene meetings of interested parties. They will meet with the staff to propose rules, to discuss their own proposals, and to try to come up with a final, agreed-upon rule, including the rule’s specific language. The agency promises to adopt the consensus proposal, at least, if subsequent notice and comment do not reveal serious flaws.” STEPHEN G. BREYER & RICHARD B. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES* 609 (3d ed. 1992). What happens in IFROs is not a negotiated regulation as that process has been (relatively) standardized, but the paradigm reflects interestingly on what happens in the organizations. *See generally*, Jody Freeman, *Collaborative Governance In The Administrative State*, 45 *UCLA L. REV.* 1 (1997). In addition, as with all neg-regs, the organizations raise concerns of representativeness. The idea of letting stakeholders participate in the process of a negotiated regulation derives its legitimacy in part from ensuring that all stakeholders participate in the process. The Basle Committee and IOSCO produce negotiated decisions. But they do so in a way that particularly empowers the regulators themselves that participate on the committees that matter.

¹⁵⁷ Although these problems are frequently overstated in the case of the entities studied here. *See infra* notes ?? and accompanying text.

¹⁵⁸ Laurence Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 *YALE L. J.* 1063 (1980).

¹⁵⁹ *Id.* at 1064.

The turn to (relative) formalization that the Basle Committee has made, then, is an interesting twist of both the intentions of the founders of the organizations and of what most of us think really matters about public decision-making: its outcomes.

Nonetheless, the ever-present problem of trying to ensure the vindication of substantive values through mere procedural safeguards should not blind observers to the implications of the turn of the Basle Committee and IOSCO to openness.

Soft Rules and the Proselytization Imperative

IOSCO's principal achievement consists of its Core Principles of Securities Regulation, which its members have pledged to adopt.¹⁶⁰ Promulgating broadly worded core principles are also how most of the second wave of IFROs – again, more about them later – began their operations.¹⁶¹ I argue that these sorts of declaration of principle are designed not for the regulators of developed economies, who generally deem themselves in compliance with them, but for emerging markets. I argue that this function of IFROs – proselytization – is a second way that their products should be understood. I sketch the proselytization function through the lens of IOSCO, and I consider, in the context of the history of that organization, why it has imposed soft, as opposed to hard, rules on its members.

1. A Case Study and Survey

According to the SEC, “[t]he Core Principles, which SEC staff developed together with a number of foreign counterparts, represent international consensus on the key objectives of, and sound prudential principles for, securities regulation.”¹⁶² The Core Principles are broadly phrased, and generally represent standards that most of its most sophisticated members purport to have in place: “[t]here is often no single correct approach to a regulatory issue,” IOSCO warns at the beginning of the Principles.¹⁶³

For example, IOSCO's principles have the following to say about capital adequacy:

Capital standards should be designed to provide supervisory authorities with time to intervene to accomplish the objective of orderly wind down. A firm should ensure that it maintains adequate financial resources to meet its business commitments and to withstand the risks to which its business is subject.¹⁶⁴

¹⁶⁰ See supra notes ?? and accompanying text.

¹⁶¹ See infra notes ?? and accompanying text.

¹⁶² See *The SEC Speaks*, 1235 PLI/Corp 977, 988-89 (2001). The SEC issued a “concept release” in the Federal Register seeking comment on the organization's development of common accounting standards, in tandem with a semi-public organization of accountants. See infra notes ??? and accompanying text; <http://www.sec.gov/rules/concept/34-42430.htm>; 65 Fed. Reg. 8896 (February 23, 2000).

¹⁶³ <http://www.iosco.org/pubdocs/pdf/IOSCOPD82-English.pdf>.

¹⁶⁴ <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD82-English.pdf>

The organization's recommended "legal framework" on which "effective securities regulation depends" is only one page long, including bullets advising the creation of "taxation laws" with "clarity and consistency, including, but not limited to the treatment of investments," a "dispute resolution system" that is "fair and efficient" and that provides for "the enforceability of court orders and arbitrations awards," and a "banking law," about which no more is said.¹⁶⁵

These principles leave room for a wide variety of approaches to capital adequacy and banking supervision, and the other principles in the document are comparable.

In addition to promulgating the core principles, IOSCO has issued a flurry of white papers on best practices, appropriate technical regulations, and other advice. In October, 2003, for example, the Technical Committee issued reports on "Collective Investment Schemes As Shareholders: Responsibilities And Disclosure,"¹⁶⁶ and "Investment Management Risk Assessment: Marketing And Selling Practices,"¹⁶⁷ and a survey of member practices on "Fees And Commissions Within The CIS And Asset Management Sector."¹⁶⁸ In this way, it has evaluated access to markets, capital requirements, clearing and settlement rules, accounting standards, and more traditional securities and futures rules among its members and has debated which standards are the most amenable to common standard-setting within its committees.

This advice, however, does not rise to the level of requirement of any of IOSCO's members. And the combination of recommendation plus very broad principles characterizes the regulatory product of the organization. IOSCO has created broad areas of agreement, but, other than perhaps in the area of disclosure standards for non-financial statement information,¹⁶⁹ not the sort of specific standards represented by Basle's Capital Accord.

Its most promising potential initiative probably lies in the way it partnered with another IFRO, the International Accounting Standards Board, in an effort to develop accounting standards that could be used in all securities markets, an initiative I discuss in (slightly – fear not!) more detail below.¹⁷⁰ As of this writing, however, although a number of jurisdictions (notably European ones) have agreed to harmonize around the International Accounting Standards (IAS) developed by the IASB in consultation with IOSCO, the United States has thus far expressed skepticism about the prospects of harmonization.¹⁷¹ Accordingly, the dream of a worldwide set of accounting standards endorsed by IOSCO and enforced by its members – one

¹⁶⁵ Basle Comm. on Banking Supervision, Annexure C para. 3 (Sept. 1995)

¹⁶⁶ <http://www.iosco.org/pubdocs/pdf/IOSCOPD158.pdf>

¹⁶⁷ <http://www.iosco.org/pubdocs/pdf/IOSCOPD156.pdf>

¹⁶⁸ <http://www.iosco.org/pubdocs/pdf/IOSCOPD157.pdf>

¹⁶⁹ See *supra* notes ?? and accompanying text.

¹⁷⁰ See *infra* notes ?? and accompanying text.

¹⁷¹ For a brief discussion related to IOSCO from the perspective of an SEC official, see Kung, *supra* note ?? at 474-77.

comparable to the worldwide capital adequacy standard adopted by the Basle Committee – is far from becoming a reality.

Thus, its “most significant accomplishment,” in the words of former CFTC chair Brooksley Born, has been its promulgation of its binding but broad set of Core Principles.¹⁷²

2. Analysis

This sort of second achievement of IFROs, then, is regulatory cooperation as a matter of *proselytization*, specifically, proselytization of minimum standards from developed countries to less developed countries.

There are, of course, a number of ways to look at the Principles and Objectives and their ilk. As with the promulgations of the Basle Committee, they do not meet the Schepel test for adequate internal administrative law.¹⁷³ It could instead be viewed as an instrument of foreign policy, a set of best practices sent from a class of haves, represented in IOSCO’s Technical Committee, to a class of have-nots, including the rest of the organization’s membership.¹⁷⁴

Or, less cynically, call this administrative development the functional equivalent of an advice column from those who have made their mistakes to those who are about to do so. Tony Porter has noted that “the difficulty for the emerging markets of formulating and promoting a position in matters that are highly technical, in fora that are dominated by the developed markets, and in an issue area where their own institutions are in a process of rapid change.”¹⁷⁵ These markets, and their regulators, may benefit from the expertise of IOSCO’s Technical Committee.

Of course, we see similar sorts of proselytization in the Basle Committee. Similarly broadly, Principle 1 of the Basle Committee’s Core Principles reads as follows:

An effective system of banking supervision will have clear responsibilities and objectives for each agency involved in the supervision of banks. Each such agency should possess operational independence and adequate resources. A suitable legal framework for banking supervision is also necessary, including provisions relating to authorization of banking establishments and their ongoing supervision; powers to address compliance with laws as well as safety and soundness concerns; and legal protection for supervisors. Arrangements for sharing information between supervisors and protecting the confidentiality of such information should be in place.¹⁷⁶

¹⁷² Brooksley Born, *International Regulatory Responses To Derivatives Crises: The Role Of The U.S. Commodity Futures Trading Commission*, 21 NW. J. INT’L L. & BUS. 607, 613 (2001).

¹⁷³ See *supra* notes ?? and accompanying text; Harm Schepel, *The Constitution of Private Governance. Product Standards in the Regulation of Integrating Markets*, Chapter 7.1. Ph.D. Thesis EHI Florence 2003.

¹⁷⁴ Jorge Guira, for example, believes that, for developing countries such as Brazil, “there is little question that, despite the sensitivity of this area in domestic political environments who do not like such ‘soft law’ imposed on them, such institutional development [of, inter alia, IOSCO’s standards] serves a highly positive social purpose.” Jorge M. Guira, *Preventing and Containing International Financial Crisis: the Case of Brazil*, 7 L. & BUS. REV. AM. 481, 487 (Fall, 2001).

¹⁷⁵ Tony Porter, *The Transnational Agenda for Financial Regulation*, in DEVELOPING COUNTRIES, IN FINANCIAL GLOBALIZATION AND DEMOCRACY IN EMERGING MARKETS 100 (LESLIE ELLIOTT ARMJO, ED., 1999).

¹⁷⁶ <http://www.bis.org/publ/bcbs30.pdf#xml=http://search.atomz.com/search/pdfhelper.tk?sp-o=6,10000,0>

The Basle Committee has also established a substantial number of ties with other central bankers and bank supervisors. As it has explained:

Over the past few years, the Committee has moved more aggressively to promote sound supervisory standards worldwide. In collaboration with many non-G-10 supervisory authorities, the Committee in 1997 developed a set of "*Core Principles for Effective Banking Supervision*", which provides a blueprint for an effective supervisory system. To facilitate implementation and assessment of implementation by outsiders, the Committee in October 1999 developed a "*Core Principles Methodology*."¹⁷⁷

Moreover, the committee "stands ready to give advice to supervisory authorities in all countries."¹⁷⁸ BIS supervisors (the Basle Committee does not have its own secretariat) attend a bi-annual International Conference of Banking Supervisors, sponsored by the Basle Committee partly for this purpose.¹⁷⁹ In 2002, the conference, held in South Africa, featured sessions on two subjects: the implementation of the Basle Accord and "creat[ing] a stable financial environment" in emerging market economies.¹⁸⁰ Other, more formal international organizations have adopted Basle principles.¹⁸¹

This is international law as the talking shop, except that, rather than being the General Assembly or UNESCO, these organizations look like the Security Council. In each of them, the largest, richest, and most important jurisdictions guide the advice offered by the organizations. Developing countries, on the other hand, are offered the advice to take or leave. The vast majority of them takes – or at least claim to do so.

So much, so familiar. As a disseminator of standards from first world to the rest of the world, these organizations look quite a bit like the ones created by global treaties, to which many subscribe, but, some argue, few obey – unless the treaty recommends low cost compliance, which the broadly worded standards generally offer. On this level, the organizations solve coordination problems, benefit from network effects, and create standardization by cabining the wide range of regulatory choices domestic financial regulators face.

For developing countries, then, the organizations' increasingly formally issued hard rules are perhaps less relevant than their quickly promulgated soft ones. The Basle Committee and IOSCO are to them venues through which they obtain information about best regulatory

¹⁷⁷ <http://www.bis.org/bcbs/cacomments.htm> (site last visited ???).

¹⁷⁸ <http://www.bis.org/bcbs/aboutbcbs.htm> (site last visited ???).

¹⁷⁹ <http://www.bis.org/bcbs/aboutbcbs.htm> (site last visited ???).

¹⁸⁰ <http://www.bis.org/press/p020919b.htm> (site last visited ???).

¹⁸¹ For example, as Sol Picciotto has observed, "the members of the Basle Committee have used their influence to urge the formation of a half-dozen other specialized, regional groupings with which it can coordinate supervision efforts, such as the Offshore Group of Bank Supervisors." Sol Picciotto, *Networks In International Economic Integration: Fragmented States And The Dilemmas Of Neo-Liberalism*, 17 Nw. J. Int'l L. & Bus. 1014, 1041 (1997).

practices, and the common standards that, it is hoped, might persuade investors from wealthy countries to consider diversifying into emerging markets. And finally, membership in the organizations (with the exception of the Basle Committee, which does not accept new members) may convey to the regulators the same sort of badge of respectability as participation in more formal international organizations, such as the UN.¹⁸²

This sort of proselytization has met with success even beyond the community of bank supervisors, and thus is not without some substantive bite, if not because of what IOSCO requires, because of what other entities who listen to IOSCO require. As the General Accounting Office has concluded, the “IMF, the World Bank, and other international financial institutions that provide direct assistance use the Basle principles in assisting countries to strengthen their supervisory arrangements in connection with their work aimed at promoting financial stabilization and supporting improved supervisory qualifications.”¹⁸³

Modeling: Ever Developing Regulatory Cooperation

1. The Second Wave of IFROs

Although the Basle Committee and IOSCO are the two most established IFROs, they are by no means unique.¹⁸⁴ There recently has been a proliferation of IFROs modeled on both organizations. In many cases, in fact, these two founding IFROs are members of the entities created in their image. A brief tour through the second generation of IFROs is instructive in both illustrating the design and purpose of the organizations and the extent of the phenomenon of regulatory cooperation that they represent.

IASB IOSCO’s closest and perhaps most currently vibrant partnership may lie in its relationship with the semi-private International Accounting Standards Board, which consists of some government and some private accountants from a few select countries.¹⁸⁵

¹⁸² See Raustiala, *supra* note ?? at 60-61 [eds: va j intl l article].

¹⁸³ GEN. ACCOUNTING OFFICE, INTERNATIONAL FINANCE ACTIONS TAKEN TO REFORM FINANCIAL SECTORS IN ASIAN EMERGING MARKETS, REPORT TO CONGRESSIONAL REQUESTERS 32, available at <http://www.gao.gov/archive/1999/gg99157.pdf>. See, e.g., INT’L MONETARY FUND, WORLD BANK, EXPERIENCE WITH THE ASSESSMENTS OF THE IOSCO OBJECTIVES AND PRINCIPLES OF SECURITIES REGULATION UNDER THE FINANCIAL SECTOR ASSESSMENT PROGRAM 3 (1999) (stating that the Objectives and Principles “form an essential part of the standards and codes work undertaken in the Financial Sector Assessment Program... The Principles set a standard against which a country’s practice of regulation and supervision of securities markets is assessed.”) available at <http://www.imf.org/external/np/mae/IOSCO/2002/eng/041802.pdf>; WORLD BANK, EVALUATING LEGAL INSTITUTIONS (stating that “The IOSCO Objectives and Principles, with a defined rating system, are widely used by the International Monetary Fund (IMF), the World Bank and others in assessing the health of the securities markets of countries.”) at <http://www1.worldbank.org/publicsector/legal/evaluatinglegal.htm>

¹⁸⁴ Herbert Marais has observed that most IFROs are concerned with the “preparation and dissemination of standards ... directed towards self-regulation of the professionals.” Herbert V. Marais, *The Quest For International Standards: Global Governance Vs. Sovereignty*, 50 U. KAN. L. REV. 779, 786 (2002).

¹⁸⁵ The complicated details of the IASB’s structure can be found in its constitution. See <http://www.iasb.org.uk/cmt/0001.asp?n=3268&s=9361721&sc={37153A4F-0719-4CD1-96C5-7BA743C0D48A}&sd=259382760> (site last visited ???).

The Board has attempted to solve the difficult question of whether the rather different accounting standards employed throughout the world can be harmonized (and, as Beth Simmons has noted, American accounting standards are particular outliers both because they are more strict than those in place on the European continent, and also extremely important, as they must be used by companies seeking entrance to America's capital markets).¹⁸⁶ As one former SEC commissioner has stated, "one cannot overlook the potential expansion of investment opportunities if all issuers could use one set of accounting standards that would be accepted world-wide for securities offerings."¹⁸⁷ As the Board has explained, it "and IOSCO [have] work[ed] on a programme of 'core standards' which could be used by publicly-listed enterprises when offering securities in foreign jurisdictions."¹⁸⁸

The IASB is organized, however, in the usual style of IFROs: it began as an informally constituted committee; it was then reconstituted as a "not-for-profit corporation incorporated in the State of Delaware" in March of 2001; the corporation was later transformed into the parent entity of the IASB, an "independent accounting standard setter based in London."¹⁸⁹ However, it also has moved increasingly to publicize its deliberations, in an effort, some commentators believe, to win acceptance of its International Accounting Standards by both IOSCO's Technical Committee and its member agencies.¹⁹⁰

IAIS Established in 1994 as a nonprofit corporation in Illinois, the International Association of Insurance Supervisors (IAIS) represents insurance supervisory authorities in approximately 100 jurisdictions.¹⁹¹ It is organized rather similarly to IOSCO, and, as with the

¹⁸⁶ Beth A. Simmons, *The International Politics of Harmonization: The Case of Capital Market Regulation*, 55 INT'L ORG. 589, 595 (2001), *see also* F. Greene et al., *Hegemony or Deference: U.S. Disclosure Requirements in the International Capital Markets*, 50 BUS. LAW. 413, 418 (1995) (describing loss of market share of U.S. exchanges to foreign exchangers subject to less rigorous accounting requirements).

¹⁸⁷ Hunt, *supra* note ??, at 1114.

¹⁸⁸ <http://www.iasb.org.uk/cmt/0001.asp?s=9361721&sc={37153A4F-0719-4CD1-96C5-7BA743C0D48A}&n=3294#faq5> (site last visited ???); *see also* Kung, *supra* note ?? at 474-77.

¹⁸⁹ <http://www.iasc.org.uk/cmt/0001.asp?s=9279469&sc={5AF81BF1-2A00-46C7-86AF-F287B152DCB7}&n=80> (site last visited ???). The IASB, however, differs from other IFROs by including private members and by its rather detailed constitution. <http://www.iasc.org.uk/cmt/0001.asp?s=9279469&sc={5AF81BF1-2A00-46C7-86AF-F287B152DCB7}&n=3268> (site last visited ???).

¹⁹⁰ The restructuring "include[s] changes in the IASC's objectives and strategy, due process, standards implementation and enforcement, and funding mechanisms." Maureen Peyton King, Note, *The SEC's (Changing?) Stance On IAS*, 27 BROOK. J. INT'L L. 315, 332 (2001). As King has noted, these changes respond to criticism of the way the organization was organized. *See id.* at 332 n.85; *See* THE IASC - U.S. COMPARISON PROJECT: A REPORT ON THE SIMILARITIES AND DIFFERENCES BETWEEN IASC STANDARDS AND U.S. GAAP 15 (Carrie Bloomer ed., 2d ed. 1999). The SEC has expressed some skepticism about the way the old IASC developed its standards:

While IOSCO is a committee of securities regulatory agencies, the IASC is an independent, private sector organization. The 1995 core standards agreement between IOSCO and the IASC did not alter the structure, composition or operating procedures of the IASC, and IOSCO was not given any type of veto. IOSCO, through its Working Party No. 1, monitors the standard-setting process both as a non-voting observer at IASC Steering Committee and Board meetings, and as one of the many groups commenting on specific IASC proposals.

<http://www.sec.gov/news/studies/acctgsp.htm>. Now that the IASC has released a number of standards, the SEC has solicited comments on their quality. *See supra* notes ?? and accompanying text [eds. Concept release 2000].

¹⁹¹ *See* Zaring, *supra* note ?? at 297-304.

Basle Committee, the BIS serves as its secretariat.¹⁹² Like both of these organizations, IAIS has issued global insurance principles. It also has conducted research on supervision problems, provided training and support on issues related to insurance supervision, and organized meetings for insurance supervisors, including an “Annual Conference where supervisors, industry representatives and other professionals discuss developments in the insurance sector and topics affecting insurance regulation.”¹⁹³ Like IOSCO, IAIS permitted over 60 observers “representing industry associations, professional associations, insurance and reinsurance companies, consultants and international financial institutions,” to participate in its meetings and deliberations.¹⁹⁴

FSF The G-7 recently created a Financial Stability Forum, “to ensure that national and international authorities and relevant international supervisory bodies and expert groupings can more effectively foster and coordinate their respective responsibilities to promote international financial stability, improve the functioning of the markets and reduce systemic risk.”¹⁹⁵ The Forum meets biannually and currently consists of 26 national regulatory agencies, and, inter alia, the Basle Committee and IOSCO.¹⁹⁶ It is run by the General Manager of the Bank for International Settlements, who “was appointed Chairman of the FSF in a personal capacity.”¹⁹⁷

Joint Forum In fact, IFROs themselves are coming together to create IFROs, second order collaborations between regulators as channeled through the first order organizations that occupy particular issue areas. IOSCO, the Basle Committee, and IAIS have formed a “Joint Forum on Financial Conglomerates,” – to deal with the regulatory issues raised by multinationals that offer banking, investment banking, securities brokering, and insurance services to clients. In November, 2001, that forum issued its own set of Core Principles.¹⁹⁸ As is the case with the founding IFROs, the Joint Forum informally invited commentary on its draft proposals.¹⁹⁹ The forum issued a “press communiqué” stating:

The Basle Committee, IOSCO and IAIS stress the working paper nature of the documents and invite comments which will be taken into account in the evolution of these papers and in the implementation of supervisory guidance. The input from both the industry and the supervisory community in each sector will also

¹⁹² <http://www.iaisweb.org/framesets/about.html> (site last visited ???). The IAIS secretariat was moved to the BIS in 1996. <http://www.bis.org/press/p961023.htm#pgtop>.

¹⁹³ <http://www.iaisweb.org/framesets/about.html> (site last visited ???).

¹⁹⁴ <http://www.iaisweb.org/framesets/about.html> (site last visited ???).

¹⁹⁵ Communiqué of G-7 Finance Ministers and Central Bank Governors, February 20, 1999 (available at <http://www.iaisweb.org/framesets/inter.html>).

¹⁹⁶ <http://www.iaisweb.org/framesets/inter.html> (site last visited ???).

¹⁹⁷ Communiqué of G-7 Finance Ministers and Central Bank Governors, February 20, 1999 (available at <http://www.iaisweb.org/framesets/inter.html>).

¹⁹⁸ <http://www.bis.org/publ/joint02.pdf#page=15>

¹⁹⁹ <http://www.bis.org/bcbs/jfhistory.htm>

influence the continuing work of the Joint Forum in addressing supervisory issues that arise from the continuing emergence of financial conglomerates and the blurring of distinctions between the activities of firms in each financial sector.²⁰⁰

The principles of the Joint Forum, although broad, do matter for developing markets. As the Forum acknowledged, “The IMF and the World Bank” suggested that principles be developed, in part to “help assessors improve their understanding of the principles and thereby make the implementation and assessment process more effective.”²⁰¹ That important financial institutions such as the IMF and the World Bank is no surprise: these institutions made up the most biting aspect of the proselytization functions of IFROs that I earlier illustrated with reference to IOSCO’s own core principles.²⁰²

FATF The Financial Action Task Force, created by the G-7 in Paris in 1989, has issued a set of “40 Recommendations” to combat money laundering.²⁰³ The organization “comprises 29 governments and two regional organizations representing the major financial centers of the Americas, Europe, and Asia.”²⁰⁴ It is composed of “Members of the ministries of Finance, Justice, the Interior, and External Affairs, financial regulatory authorities and law enforcement agencies.”²⁰⁵

2. IOSCO and the Basle Committee Together

The Basle Committee and IOSCO do not just pursue their own regulatory agendas: they work together to create common standards of supervision.²⁰⁶ As the SEC has noted, “through its membership in ... IOSCO..., the Commission has been cooperating with the Basle Committee ... with respect to the use of proprietary ... models to determine bank capital requirements for market risk.”²⁰⁷ IOSCO and the Basle Committee also coordinated efforts to prepare the financial markets for the Y2K bug.²⁰⁸

To be sure, inter-organizational collaboration hasn’t always been perfectly harmonious. In 1991, the Basle Committee entered discussions with IOSCO to jointly develop a framework for regulation of both credit risk (roughly, the making of loans), with which the 1988 accord had

²⁰⁰ <http://www.iosco.org/news/pdf/IOSCONEWS49.pdf> (site last visited ???).

²⁰¹ Joint Forum, *Core Principles Cross-Sectoral Comparison*, para. 12, available at <http://www.bis.org/publ/joint03.pdf>.

²⁰² See *supra* notes ?? and accompanying text.

²⁰³ The recommendations are available at http://www1.oecd.org/fatf/40Recs_en.htm (site last visited ???).

²⁰⁴ FATF Annual Report 2001-02, available at http://www1.oecd.org/fatf/pdf/AR2002_en.pdf at 2. The international organization members are the Gulf Coordination Council and the European Union. http://www1.oecd.org/fatf/Members_en.htm (site last visited ???).

²⁰⁵ FATF Annual Report 2001-02, available at http://www1.oecd.org/fatf/pdf/AR2002_en.pdf at 2.

²⁰⁶ See e.g., Picciotto, *supra* note ?? at 1042 (“Efforts have been made to establish a liaison between IOSCO and the Basle Committee.”).

²⁰⁷ 63 Fed. Reg. 59362, 59384 (November 3, 1998).

²⁰⁸ Former SEC Commissioner Isaac Hunt describes the coordination of these efforts, as well as the efforts of IOSCO more specifically. See Hunt, *supra* note ?? at 1108-10.

been principally concerned, and market risk (such as the buying and selling of securities in financial markets).²⁰⁹ Richard Breeden, then the head of the SEC and chairman of the Basle-IOSCO committee, ultimately scuttled the possibility of a joint framework, which he believed would result in drastically reduced capital requirements for U.S. securities firms.²¹⁰ But on other occasions, joint collaboration appears to have made a real impact on member jurisdictions. For example, the GAO has concluded that “[i]n Germany, reporting for derivatives has been further improved by banks, especially through disclosure of value-at-risk estimates that were introduced in Basle Committee on Banking Supervision and IOSCO Technical Committee papers.”²¹¹

4. Conclusions

What are we to make of this proliferation of international organizations? Joseph Norton believes that “[o]ver the past two decades, the international financial community has been in the process of devising a ‘consensus’ on standards and codes of conduct and a related loose international institutional framework to achieve financial stability and to develop robust financial systems on a global basis.”²¹² If it has done so, it has used an ever increasing number of ever more institutionalized IFROs to achieve these goals. But with the second wave of IFROs it is too soon to tell whether the wealthy countries will be able to agree on a common approach to preventing money laundering, or capital adequacy standards for insurance companies, and so on.

The proliferation of international financial regulatory cooperation is a recent development, and one gathering increasing momentum, but it is not an unpredictable one.²¹³ Political theorists have long posited that technical cooperation by self-interested regulators could expand into an internationalization of regulation. Neo-functionalists such as Ernst Haas and, before him, David Mitrany, posited that international cooperation is likely to develop along task specific lines when prodded by domestic actors who expect to benefit from it.²¹⁴

²⁰⁹ http://www.riskglossary.com/articles/basle_committee.htm (site last visited ???).

²¹⁰ http://www.riskglossary.com/articles/basle_committee.htm (site last visited ???).

²¹¹ GAO/GGD/AIMD 97-8 (also discussing the effects of Basle on Australian, Japanese, Singaporean, Swiss, and British bank regulators).

²¹² Joseph J. Norton, *The Modern Genre Of Infrastructural Law Reform: The Legal And Practical Realities--The Case Of Banking Reform In Thailand*, 55 SMU L. REV. 235, 238 (2002); see also Joseph J. Norton, *A "New International Financial Architecture?"--Reflections on the Possible Law-Based Dimension*, 33 INT'L LAW. 891 (1999).

²¹³ I, for one, have explored the implications of a momentum in this field before. Zaring, *supra* note ?? at 323-25.

²¹⁴ David Mitrany's classic exposition of functionalism, *A WORKING PEACE SYSTEM*, first appeared in 1943, and was heavily influenced by the new deal, which he interpreted to represent a fundamental shift in political power from the states to the federal government that had occurred quietly because of the way the New Deal created specific new powers in task-defined federal agencies such as the SEC and the Tennessee Valley Authority. *Id.* at 56-57 (“No attempt was made to relate [New Deal reforms] to a general theory or system of government.... Yet the new functions and the new organs, taken together, have revolutionized the American political system. The federal government has become a national government.”). Ernst Haas refined the theory (he called it “neo-functionalism”) and applied it to European integration: he believed that technical experts, if linked to effective interest groups, could further integration on a regional level. ERNST HAAS, *THE UNITING OF EUROPE: POLITICAL, SOCIAL, AND ECONOMIC FORCES, 1950-1957*, 19 (1958). His study of Europe substantiated “the pluralistic thesis that a larger political community can be developed if the crucial expectations, ideologies, and behaviour patterns of certain key groups can be successfully refocused on a new set of central symbols and institutions,” provided the community was developed from

The crucial insight of neo-functionalism, for our purposes, is its recognition that regulatory cooperation in particularly issue areas can, under the right circumstances, enmesh states and societies in international cooperation.²¹⁵ Thus IFROs grow and/or beget more IFROs and expand turf as the members of these organizations see their interests more globally. There are a number of implications to this process of enmeshment. One is that the growth of regulatory cooperation will likely be accompanied by a mobilization of, and interaction with, interested private groups affected by the organizations.

The IASB's relationship with IOSCO is a good example of this, as is the organization's vast affiliate membership of broker's organizations and private stock exchanges.²¹⁶ Another such implication is that the enmeshing of domestic regulators in international regulatory frameworks will turn the interests of the regulators abroad. We can see this in the SEC's annual reports of its work with IOSCO.²¹⁷ The Federal Reserve has ALSO published a great deal of material about its work with the Basle Committee.²¹⁸ And the final implication – a rather strong claim – is that after these entities are drawn further into the international regulatory framework of IFROs, a return to solely domestic regulation will become increasingly unlikely.²¹⁹

To be sure, neo-functionalism is a controversial theory among political scientists – it is, for one thing, very difficult to quantify how much harmonization the theory demands, and even in drawing-together entities such as the European Union, its predictive power has been hotly contested.²²⁰ But whatever its drawbacks in other contexts, IFROs exhibit much of the informal coagulation predicted by Haas and Mitrany.

Thus, IFROs grow and/or beget more IFROs and expand turf as the members of these organizations see their interests more globally – a sensitivity that can be fostered by participation in the organizations. Part of the neo-functionalist story of a momentum to informal regulatory collaboration turns on what are now termed network effects.

To economists, network effects exist for those products for which the utility of the product to the consumer increases as other consumers obtain the product. Email is an example. The ability to get and receive email is worth more to you the more other people have email

democratic states with sophisticated economies enmeshed in international trade and finance. *See id.* at xiv-xvi.

²¹⁵ Paul Taylor identified this sort of expansion in his introduction to one of David Mitrany's final publications. *See* Paul Taylor, *Introduction*, in DAVID MITRANY, *THE FUNCTIONAL THEORY OF POLITICS* x (1975).

²¹⁶ *See supra*, notes ??? and accompanying text.

²¹⁷ *See supra*, notes, ?? and accompanying text.

²¹⁸ *See supra* notes ?? and accompanying text.

²¹⁹ Zaring, *supra* note at 324-25.

²²⁰ *See, e.g.*, ANDREW MORAVCSIK, *EUROPE'S INTEGRATION AT CENTURY'S END, IN CENTRALIZATION OR FRAGMENTATION? EUROPE FACING THE CHALLENGES OF DEEPENING, DIVERSITY, AND DEMOCRACY* 1, 51 (ANDREW MORAVCSIK ED., 1998). On the other hand, academics like Alec Stone Sweet believe that the theory has substantial predictive power. *See* Sweet, *supra* note ??.

addresses on the network to which you have access.²²¹ Kal Raustiala has applied an understanding of these network effects to regulatory cooperation. He has noted that regulators across jurisdictions may settle on a common regulatory standard, one that permits them to exchange information easily and broaden the reach of their regulatory efforts. In these circumstances,

network theory predicts that tipping occurs, leading to an equilibrium in which one (or more...) regulatory standard dominates. Network effects thus aid policy standardization. [T]his is not to say that convergence is "caused" by network effects, but rather that network effects boost the existing incentives to standardize.²²²

Thus, if SEC and Fed regulators are interested in creating a common standard with other jurisdictions, these organizations can serve as the fora in which such a standard is hammered out. Whatever standard is chosen has a good chance of developing an adoptive momentum by virtue of the advantages regulators see in being a part of the "network" of regulators applying the same schema to their regulated industry.

IV. Conclusion: The Promise of the New Process

I don't want to overly complicate the prescriptive takeaway for a phenomenon that, as we have seen, is plenty descriptively complex. But in evaluating whether a phenomenon is good or bad, one must have some idea of what it actually does, and much of what I have tried to do in this article is designed to describe and theorize how regulatory cooperation actually works.²²³ In this section, I consider some normative implications of the phenomenon, and site what I have found in the literature of international cooperation.

A. *The Implications for Scholarship*

First: the literature. Legal scholars disagree whether the paradigmatic limitation of legal personality to states ought to be opened up in a world where subjects of states, including agencies, nongovernmental organizations, and even people, play an active role. I argue that, at least in areas of technical regulatory cooperation, that this debate is not fruitful, and that sub-state actors are both clearly important and independent. However, this does not mean that the rationalist parsimony of state-centered paradigms of international relations should be abandoned.

²²¹ For a general discussion, see Zaring, *supra*, note ?? at ??; Lemley & McGowan, *supra* note ??, at 489-90, 492-93; Raustiala, *supra* note ?? at 63.

²²² Raustiala, *supra* note ?? at 65.

²²³ *Pace* MALCOLM FEELEY & EDWARD RUBIN, JUDICIAL POLICY MAKING 11 (1998).

Those paradigms have much to say about what happens in regulatory cooperation – if they are refocused on the regulators.

Legal scholars have also recently challenged the concept of “soft law” in international life. Although this debate is a helpful one, I argue that the regulatory cooperation studied here transcends it. IFROs represent a classic version of non-required cooperation, but calling it soft law is pointless. Financial regulatory cooperation enjoys widespread adherence, in the way that widely adopted models of regulation enjoy adherence in any regulatory context. Even if it is nonbinding, what does it matter, if it is obeyed?

This article has proceeded, per an assumption of international relations liberals, on the premise that international society is disaggregated.²²⁴ That is, the interests and perspectives of the agencies engaged in international regulatory cooperation can usefully be understood separately from the interests of the states that comprise them.²²⁵

This premise is often thought to be a controversial one, but, really, few international lawyers, at least in this area, would seriously dispute it. Concerns about a democracy deficit, for example, make little sense if agency actions are inseparable from the interests of the states to which they belong. Provided these states are democracies, after all, there is little chance that the agencies that faithfully act in their polity’s interest will act undemocratically (the calculus is of course different if the “democracy deficit” is being used as a shorthand for a First World-Third World power imbalance).

However, the sort of collaboration wrought by agencies often mimics the kind of collaboration that realists expect from state-state cooperation, albeit on a smaller scale. International financial regulators have designed regimes that seek *legitimacy* for their actions with ever more process safeguards: this can be understood as an agreement to constrain the action that the agencies take in a way to get interested parties to buy into to the process of regulatory harmonization – a classic observation about how regimes work.²²⁶

²²⁴ See Slaughter, *supra* note ?? at ??; Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT’L L. 205, 230 (1993) *see generally* Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT’L ORG. 513, 513 (1997); Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two Level Games*, 42 INT’L ORG. 427 (1988) (an early and influential model of the ways domestic concerns could affect the international relations of the state). As William Burke-White has put it, “According to positive liberal international relations theory, individuals--the basic actors in international society--organize to promote their own interests; States represent some subset of those domestic interests; and international outcomes depend on the configuration of national interests.” William Burke-White, *Community Of Courts: Toward A System Of International Criminal Law Enforcement*, 24 MICH. J. INT’L L. 1, 29 (2002) (citing Moravcsik, *supra*).

²²⁵ *See generally* Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, 24 MICH. J. INT’L L. 1041 (2003).

²²⁶ Stephen Krasner, who set much of the framework for regime theory, has increasingly turned to examining regimes as precommitment strategies by states. *See* Stephen D. Krasner, *Global Communications and National Power: Life on the Pareto Frontier*, 43 WORLD POL. 336, 335-40 (1991) (defining regimes as solving particular kinds of coordination games by states); Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in INTERNATIONAL

Similarly, the *proselytization* in which IFROs can be seen as a realist, rational effort to create baseline regulatory standards across the globe, perhaps to reduce regulatory arbitrage.²²⁷

I nonetheless think that the question of the rationality of IFROs depends a bit on the time in their development that you look at them. They begin as ad hoc, path dependent solutions to regulatory problems. Some of these problems are unique to the financial sector, and the explosion of international markets. But in other ways, financial regulatory cooperation has analogs in other international issue areas.

That cooperation, in the end, is not a stable thing. It might start in lieu of treaties, pledges or other sorts of international agreements – and often steals a march on them. But, it rapidly adopts the trappings of domestic administrative process and aspires to establish this sort of uniformity of process, and of standard, as widely as possible. So even though international regulatory cooperation is an explosive regulatory phenomenon, it may, in the end, not create a new way of doing administrative law, but rather the same old one, albeit, one offered by new international institutions, and with broad international reach. In this way, the internationalization of both hard and soft administrative rules doesn't require international lawyers to throw out the way they understand the international system.

Kal Raustiala has recently argued that the concept of soft law makes little sense in a world where states proceed by either contract-type agreement, or more flexible pledges.²²⁸ Andrew Guzman also believes that the concept obscures more than it helps.²²⁹

I agree – to a point. Financial regulatory cooperation would seem to be the epitome of soft law, but it is much harder than it looks. The Basle Accord, for one, has enjoyed widespread compliance despite being “nonbinding.”²³⁰ IOSCO's pronouncements are more flexible, and pledge like, but are not designed to create a wide zone of legitimate difference.²³¹ Instead the nonbinding character of regulatory cooperation is designed to create a harmonized regime. That it depends upon the agreement of regulators about which practices are best, does not alter the fact that those practices on which there is consensus quickly achieve widespread adherence.

REGIMES 2, 2 (Stephen D. Krasner ed., 1983) (defining regimes as involving “sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations”).

²²⁷ As Claire Kelly notes, “start from the realist premise and claim that regimes operate to mitigate the harmful effects of a state of anarchy by promoting cooperation.” Claire R. Kelly, *Regime Theory and Realist Constraints*, 44 VA. J. INT'L L. 545, 554 (2004). See generally Claire R. Kelly, *The Value Vacuum: Self-Enforcing Regimes and the Dilution of the Normative Feedback Loop*, 22 MICH. J. INT'L L. 673 (2001).

²²⁸ Kal Raustiala, *Form and Substance in International Agreements* at 16-19 (working paper draft on file with the author).

²²⁹ Guzman, *supra* note ?? at 1880 (“soft law remains largely outside the theoretical framework of international legal scholars”).

²³⁰ See *supra* notes ?? and accompanying text.

²³¹ See *supra* notes ?? and accompanying text.

In this sense, regulatory cooperation, both hard and soft, amounts to administration by agreement in a way just as substantial as agreement by treaty. It is, accordingly, somewhat unhelpful to focus on the legal quality of the international agreement when it enjoys widespread compliance.

Finally, my findings vindicate the international networks literature.²³² We know networks exist: we don't have a particular reason to believe they are good things. There is still more work to be done here, but, as I discuss below, there are reasons to be cautiously positive about the qualities of network governance. We must remember, however, that regulatory cooperation is a phenomenon dominated by first worlders.

B. Prescriptive Implications

Second: the prescriptive implications. Regulatory cooperation is not a phenomenon that will be costless for national lawmakers to control. The explosion of outlets for financial regulatory cooperation that I describe, has, after all, developed without the *ex ante* endorsement by treaty or national legislature, or, at least in the United States, the *ex post* imprimatur of national courts.

Regulatory cooperation therefore is both a fact on the ground and a choice presented for national lawmakers. These lawmakers must decide whether they wish to try to develop international coordination through more centralized means, such as through treaties or existing international organizations, or whether they wish to leave the cooperative process to the informal outlets increasingly offered by regulatory cooperation.²³³

In making this, choice, lawmakers must remember that regulatory cooperation moves quickly and flexibly; national lawmakers often do not. Moreover, regulatory cooperation, at least in the financial sector, addresses technical and complex issues, about which generalist national lawmakers are usually inexpert.

Thus, regulatory cooperation is often unobjectionably coordinative; it responds to clear externalities and the prospect of regulatory arbitrage. It is accordingly unlikely that national legislatures or courts will lightly ban the phenomenon, encompassing as it does an aura of expertise and a seemingly necessary response to an increasingly globalized world.

Is the phenomenon a good thing? Should it be encouraged or should lawmakers like Congress do what they can to limit international financial regulatory cooperation? Of course, part of the answer to that question will turn on the issue areas in which the phenomenon can flourish. Regulatory collaboration is particularly appropriate in technical areas of "low politics,"

²³² See Slaughter, *supra* note ??.

²³³ The choice is similar to a domestic one that I have discussed elsewhere: whether to proceed through

where national interests in unique approaches to regulation are hard to discern.²³⁴ In these areas, there is every indication that globalized administrative process is by no means a bad thing.

In the remainder of this section, I focus on two reasons why. I show how the new global administrative process contributes a solution to two evergreen questions that have long exercised international lawyers. The questions are:

Are these bureaucrats on the loose?²³⁵

Can this phenomenon be used to constrain a hegemonic power?²³⁶

I offer two hopeful answers to both questions.

1. The Democratic Deficit Problem

Many commentators have evinced concern about whether international regulatory agreement is subject to control by elected officials, and to real participation by the people and entities affected by the work of these institutions.²³⁷ This is the democratic deficit inherent in international regulatory agreement. Some have called for a variety of procedural fixes to ensure the accountability of phenomena like IFROs, ranging from enhanced internet access to the proposals of these organizations to formal treaties ratifying the existence and work of the regulators.²³⁸ Others have downplayed the problem of popular control of regulators, positing that such control is only one value among many, including the development of effective policy and the control of multinational and many-tentacled corporations.²³⁹ These scholars contrast the work of regulators favorably with that of domestic agencies and legislatures.²⁴⁰

²³⁴ Here, at least, I agree with Guzman. *See* Guzman, *supra* note ?? at 1885 (“those areas in which international law matters ... include ... the entire range of international economic issues, from trade to the international regulation of competition law to environmental regulation”).

²³⁵ *Pace* Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies, And Disaggregated Democracy*, 24 MICH. J. INT'L L. 1041, 1052 (2003) (coining the term “agencies on the loose”).

²³⁶ As Robert Keohane and Mary Grant have observed, “A common response to these new patterns of global governance is to call for greater accountability.” Ruth W. Grant and Robert O. Keohane *Accountability and Abuses of Power in World Politics*, available at <http://www.law.nyu.edu/kingsburyb/spring04/globalization/keohane.Grant%20paper.doc> (“The most complex issues arise with respect to very powerful states with constitutional democratic governments, such as the United States. Such governments are accountable to their citizens and to an array of domestic interests and institutions, but as we have noted, this does not assure accountability to outsiders. Large and powerful states do not depend on subventions from others or on markets, and there is no strong international legal structure governing their actions.”).

²³⁷ *See, e.g.*, Jonathan R. Macey, *Regulatory Globalization as a Response to Regulatory Competition*, 52 EMORY L.J. 1353, 1353-54 (2003) (for a conservative perspective); Kinney, *supra* note ?? at 430-32; Lori M. Wallach, *Accountable Governance in the Era of Globalization: The WTO, NAFTA, and International Harmonization of Standards*, 50 U. KAN. L. REV. 823, 824 (Director of Public Citizen’s Global Trade Watch arguing that harmonization through the WTO and NAFTA (admittedly more formal means of formalization than the ones considered here) “directly and deeply affect an array of domestic policies, [but] were developed in processes that excluded many interested parties”); *see also* Kinney, *supra* note ??, at 430 (“The greatest concern with .. transgovernmental networks involved with international regulation is their limited accountability,” especially compared to “democratically elected governments”).

²³⁸ Kinney has called for a confluence of international policy makers and scholars working under a formally constituted organization like the U.N.’s International Law Commission to address the problem. *See* Kinney, *supra* note ?? at 431-32.

²³⁹ *See, e.g.*, Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies, And Disaggregated Democracy*, 24 MICH. J. INT'L L. 1041 (2003).

²⁴⁰ *See id.*

I take a different view. Although it is possible that democratic control of international cooperation is overrated, it is by no means clear that this control is lacking in financial regulation – an area of regulation mysterious and complex enough to seem like an almost paradigmatic case of bureaucrats on the loose.

There are two reasons to take heart: the first lies in the procedural safeguards adopted by IFROs that seek to promulgate hard rules, and the second lies in the domestic institution that, at least in the United States, carefully watches the rulemaking process. That institution is Congress, and not the courts.

Procedural Safeguards Bureaucrats have not used informal cooperation to dispense with process; instead, in their First World regulatory efforts, they have adopted quite a bit of process. The publicity, comment periods, etc., of hard rules now proposed by organizations such as the Basle Committee is a salve to the democracy deficit, rather than a threat to it.

No doubt, this salve is an imperfect one, because the comment periods, etc, are done by the grace of IFROs.

But the fact remains that as these organizations have evolved and tackled far-reaching regulatory problems, they have done so more openly, and with increasing procedural regularity. There is little reason to believe that this momentum will change.

This is the good news about the legitimacy impetus of regulators who hope to coordinate around hard, biting rules. There is simply no evidence, in the financial arena at least, that cooperation with First World significance will happen without some simulacrum of First World style administrative process.

Legislative, Not Judicial, Control Moreover, perhaps hearteningly, the institution that most oversees IFRO rulemakings in the United States is a particularly democratic branch of government. As we have seen, the Federal Reserve includes a discussion of the Basle Committee in its annual reports to Congress.²⁴¹ A number of individual congressmen have recently sent the American banking regulators a letter expressing their concerns about the development of Basle II.²⁴²

Congress has also expressed interest in constraining the activities of the organizations through disclosure and reporting. In 1996, Congress passed the National Securities Markets Improvement Act of 1996. Section 509 of that Act required the Commission to report to the Congress “on progress in the development of international accounting standards and the outlook

²⁴¹ See *supra* notes ?? and accompanying text.

²⁴² Oxley, Financial Services Letter.

for successful completion of a set of international standards that would be acceptable to the Commission for offerings and listings by foreign corporations in United States markets.”²⁴³

Moreover, many Congressmen have begun to express concern about the lack of accountability implicit in the actions of IFROs. One bi-partisan set of legislators have introduced legislation that would require banking regulators to come to consensus on positions to be taken at the Basle Committee, and, if no consensus could be reached, to defer to the position of the Secretary of the Treasury.²⁴⁴

That bill would also require the agencies to report to Congress before agreeing to any regulation before the Basle Committee: “No ... banking agency ... may agree to any proposed recommendation of the Basel Committee on Banking Supervision before the agency submits a report on the proposed recommendation to the Congress.”²⁴⁵

As the chairman of the House Financial Services Committee has said, because “[c]hanges to the Basel Accord will have a dramatic impact on financial institutions around the globe,” the legislation is designed to “create a mechanism by which Congress can be sure that any changes to the Basel Accord will have a positive effect on both competition and our economy.”²⁴⁶

This developing approach to cure the undemocratic aspects of the generation of regulations in the sphere of international harmonization is rather different than the classic ways these agencies are constrained in domestic law: by courts.²⁴⁷ Neither American nor European courts have yet played an important role in constraining international financial regulation.²⁴⁸

²⁴³ For the October, 1997 report, see <http://www.sec.gov/news/studies/acctgsp.htm> (Pursuant to Section 509(5) of the National Securities Markets Improvement Act of 1996 Report on Promoting Global Preeminence of American Securities Markets).

²⁴⁴ H.R. 2043 (“If the members of the Committee that are participants on the Basel Committee on Banking Supervision are unable to agree on a uniform position on an issue, the position of the Secretary of the Treasury shall be determinative for purposes of paragraph (1) with respect to such issue.”)

²⁴⁵ H.R. 2043.

²⁴⁶ House Committee on Financial Services Press Release, May 9, 2003, *Basel Bill Would unify U.S. Position, Promote Competitiveness*. In the future, thinking about IFRO pronouncements on a scale of hardness and softness might help determine where to strike the balance between permitting these organizations to develop organically or to check their growth with strict limits on American agency participation. The persuasion and jawboning involved with the development of broad principles and the exchange of ideas about best practices seems harmless, particularly to Americans. But it might be wise to require agencies participating in IFROs to file an annual report with Congress indicating the potential regulatory initiatives. For those initiatives designed to result in hard standards, Congress could require advanced notices of proposed rulemaking or issue its blessing with an authorizing statute directing the agency to develop hard standards with foreign regulators if possible. For the Fed’s view of such a statute (as well as for a good explanation of what Basel II is designed to do, see Testimony of Vice Chairman Roger W. Ferguson, Jr., *Basel II and H.R. 2043*, Testimony Before the Subcommittee on Financial Institutions and Consumer Credit, Committee on Financial Services, U.S. House of Representatives, June 19, 2003, at <http://www.federalreserve.gov/boarddocs/testimony/2003/20030619/default.htm> (site last visited ???).

²⁴⁷ I have found no evidence yet of typical judicial review of provisions created by IOSCO and the Basle Committee. One Tax Court case has, however, attributed the origins of a rule to the Basle Committee. *Bank One Corp. v. C.I.R.*, 120 T.C. 174, 222-23 (2003). Martin Shapiro, *Institutionalizing Administrative Space* in *THE INSTITUTIONALIZATION OF EUROPE* 94, 95 (Alec Stone Sweet, Wayne Sandholtz, & Neil Fligstein eds. 2001).

²⁴⁸ Although Martin Shapiro believes that the EU, “which exhibits so much Angst about the democratic deficit ... is likely to move in the direction of judicial ... democratization of the administrative process” by adopting some form of the dialogic method of notice, comment, and lawsuit over the record permitted in American courts. Martin Shapiro, *Institutionalizing Administrative Space* in *THE INSTITUTIONALIZATION OF EUROPE* 94, 112 (Alec Stone Sweet, Wayne Sandholtz, & Neil Fligstein eds. 2001).

But this is not a bad thing. Supervision by Congress is probably the best hope for any sort of supervision of international regulatory cooperation. It is unlikely that the lack of supervision by the courts will change.²⁴⁹

In fact, it is not clear what the courts could do. For example, although American regulators expect litigation over the Basle II accord,²⁵⁰ American courts are unlikely to feel comfortable involving themselves in the accord, even though it will be presented to them as something of a *fait accompli*.

Because the formalities of administrative procedure will have been observed rather scrupulously in this case (with an ANPR, an NPR, and notice and comment on an international level accepted by the Basle Committee), and given that there will probably be some differences between the final rule promulgated by the committee and the American banking regulators, it is unlikely that courts will look closely at a deal that will, in a real way, have been heavily affected by what has already been agreed to internationally.

In this way, the “democratic deficit” threatened by financial regulatory cooperation is really only a judicial deficit. With plenty of agency process on hand, and with the active supervision of Congress, it is by no means clear that First Worlders should worry about the phenomenon.²⁵¹

The caveat here, of course, is that non-First Worlders are faced with a more limited form of participation. Although they are free to participate in the regulatory process offered by IFROs, they have much less control over the activities of the Basle Committee and IOSCO’s Technical Committee than do First World legislatures and executives. But the question is, however, whether this cost is an insurmountable one.

2. Constraint of Hegemonic Power

Other observers of the international scene worry about the role of international law in a world where one power is so much stronger than all of the others.²⁵² What are we to do, it is asked, in a world where the SEC plays an outsized role in the harmonization of accounting

²⁴⁹ I have found no evidence yet of typical judicial review of provisions created by IOSCO and the Basle Committee. One Tax Court case has, however, attributed the origins of a rule to the Basle Committee. *Bank One Corp. v. C.I.R.*, 120 T.C. 174, 222-23 (2003).

²⁵⁰ Telephone Interview with Federal Reserve Board Attorney (Jan. 9, 2004).

²⁵¹ We also see the OECD doing this, at least in some cases. See James Salzman, *The Organization for Economic Cooperation and Development*, working paper at 26 (noting that recent revisions to the OECD’s Guidelines for Multinational Enterprises were first tested among a variety of members “like a focus group” and then “fed into a process that resembled notice-and-comment rulemaking”).

²⁵² For a recent collection of the varying perspectives that advance these concerns, see *UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW* (Michael Byers & Georg Nolte, eds. 2003).

standards and the like? But the way that IFROs work – and I do not seek to be new here – calls a strong conception of hegemonic power into question.²⁵³

Consider the very concept of a hegemonic interest that can be attributed to the United States. Does it include the interests of turf-protecting regulators (to the extent that regulators actually pursue this goal²⁵⁴), the goals of sophisticated financial institutions who wish to act without constraint, or the perspective of American financial consumers?

Each of these oxen has been gored by the efforts of IOSCO and the Basle Committee. The American bureaucrats who attend IOSCO meetings often complain about the demands membership in the organizations create.²⁵⁵ American banking regulators have disagreed with one another about the merits of the impending revisions to Basle's capital accord,²⁵⁶ while some American banks are preparing to (ineffectually) dispute Basle II in domestic courts.²⁵⁷ As for the consumer perspective (if that perspective is represented by Congress), Congress has expressed its worry about – and exercised its supervision of – both the capital accord the accounting standards harmonization efforts of IOSCO.²⁵⁸

In sum, although the organizations do not offer developing countries the same sort of rights as developed ones (and it is, of course, not clear that they should), it is by no means clear that they represent “unilateralism,” whatever such a term would mean when applied to the diverse American economy.²⁵⁹

²⁵³ For a defense of the importance of conceiving of unitary states as principle actors in international relations – an importance that this paper disputes – see Andrew Moravcsik, *Europe's Integration at Century's End, in Centralization or Fragmentation?* EUROPE FACING THE CHALLENGES OF DEEPENING, DIVERSITY, AND DEMOCRACY 1, 51 (Andrew Moravcsik ed., 1998).

²⁵⁴ I am, as are many observers, very skeptical of simplistic claims that agencies attempt to maximize turf. *See, e.g.*, Daryl J. Levinson, *Empire-Building Government in Constitutional Law* 118 Harv. L. Rev. ____ (forthcoming 2005) (questioning “the theoretical basis for believing that government predictably seeks to build empires of either the imperialistic or avaricious variety”); Edward L. Rubin, *Public Choice, Phenomenology, And The Meaning Of The Modern State: Keep The Bathwater, But Throw Out That Baby*, 87 CORNELL L. REV. 309, 320 (2002) (“Within the political sphere . . . , material self-interest models have been energetically proposed and convincingly refuted in such disparate areas as voting behavior, social movement participation, legislative action, and judicial decision-making.”). However, federal banking agencies, with overlapping jurisdictions (the OCC regulates federal banks, the FDIC insures banks, and has some supervisory power over state banks, as does the Fed, which also exercises exclusive supervisory powers over bank holding companies), do often disagree over policies that they each would implement, along with OTS. For a brief overview, see Carter H. Golembe, *Banking Agency Turf War: It's Not Like Wendy's and McDonald's*, 17 Banking Pol'y Rep. 1 (May, 1998).

²⁵⁵ Breeden statement, Telephone Interview with CFTC Attorney (Jan. 2004).

²⁵⁶ The OCC and the Basle Committee, for example, have disagreed about the complexity of the new accord. Speech of Comptroller of the Currency John D. Hawke before the American Academy in Berlin, December 15, 2003, at 17 [web site tk] (noting the unspecific nature of the first accord). The FDIC has also expressed concerns about the substantive implications of the accord, while grudgingly supporting it. Testimony of Donald E. Powell on the New Basel Accord, June 19, 2003, at ?? [web site tk]. For an overview of the structural reasons for conflict between banking regulators, see Golembe, *supra* note ??.

²⁵⁷ Telephone Interview with Federal Reserve attorney (Jan. 9, 2004).

²⁵⁸ *See supra* notes ?? and accompanying text.

²⁵⁹ *See, e.g.*, Joseph S. Nye, Jr., *The Information Revolution And The Paradox Of American Power*, 97 AM. SOC'Y INT'L L. PROC. 67, 72 (2003) (“The United States is the only country with both intercontinental nuclear weapons and large state-of-the-art air, naval, and ground forces capable of global deployment. But . . . economic power is multipolar On this economic board, the United States is not a hegemony; it must often bargain as an equal with Europe. The bottom chessboard is the realm of transnational relations that crosses borders outside government control.”); Grant & Keohane, *supra* note ?? at 39 (“The diversity of views in world politics means that ideological hegemony is rarely attained”).

There is no particular American interest represented in disaggregated financial regulatory cooperation. There is instead the increasing involvement of domestic regulators in the work of international cooperation – cooperation that the regulators feel obligated to vindicate with domestic policymaking.²⁶⁰ The evidence instead suggests that the obligations created by these organizations can result in requirements that "are thought of, spoken of, and function as" binding, regardless of whether they are American, European, or other regulators.²⁶¹

IFROs, in sum, move us towards a global administrative law that is voluntary and created by the regulators themselves. In doing so, it is not clear that they vindicate the interests of the subtly, or not so subtly, powerful within their midst. The very existence of the organizations, if their rulemaking processes are taken seriously, belies the concern about American dominance. For which aspect of that dominance do they really represent?

C. *A Broader View*

This question and others raised by the prospect of financial regulatory cooperation suggest that the phenomenon, likely to be copied in adjacent issue areas, and even emulated in areas of environmental law,²⁶² criminal law,²⁶³ and elsewhere, is not something to fear, at least not in the way it is usually feared. The principal problem of regulatory cooperation is not the prospect of a democratic deficit, which its voluntary procedural safeguards and legislative, rather than judicial, supervision do much to ameliorate.

Instead, the problem is a First World/Developing World problem; a problems where the haves, speaking for the global economy, develop common regulatory standards over which the have nots have little (but not no) say. Financial regulatory cooperation in this way clarifies the prospects of the new global administrative process. It is a process open to the sophisticated, but not to all.

Further research is needed on other issue areas. But the case of financial regulation suggests that the new global administrative law is not so bad for those that have the most at stake in it now; and problematic for those who will have a stake in it in the years to come.

²⁶⁰ John Peterson has observed that in the EU, WTO, and IMF, "supra-national policy-making ... is highly technical. In these and other IOs, experts who share specialized knowledge and casual understandings tend to identify and 'bond' with each other, and often seek to depoliticize the policy process." John Peterson, *Policy Networks, Theorizing the New Europe* draft chapter at 2 (available at Hauser website).

²⁶¹ H.L.A. HART, *THE CONCEPT OF LAW* 226 (1961). Thomas Franck argued that the perceived legitimacy of a rule would exert a "compliance pull" on those charged with implementing the rule. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 51 (1992). Franck was interested in the legality of these rules qua states. His compliance pull mechanism could conceivably matter even more for regulators, especially now that they act in an era that particularly values best practices. Although, then, Franck has been prescient, I do not attempt to apply his work here in the work of pre-legal regulatory cooperation.

²⁶² See *supra* notes ?? and accompanying text.

²⁶³ See *supra* notes ?? and accompanying text.