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Promises and Perils of New Global Governance: A Case of the G20 (with C. Kelly)

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PROMISES AND PERILS OF NEW GLOBAL GOVERNANCE: A CASE OF THE G20

*Sungjoon Cho and Claire R. Kelly**

ABSTRACT

In the wake of the 2008 financial crisis, a new global governance structure emerged. During and subsequent to the crisis, the G20 arose as a coordinating executive among international governance institutions. It set policy agendas, prioritized initiatives and, working through the Financial Stability Board, drew other governance institutions and networks such as the International Monetary Fund, the Basel Committee on Banking Supervision, the Organization of Economic Cooperation and Development, the World Trade Organization, the International Association of Insurance Supervisors and the International Organization of Securities Commissions to set standards, monitor enforcement and compliance, and aid recovery. Its authority cross-cuts regimes and creates collaborative linkages between economic law and social issues such as food security and the environment. Its leadership role, born out of exigency, now continues to evolve as part of the new international economic law order.

The G20's coordination of institutions and networks exemplifies a new form of global governance. Network coordination offers an opportunity to confront complex problems with a needed comprehensive approach. The institutions and networks engage in an ongoing dialectical process that propels standard setters towards convergence on a number of fronts. The actors in this process employ a variety of tools to forge consensus and the

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G20 leverages this consensus-creating process to achieve its goals. Unpacking these tools can help us tackle intricate questions that arise from this new structure. In particular, we focus on concerns of effectiveness and legitimacy originating from the G20's coordination of multiple networks and institutions.

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INTRODUCTION

An unprecedented challenge calls for an unprecedented response. The exigency of the financial crisis in 2008, which precipitated the worst global recession since the Great Depression in the 1920s, forced major global economies to develop a new type of collective regulatory response, which was largely unfathomable under traditional international cooperation mechanisms, such as diplomacy or treaty-making. The leaders of twenty major economies – the G20 Leaders– promptly assumed the unprecedented role of an executive coordinator over pre-existing trans-governmental

regulatory networks (TRNs).¹ In doing so, the G20 harnessed these sector-specific TRNs² comprised of professional regulatory agencies from different economies and set itself at the helm as an executive coordinator. It promised the spontaneity and efficacy necessary to respond to the financial crisis. This article aims to scrutinize this phenomenon of coordinated networks that remains largely unaddressed.

One of the greatest challenges globalization has brought to international law is that it has irreversibly altered the traditional notion of time and space in which we used to grapple with international law.³ The end of the Cold War and the spectacular advancement of technologies have molded a multi-faceted phenomenon of globalization: integration, interdependence, spontaneity, and synchrony. In an unprecedented pace, more goods, more services, more people and more money circulate all over the world.⁴ Nevertheless, the global financial crisis in 2008 has left a sobering lesson that globalization remains a mixed blessing. A globalized financial and trade system has forced national economies to share not only prosperity but also risks. This dark side of globalization tends to cast daunting challenges to regulators – both domestic and international.⁵ First, effects of domestic regulations may become limited as domestic systems become highly sensitive to external forces. Second, as is seen in the climate change debate, certain regulatory problems are *inter-national* per se.

¹ Cf. Andrew F. Cooper, *The G20 as an Improvised Crisis Committee and/or a Contested 'Steering Committee' for the World*, 86 INT'L AFF. 741 (2010) (characterizing the G20 as a "steering committee" or a "crisis committee" to deliver specific regulatory deliverables).

² See generally ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004) (presenting one of the most comprehensive narratives on nascent government networks and their norm-generating effects); David Zaring, *Rulemaking and Adjudication in International Law*, 46 COLUM. J. TRANSNAT'L L. 563, 576 (2008) [hereinafter Zaring, *Rulemaking and Adjudication*] (arguing that "networks are the rulemakers of international administrative law.").

³ See e.g., John Gerard Ruggie, *Territoriality and Beyond: Problematizing Modernity in International Relations*, 47 INT. ORG. 139, 172 (1993) (observing the emergence of a "decentered yet integrated space-of-flows, operating in real time, which exists alongside the spaces-of-places that we call national economies").

⁴ Philip H. Gordon, *Europe's Cautious Globalization*, in 88 CONTEMP. STUD. IN ECON. & FIN. ANALYSIS 3 (Janet Laible et al. eds., 2006) ("[C]learly the degree, intensity, speed, volume, and geographic reach of economic globalization today far exceed anything that has come before."); Dinah Shelton, *Protecting Human Rights in a Globalized World*, 25 B.C. INT'L & COMP. L. REV. 273, 276 (2002). ("[I]nformation and communications technology has emerged as a dominant force in the global system of production, while trade in goods, services, and financial instruments are more prevalent than any time in history.").

⁵ Slaughter characterizes the dilemma of needing more government yet fearing it as a "globalization paradox." SLAUGHTER, *supra* note 2, at 8.

Domestic regulatory efforts alone are insufficient to address such problems. Third, international regulations, if any, may not come as quickly as the urgency would demand.

At the inception and throughout the 2008 financial crisis, society saw national governments struggle to muster stimulus packages, fight off protectionism, and save at-risk entities. Notably, society also saw an international effort to facilitate these national efforts. The G20 Leaders initiated this international effort and managed to save 21 million jobs in 2009 and 2010.⁶ Ironically, however, this unprecedented success of global policy coordination led the public to perceive the G20 from a rather superficial, that is to say mainly “political,” standpoint. In other words, the public remains largely uninformed of the behind-the-scene intense regulatory interactions among professional regulatory agencies at a *micro*-operational level. The bottom line is that G20 and the resources that it brought to bear did not spring out of nothing; they were in fact an outcome of decades-long policy networks between/among like-minded government officials communicating inside and outside of relevant international organizations. Without the unique density and frequency of their interactions in those critical issue areas (such as international finance and securities), the G20 could not have proved so successful: it would have probably been yet another pompous initiative delivering no practical impacts. At the same time, the G20’s coordination of these TRNs to confront the crisis clearly revealed a whole far greater than the sum of its parts.

Admittedly, its success needs to be examined rigorously. Empirical confirmations are still limited and any attempt to quantify these successes may suffer a selection bias. Nonetheless, the coordinated TRN phenomenon is not a mere anecdote: it is a new trend which challenges our conventional understanding of global governance. We must probe closely the new TRN phenomenon, and in particular the coordination of networks, to verify if it brings truly beneficial changes and if so at what costs. And the mere fact that a TRN is successful in creating standards does not necessarily mean that it was as successful as it could have been. By definition, focusing on standards that were developed will not address those instances where the TRN sought to, or should have sought to, develop standards but failed.

In this regard, we propose to examine the work of the web of TRNs involved in the G20’s efforts to steer through the financial crisis by dissecting: (i) the G20’s coordination through the use of regulatory

⁶ *G20 Saves 21 Mln Jobs with Crisis Measures—UN*, REUTERS, Apr. 19, 2010, <http://www.reuters.com/article/2010/04/19/financial-jobs-idUSLDE63I24Q20100419>.

blueprints or frameworks; (ii) the TRNs means by which they arrive at points of decisions (their dynamics); and (iii) the decisions they reach (end products). Much has already been written about TRNs,⁷ but one piece that has been missing is how the TRNs actually do their work, in particular under a political coordinative mechanism, such as the G20.

Additionally, we propose to identify taxonomy of various moves (tools) made within TRNs that we call the “intra-network dynamics.” We make no judgment about the value of any particular tool, although readers may quickly realize that some tools are more palatable than others when one thinks about TRNs as a form of global governance. While these social tools have already been extant in each network, it was the rise of the G20 which awakened their genuine regulatory potential in an unprecedented endeavor to deliver desperate regulatory effects to avert the financial crisis.

We also consider the end products of these TRNs and identify their characteristics as well as their utility. Again, we do not make any value judgment about any particular end product. Instead, we hope that by revealing and deconstructing the G20’s coordination, the intra-network dynamics, and end products we can offer an analytical lens through which we better understand this emerging paradigm of global governance. In our view, this lens will reveal complex questions concerning efficacy and legitimacy.

Our thesis on the G20 as a new paradigm of global governance unfolds in the following sequence. Part I attempts to render a working definition of a TRN. After providing an intellectual pedigree and theoretical underpinnings behind the government network theory, the Part highlights the TRN’s various characteristics, such as the expert, informal, and incremental nature of participants’ dialogue and eventual norm-generating operations. Part II offers a theory of network coordination by explaining the use of frameworks or blueprints that take advantage of pre-existing network dynamics resulting in specific end products or regulatory prototypes. Part III applies the theoretical construction of coordinated TRNs to the case of the G20. This case study offers both empirical confirmations for and mismatches with the TRN model. Part IV evaluates the coordinated TRN model in accordance with two major criteria: efficacy and legitimacy.

Finally, a caveat of this article is in order. Due to its inevitable political nature as a global executive coordinator, the G20 tends to draw

⁷ Pierre-Hugues Verdier, *Transnational Regulatory Networks and Their Limits*, 34 *YALE J. INT’L L.* 113, 114 (2009) (“In recent years, scholars of global governance have devoted substantial attention to the promise and perils of . . . regulatory networks (TRNs).”).

various critics on its performance.⁸ In particular it has been faulted for being an “ineffective talk shop.”⁹ Some question whether the G20 Leaders Summit will have any influence once the crisis subsides.¹⁰ These may be aggravated by heightened expectations given its initial successes.¹¹ Yet our main focus in this article is more of uncelebrated, workmanlike aspects of the G20 operation. We aim to demonstrate, without any ideological bias, the G20’s internal, microscopic operational dynamics, as well as certain conditions under which such operations tend to work best.

I. AN EMERGING GOVERNANCE MODEL: TRANS-GOVERNMENTAL REGULATORY NETWORKS (TRNs)

The recent prominence of the G20 has demonstrated a new possibility in tackling those challenges brought by globalization. TRNs offer a flexible and pragmatic alternative to the treaty process. The TRN process is dialogical, norm-generating, and incremental.

TRNs represent a relatively recent, but increasingly prevalent, center of international law making. Traditionally international rules were negotiated and concluded by a formal treaty-making process. However, barring some exceptions, such as the EU, most international law-making

⁸ See, e.g., Peter Apps, *Eurasia Chief Sees Leaderless "G-zero" World*, REUTERS, Jan. 5, 2011, <http://www.reuters.com/article/2011/01/05/us-eurasia-interview-idUSTRE70422220110105>.

⁹ Christopher Malcolm, *And Then There was One—An Overview of the Fifth Summit of the Americas*, 16 L. & BUS. REV. AM. 11, 16 (2010) (“[T]here were still many others, however, that were skeptical and had expected that it would be no more than a talk shop”); *It Cuts Both Ways, Uncles Sam*, THE ECONOMIC TIMES, Oct. 20, 2010, http://articles.economicstimes.indiatimes.com/2010-10-19/news/27626561_1_global-imbalance-global-reserve-currency-numero-uno (“G20, a group that is mostly seen as a toothless body, a talk shop. . .”).

¹⁰ TOWARD THE CONSOLIDATION OF G20 SUMMITS: FROM CRISIS COMMITTEE TO GLOBAL STEERING COMMITTEE 2 (Colin I. Bradford & Wonhyuk Lim, eds., The Brookings Institute Press 2011) (“There is great concern, expressed by Il SaKong. . .the G20 may fade away as a significant forum for global leadership as the global financial crisis subsides and the current focus on financial and macro- economic issues increasingly shifts to technical matters unsuitable for discussion at the leadership level. . .”).

¹¹ See, e.g., Gabriele Steinhäuser & Greg Keller, *Fuzzy Compromise Threatens Relevance of G-20*, ASSOC. PRESS, Feb. 19, 2011, <http://abcnews.go.com/Business/wireStory?id=12942693>. High expectations on the role of G20 seem to have already formed among global trade investors. In the most recent incidence of global market volatility, they immediately turned to G20 for a prompt collective response. See Se Young Lee, *G20 Ministers Hold Call*, WALL ST. J., Aug. 7, 2011; *G20 Deputies to Hold Crisis Call on Saturday: Brazil*, REUTERS, Aug. 6, 2011.

now occurs in a highly de-centralized structure, which militates against a domestic analogy. Even with the existence of a well-operating international regulatory organization, such as the World Trade Organization (WTO), any formal legislative outcome tends to be limited, often “minimal,” for several reasons.¹²

First of all, a treaty-making process requires an enormous amount of diplomatic, and political, efforts necessary to reach both consensus and compromise among parties concerned. Lobbies from interested and affected constituencies are legion.¹³ Naturally, it is not only a painstaking but also treacherous process. So often, the process loses its initial passion or momentum as it develops.¹⁴ Moreover, a treaty’s legally “binding” nature tends to make negotiating parties reluctant in nailing down any definite texts, leaving them enough flexibility for future contingencies.¹⁵ Likewise, treaties are often accompanied by reservations, understandings

¹² See, e.g., John H. Jackson, *International Economic Law in Times That Are Interesting*, 3 J. INT’L ECON. L. 3, 8 (2000) [hereinafter *International Economic Law*] (viewing that “treaties are often an awkward albeit necessary method of designing institutions needed in today’s interdependent world, but they do not solve many problems”). Cf. Charles Lipson, *Why Are Some International Agreements Informal*, 45 INT’L ORG. 495, 537–38 (1991) (summarizing the benefits of informal agreements vis-à-vis formal agreements (treaties)).

¹³ See, e.g., John Cushman Jr., *Intense Lobbying Against Global Warming Treaty*, N.Y. TIMES, Dec. 7, 1997, <http://www.nytimes.com/1997/12/07/us/intense-lobbying-against-global-warming-treaty.html>; Anup Shah, *COP3—Kyoto Protocol Climate Conference*, GLOBAL ISSUES, Feb. 15, 2002, <http://www.globalissues.org/article/183/cop3-kyoto-protocol-climate-conference>; *Urging the Oil and Auto Industries to Support the Kyoto Protocol*, GREENPEACE, Apr. 5, 2001, <http://www.greenpeace.org/usa/en/news-and-blogs/news/urging-the-oil-and-auto-indust/>; Andrew C. Revkin, *Industry Ignored Its Scientists on Climate*, N.Y. TIMES, Apr. 23, 2009, <http://www.nytimes.com/2009/04/24/science/earth/24deny.html>.

¹⁴ See, e.g., President William J. Clinton, Remarks by the President at the Opening of the Commemoration of 50 Years After Nuremberg: Human Rights and the Rule of Law, Oct. 17, 1995, available in 1998 WL 608247 (“Internationally, as we meet here, talks are underway at the United Nations to establish a permanent international criminal court. Rwanda and the difficulties we have had with this special tribunal underscores the need for such a court. And the United States will work to see that it is created.”); THE AM. NON-GOVERNMENTAL ORG. COALITION FOR THE INT’L CRIM. CT., CHRONOLOGY OF US ACTIONS RELATED TO THE INTERNATIONAL CRIMINAL COURT, www.amicc.org/docs/US%20Chronology.pdf (2011) (“US votes against the adoption of the treaty out of concern that the ICC accuse US nationals of crimes for political reasons.”); Henry T. King & Theodore C. Theofrastous, *From Nuremberg to Rome: A Step Backward for U.S. Foreign Policy*, 31 CASE W. RES. J. INT’L L. 47, 52 (1999) (the U.S. “identified ideological and political differences with the Statute”).

¹⁵ Sungjoon Cho, *The WTO’s Gemeinschaft*, 56 ALA. L. REV. 483, 526 (2004). But see Oona A. Hathaway, *The Cost of Commitment*, 55 STAN. L. REV. 1821 (2003) (explaining reasons why states may wish to sign onto treaties).

and declarations that practically qualify their initial legal effects.¹⁶ Finally, as a treaty-making process is tortuous, so is its “amending” process. Therefore, a regulatory treaty, once fixed, is hard to keep abreast of the subsequently altering regulatory environment.

These shortcomings of treaties often lead to limited, or failed, international cooperation. This in turn causes countries to adhere to their own domestic regulations in a unilateral fashion. This regulatory failure tends to be more revealing and thus more problematic in the face of contemporary economic interdependence, in particular in times of crisis. Global business betrays its frustration in the face of this lack of regulatory coordination that is continuously fragmenting the global marketplace against the wave of globalization.¹⁷

As a response to these challenges, new attempts have emerged to overcome the problems of the conventional treaty-making process. Throughout the world regulators experiencing the same regulatory problems, convene frequently, meeting and talking with each other in order to enlighten and be enlightened. They establish various kinds of relationships, from formal to informal. Occasionally, international organizations like the International Monetary Fund (IMF), the WTO or the Organization for Economic Cooperation and Development (OECD) even provide like-minded regulators with a number of fora to interact. Over time, relationships become solidified and tend to evolve into systematized networks.¹⁸ These TRNs invariably produce certain regulatory norms. The recent experience of the G20 in response to a global financial crisis offers a propitious pathway toward such a new paradigm of global lawmaking and global governance.¹⁹

¹⁶ University of Minnesota Human Rights Library, U.S. Reservations, Declarations, and Understandings to Human Rights Treaties, <http://www1.umn.edu/humanrts/usdocs/usres.html> (last visited June 7, 2011).

¹⁷ See Sungjoon Cho, *Defragmenting World Trade*, 27 NW. J. INT'L L. & BUS. 39, 71 (2006).

¹⁸ See notably Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503, 535 (1995) [hereinafter Slaughter, *International Law*]; Anne-Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFF. 183, 184 (1997); 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 178 (Michael Byers ed., 2000) [hereinafter Slaughter, *Government Networks*].

¹⁹ In fact, the origin of transgovernmental networks dates back to the early seventies with the proliferation of UN agencies such as the “United Nations Children’s Fund (UNICEF),” and the “United Nations Educational, Scientific and Cultural Organization (UNESCO).” See generally United Nations Children’s Fund (UNICEF), About UNICEF, <http://www.unicef.org/uwwide/> (last visited on Oct. 30, 2010). See generally United

Nations Educational, Scientific and Cultural Organization (UNESCO), What is UNESCO, <http://www.unesco.org/new/en/unesco/about-us/> (last visited Jul. 13, 2011). “These professional agencies flourished under the auspices of the UN as many government officials or agencies convened, exchanged views, and undertook joint actions in their sector-specific fora. As the Nineties dawned and with the end of the Cold War, both exogenous and endogenous factors contributed to the transgovernmental regulatory drive.” Sungjoon Cho, *Rethinking APEC: A New Experiment for a Post-Modern Institutional Arrangement*, in WTO AND EAST ASIA: NEW PERSPECTIVES 401 (Mitsuo Matsushita & Dukgeun Ahn eds., 2004). In this context, it can be said that few purely “domestic” issues remain in an era of globalization and interdependence. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), GLOBALIZATION: WHAT CHALLENGES AND OPPORTUNITIES FOR GOVERNMENTS (2006), [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=OCDE/GD\(96\)64&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=OCDE/GD(96)64&docLanguage=En) [hereinafter OECD, *Globalization*]. Likewise, in the United States, non-foreign affairs agencies, such as the Department of Justice and the Department of Treasury accounted for a dramatic increase (from 1,578 to 2,265: 44%) in the levels of US direct hires overseas over the last decade, which mainly reflects the increasing “globalization” of US national interests. THE US GOVERNMENT ACCOUNTING OFFICE (GAO), OVERSEAS PRESENCE: STAFFING AT US DIPLOMATIC POSTS (REPORT TO THE CHAIRMAN, LEGISLATION AND NATIONAL SECURITY SUBCOMMITTEE, COMMITTEE ON GOVERNMENT OPERATIONS, HOUSE OF REPRESENTATIVES) 18–21 (1994), <http://archive.gao.gov/t2pbat2/153262.pdf>. Keohane and Nye depicted this phenomenon as “societal interdependence” which eventuates “policy interdependence.” Robert O. Keohane & Joseph S. Nye, *Transgovernmental Relations and International Organizations*, 27 WORLD POL. 39, 61 (1974) [hereinafter Keohane & Nye, *Transgovernmental Relations*]. In the same vein, Hopkins also observed that “increased interdependence” elicited many important questions, e.g., “how should the world’s food, energy and natural resources be shared among the world’s peoples?” Raymond F. Hopkins, *Global Management Networks: The Internationalization of Domestic Bureaucracies*, 30 INT. SOC. SCI. J. 31, 31 (1978). Future international transactions including imports and exports would be hampered by potential regulatory gaps between domestic and international arenas. As a prescription for “global market failure,” Professor Jackson has emphasized the necessity of “human institutions” which helps markets to function successfully. *International Economic Law*, *supra* note 12, at 5. TRNs discussed in this paper, can be said to fall within the rubric of such human institutions at large. In addition, technological innovation such as the “Internet” has since contributed significantly to the ability to respond to the various transgovernmental regulatory needs brought about by globalization. Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT’L L. 1, 12 (2002) (observing that “the rise of . . .the Internet has progressively made long-distance communication, and thus networks, far easier. . . .”). As Gerard Ruggie aptly observes, this networking phenomenon can be understood as “a decentralized yet integrated space-of-flows, operating in real time, which exists alongside the spaces-of-places that we call national economies.” John Gerard Ruggie, *Territoriality and Beyond: Problematizing Modernity in International Relations*, 47 INT’L ORG. 139, 172 (1993). Endogenously, government officials have become more professional and *expert* in the face of the aforementioned complicated and turbulent regulatory challenges. *Cf.* Jane Perlez, *As Diplomacy Loses Luster, Young Stars Flee State Dept.*, N.Y. TIMES, Sep. 5, 2000, <http://www.nytimes.com/library/world/global/090500us-statedept.html> (quoting Mark L. von Hagen, Director of the Harriman Institute at Columbia University stating that

TRNs have several key characteristics. First, TRNs are “transgovernmental,” rather than “international.” Existing national agencies are *trans*-linked to each other. They do not assume an international space of their own.²⁰ As *trans-national*, TRNs mainly consists of players from the public sector, the working-level government officials. Non-Governmental Organizations (NGOs) may play an important role in the operation of TRNs they are not the primary actors.²¹ For example, the main

“smart graduates who want to join government are heading for the Departments of the Treasury or Commerce.”). This position mirrors that of Keohane and Nye. They limited the term “transnational” to nongovernmental actors, and the term “transgovernmental” to define sub-units of governments on those occasions when they act relatively *autonomously* from high politics. Keohane & Nye, *Transgovernmental Relations*, *supra* note 19, at 41.

²⁰ Cho, *supra* note 19, at 401.

²¹ For instance, Professor Freeman conceptualizes “public governance” in a novel way as a “set of negotiated relationships between the public and the private.” Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 548 (2000). According to this view, the regulatory decision-making process tends to be decentralized since “public and private actors negotiate over policy-making, implementation and enforcement.” *Id.* As a result, more cooperative or “aggregate” notion of accountability is offered as an alternative to “formal and hierarchical” accountability that dominates conventional administrative law. *Id.* In some cases, a (private) transnational network plays a cooperative and complementary, but sometimes competitive, role vis-à-vis a (public) government network. For instance, a private network under the aegis of the FIBV (International Federation of Stock Exchanges)—a trade organization for regulated securities and derivative markets world-wide—is regarded as a counterpart to a public network under the auspice of the IOSCO (International Organization of Securities Commissions) which represents the world’s governmental agencies involved with the supervision of financial markets. The FIBV name has changed to the World Federation of Exchanges (WFE), About WFE, <http://www.world-exchanges.org/about-wfe> (last visited on Oct. 30, 2010); *see also* World Federation of Exchanges (WFE), Our Mission, <http://www.world-exchanges.org/about-wfe/our-mission> (last visited on Jul. 13, 2011). *See also* IOSCO Historical Background, <http://www.iosco.org/about/index.cfm?section=background> (last visited on Oct. 30, 2010). One of its basic role is “to act as the central reference point for the industry by offering members guidance in the process of international harmonization of business practices,” which is quite complementary to the IOSCO’s regulatory role considering that the it is composed of “regulates.” *See id.* However, some of the FIBV’s (WFE’s) goals—i.e., “to maintain a platform for securities markets professionals to discuss issues of common interest”—may overlap with those of the IOSCO, in which sense the relationship between these two networks can be depicted as “competitive.” *See id.* Meanwhile, it is worthy of highlighting that the two networks *interact (network)* with each other, for instance, by participating in the other’s meetings. WFE, WFE Becomes Affiliate Member of IOSCO, <http://www.world-exchanges.org/news-views/news/wfe-becomes-affiliate-member-iosco>, (last visited Oct. 30, 2010). Another example of such interaction (networking) between a transnational (private) network and a transgovernmental (public) regulatory network can be found in the relationship between the IFCI (International Finance and Commodities Institute), and the Bank for International Settlement (BIS) and the IOSCO. The IFCI, a non-profit organization nesting a network among the world’s

banking network, the Basel Committee of Banking Supervision (BCBS) is comprised of the central bank governors from 27 countries.²²

Second, a TRN is “regulatory” in nature, which means deals with particular regulatory issues or problems.²³ Thus, TRNs differ from “trans-judicial networks”, which involve judges from different jurisdictions exchanging views.²⁴ For example, the major insurance network, the International Association of Insurance Supervisors (IAIS), sets standards meant to guide national insurance regulators in their regulation of insurers.²⁵

Third, it is a “network.” The network concept can cover a range of gatherings, but the most important feature of a network is that it is a “process” rather than an “entity.”²⁶ The process allows a TRN to be positioned in a symbiotic relationship with conventional international organizations. In other words, networking as a process can take place in an international organization *qua* entity. The process capitalizes on a “common ‘belief’ or ‘faith’ . . . to better regulatory outcomes” amongst networkers.²⁷ This common belief is most likely to stem from common “experience” and “knowledge” shared by participants of the network, i.e., professional working-level government officials²⁸ International

major derivatives exchange and financial firms, web-posts a quarterly updated library of about 100 official documents contributed by major international regulatory organizations such as the BIS and the IOSCO. IOSCO Library of Public Documents, <http://www.iosco.org/library/index.cfm?whereami=pubdocs> (last visited Jul. 14, 2011). Despite these rich interaction between transnational (private) networks and transgovernmental (public) regulatory networks, such transnational (private) networks should be understood as complementary to the transgovernmental (public) network in terms of *regulatory* function. Although the “new medievalists” proclaim the end of the nation-state thanks to the “information technology revolution”, private power is still no substitute for state power, and a gain in power by non-state actors does not necessarily translate into a loss of power for the state. SLAUGHTER, *supra* note 18, at 184. Likewise, Sol Picciotto also acknowledges the validity of states itself, though he observed a new trend of disintegration within them. Sol Picciotto, *Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-Liberalism*, 17 NW. J. INT'L L. & BUS. 1014, 1014–22 (1996–97).

²² Banking for International Settlements, Basel Committee on Banking Supervision: About the Basel Committee, <http://www.bis.org/bcbs/> (last visited Feb. 24, 2011).

²³ Cho, *supra* note 19, at 402.

²⁴ See generally Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99 (1994) (exploring the commonalities among, and consequences of, several instances of transjudicial communication). Cho, *supra* note 19, at 402.

²⁵ International Association of Insurance Supervisors, <http://www.iaisweb.org/> (last visited Feb. 24, 2011).

²⁶ Cho, *supra* note 19, at 381.

²⁷ *Id.*

²⁸ In the context of Western social and philosophical traditions, one may attribute a

organizations often provide government networkers with physical forums while some TRNs may even mirror the operational format of international organizations.²⁹ Therefore, any physical body or even a more fluid relationship may fall under this category once it meets certain requirements characterizing it as a network.³⁰ For example, the Banking Network, which includes the BCBS, can operate within the IMF.

Already in the early seventies, Keohane & Nye observed this phenomenon among like-minded government officials and labeled it as “transgovernmental coalition building.”³¹ They highlighted a “sense of collegiality” developed and reinforced by their membership in common profession, which may be analogous to the “epistemic community” as Peter Haas famously dubbed it.³² Likewise, Eugene A. Ludwig, the former Comptroller of the Currency submitted that “I am convinced that all regulators today share a common concern that spans geographical boundaries and transcends cultural barriers. All of us speak the shared language of safety and soundness.”³³ Naturally, it is this shared professional or expert culture which tends to secure a high level of compliance with what a TRN produces as a normative output.³⁴ Perhaps this fidelity to network-generated norms can be said to result from a bureaucratic habit or bureaucratic culture that is analogous to the “law habit.”³⁵

theoretical root of this transgovernmental regulatory network to the notion of “social epistemes,” connoting both German tradition of viewing society as “comprising webs of meaning and signification” and French tradition of exploring “*mentalités collectives*.” Ruggie, *supra* note 19, at 157.

²⁹ See Raustiala, *supra* note 19, at 6, 88 (identifying a “synergistic” relationship between treaties and networks due to the former’s political and institutional contributions to the latter).

³⁰ Cho, *supra* note 19, at 402.

³¹ Keohane & Nye, *Transgovernmental Relations*, *supra* note 19, at 44.

³² *Id.* at 45; Peter Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT. ORG. 1 (1992).

³³ John E. Shockey, *Bank Regulatory Examination and Enforcement after Barings and Daiwa*, 935 PLI / CORP. 681, 708 (1996).

³⁴ Here, the meaning of compliance is mostly limited to a soft dimension in the absence of any technically binding force. If the concept of compliance involves a hard (political) dimension, such as national legislation, as it often does in public international law, it invites a whole range of different issues, such as the depth of compliance and the measurement.

³⁵ David Zaring, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*, 33 TEX. INT’L L.J. 281, 303 n.189 (1998); Richard R. Baxter, *International Law in “Her Infinite Variety”*, 29 INT’L & COMP. L.Q. 549, 556 (1980). In building up such common belief and faith, another psychological element, namely “trust” serves as an important catalyst. See Scott H. Jacobs, *Why*

TRNs involve an ongoing dialogue, although the fora for that dialogue may change.³⁶ Early in the Seventies, Robert Keohane and Joseph Nye, in their pioneering work, developed a notion of “complex interdependence” ideal type of international relations, which correlated a reluctance to resort to the use of force among a group of states with “multiple channels of contact connecting societies.”³⁷ A subset of their notion of complex interdependence is the phenomenon of “transgovernmental communication”, the existence of “informal ties between government elites” and direct meetings and communications between bureaucrats from different countries, which coexist with formal foreign office arrangements.³⁸ Raymond Hopkins also highlights this dialogical process in developing working relationships through “telephone calls, correspondence, regular meetings and pre-meeting agenda sessions.”³⁹

TRNs work incrementally through day-to-day interactions. These interactions are un-dramatic if not mundane, but they can have an enormous affect.⁴⁰ For example, the *Supervisory Information Framework for Derivatives and Trading Activities* (Joint Report by the BCBS and the Technical Committee of the International Organization of Securities Commissions (IOSCO)), which was issued to the public on September 1998, was a revised version of an earlier similar report jointly published in May 1995 by the same TRNs to assess the derivatives activities of banks and securities firms.⁴¹ This revision represents on-going and cumulative

Governments Must Work Together, OECD OBSERVER No. 186 (Feb./Mar. 1994) at 14 [hereinafter Jacobs, *Work Together*]. Therefore, government officials may have to invest more time in communicating better among each other as well as familiarizing themselves with one another’s administrative style for the sake of a successful networking. *Id.* See also Les Metcalfe, *The Weakest Links: Building Organizational Networks for an Interdependent World*, in REGULATORY CO-OPERATION FOR AN INTERDEPENDENT WORLD 49, 57 (Organisation for Economic Co-operation and Development Economic Co-operation and Development ed., 1994) (arguing that the establishment of “trust and confidence” among the organizations participating in a regulatory system has an important bearing on the reliability of an inter-organizational network). *But see* Jeffrey Atik, *Science and International Regulatory Convergence*, 17 NW. J. INT’L L. & BUS. 736 (1996–97) (questioning the possibility of expert consensus by arguing that “scientific consensus is geographically distributed and flows from centers of influence.”).

³⁶ Cho, *supra* note 19, at 403.

³⁷ Robert O. Keohane & Joseph S. Nye, POWER AND INTERDEPENDENCE 25 (1977) [hereinafter Keohane & Nye, POWER AND INTERDEPENDENCE]; Robert O. Keohane & Joseph S. Nye, *Power and Interdependence Revisited*, 41 INT’L ORG. 725, 731 (1987); Slaughter, *International Law*, *supra* note 18, at 512–13.

³⁸ *Id.*, at 25–26; Slaughter, *International Law*, *supra* note 18, at 513.

³⁹ Hopkins, *supra* note 19, at 36.

⁴⁰ Cho, *supra* note 19, at 403.

⁴¹ THE BASEL COMMITTEE ON BANKING SUPERVISION & THE TECHNICAL COMMITTEE

efforts by the BCBS and IOSCO with a view to keeping pace with an ever-changing regulatory environment in this area, namely, “financial innovation and progress in risk management field for trading and derivatives activities, in particular with regard to market risk.”⁴² It reflects earlier work of the two TRNs including the *1994 Joint Release of Guidelines* for improving risk management of derivatives activities and subsequent risk management guidance as well as the *1995 Joint Recommendations for Enhancing Public Disclosure*.⁴³

Thus, we see the products of TRNs undergo evolution. This evolutionary nature ensures streamlined and updated regulatory guidelines so that policy measures reflect the ever-changing regulatory environment. The Asian Pacific Economic Cooperation (“APEC”) Forum provides another apt example. APEC houses a variety of TRNs. It works through everyday communications among sector-specific actors (government officials and businessmen). In various subjects such as energy, telecommunication or transportation functional Working Groups exist to devise a detailed work program based on cooperation.⁴⁴ The *APEC Food System (AFS)* illustrates an evolution of a regulatory prototype. In 1999 the APEC leaders adopted the *AFS* upon the recommendation by the APEC Business Advisory Council (ABAC) in order to “efficiently link together food production, food processing and consumption to meet the food needs of our people as an essential part of achieving sustainable growth, equitable development and stability in the APEC region.”⁴⁵ The “Agricultural Technical Cooperation Working Group (ATCWG)” is a key implementer of the *AFS* recommendations concerning “efficiency in agricultural production, supply and trade, including the importance of technology, adding value to agricultural production and improving infrastructure.”⁴⁶ This *AFS/ATCWG* network enabled APEC Senior Officials to review food policies in the APEC area and establish the “APEC Food Security Work

OF THE INT’L ORG. OF SEC. COMMISSIONS (“IOSCO”), FRAMEWORK FOR SUPERVISORY INFORMATION ABOUT DERIVATIVES AND TRADING ACTIVITIES (1998), <http://www.bis.org/publ/bcbs39.pdf>.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ See Martin Rudner, *Institutional Approaches to Regional Trade and Cooperation in the Asia Pacific Area*, 4 *TRANSNAT’L L. & CONTEMP. PROBS.* 159, 173–75 (1994). “Consequently, unlike other formal international organizations, the APEC retains a strong potential that regulatory challenges are duly ‘managed’, rather than ‘solved.’” Cho, *supra* note 19, at 401.

⁴⁵ Asia-Pacific Economic Cooperation, *APEC Food System*, <http://www.apec.org/Groups/Other-Groups/APEC-Food-System.aspx> (last visited on Oct. 31, 2010).

⁴⁶ *Id.*

Plan” in response to the rise in regional food prices in 2008.⁴⁷

In conclusion, TRNs have been around for some time. They have arisen in part in response to the weaknesses in the treaty system to tackle pressing needs of globalization. They are also the function of professional expert communities that share understandings and a desire to find solutions to common problems. The means by which they find these solutions involves a process, although a process that can be situated within a number of institutional fora, or not. This process is dialogical, norm-generating, and incremental and involves a number of tools that we refer to as intra-network dynamics. The power of these networks results from the intra network dynamics they foster and the end products that they develop.

II. A THEORY OF NETWORK COORDINATION: PRE-EXISTING NETWORKS, REGULATORY PRODUCTS, AND OPERATIVE FRAMEWORKS

States can address complex problems through coordination of TRNs. By constructing frameworks (or blueprints) that chart goals for various TRNs, States can tackle complex systemic regulatory challenges. These frameworks instruct TRNs to work towards specific goals. TRNs are well-suited for the tasks assigned to them because of pre-existing relationships and network dynamics of the network participants. These dynamics allow TRNs to develop specific end products called “regulatory prototypes” which can be absorbed into domestic structures through a variety of strategies to fulfill the goals of the blueprint or framework. This coordination of TRNs can lead to complex regulatory responses to global problems that are well-suited for adoption at the national level. We probe examples of this phenomenon in Part III. We discuss whether these responses are desirable from a legitimacy and efficacy standpoint in Part IV.

A. A Theory of TRN Coordination

TRN coordination involves governmental coalitions organizing multifaceted responses to global regulatory challenges by leveraging the capital of pre-existing networks to develop specific regulatory products meant to be nationalized. Government groupings (such as the G7, G8 or the

⁴⁷ *Id.*

G20) have coordinated responses to political challenges or crisis.⁴⁸ Using action plans, called frameworks or blueprints, these groupings can instruct multiple actors, and in particular TRNs, to take action simultaneously and in pursuit of a common objective.

To tackle cross-border, cross-sectoral problems States sometimes develop frameworks or blueprints, which embody basic agendas or action plans, rather than specific standards. A coordinating coalition builds these agendas and tasks various actors with the production of more specific regulatory prototypes. These plans form in part out of a common understanding of the problem and the need for a coordinated response. International regulators, and even leaders, share a belief in the necessity of these plans, they understand and agree that some regulations require not only cross-border coordination but cross-*network* coordination.

Frameworks emerged long before the 2008 crisis.⁴⁹ For example, in 1996 the G20 Finance Ministers created the Joint Forum, a blueprint of collaboration amongst the BCBS, IOSCO and the IAIS. The Forum is staffed by technical efforts from each of the parent's organizations and its blueprint requires that it focus on particular subjects of interests to each of the parent entities, including risk assessment, capital adequacy and the regulation of financial conglomerates.⁵⁰ In short, the blueprint for the Joint Forum recognized the need for a cross-sectoral approach on financial conglomerates. The blueprint involves all three entities (the BCBS, IOSCO and the IAIS) in an action plan that focuses on primarily two lines of inquiry (capital risk and conglomerate supervision).⁵¹

Frameworks are generally unambiguous since they set out specific

⁴⁸ Robert P. Delonis, Note, *International Financial Standards and Codes: Mandatory Regulation Without Representation*, 36 N.Y.U. J. INT'L L. & POL. 563, 586–91 (2004). See generally, Mario Giovanoli, *The Reform of International Financial Architecture After the Global Crisis*, 42 N.Y.U. J. INT'L L. & POL. 81 (2009).

⁴⁹ As seen in the G7 or G8 experiences, major economies had tried to coordinate their financial and macroeconomic policies in the past. See, e.g., JOHN KIRTON & ANTARA HALDAR, G8 RESEARCH GROUP, *G7/8 SUMMIT REMIT MANDATES, 1975–2003* (2003), http://www.g7.utoronto.ca/evaluations/factsheet/factsheet_remits.html (listing mandates including, “At our next Summit, we will review progress on the implementation of *the G8 Africa Action Plan* on the basis of a final report from our Personal Representatives for Africa,” “Our goal for the next Summit is to develop an international financing plan for plutonium management and disposition based on a detailed project plan, and a multilateral framework to co-ordinate this co-operation,” “We are determined to speed up the implementation of our national plans called for under the Rio Climate Treaty and we will each report what we have achieved at next year's Summit.”).

⁵⁰ See Bank for International Settlements, *Mandate of the Joint Forum*, <http://www.bis.org/bcbs/jfmandate.htm> (last visited Jan. 2. 2011).

⁵¹ *Id.*

tasks for corresponding networks. Nonetheless they will lack the level of technical precision required in the case of “regulatory prototypes.”⁵² While these blueprints may assign each particular network a specific task, they may still be silent exactly how such task will be operationalized. Initially, though, the blueprint sets a plan at the network coordination level. Thus, it is the first step in a multi-layered process of cross-networking.

Since a framework or blueprint denotes a “long-term” plan, its actualization necessarily involves several incremental steps on different levels, such as working-level officials, deputy ministers, ministers, and leaders of the various TRNs. What is noteworthy is that these several incremental processes may proceed at the same time through simultaneous rounds of dialogue and communication among the network actors. It is in this sense which a blueprint plants seeds for subsequent networking and consequent regulatory prototype-building.

The individual TRNs gain strength and legitimacy from being part of the overall plan in the same way that the overall plan legitimizes itself through the use of the pre-existing networks. By infusing a large dose of political capital in largely uncoordinated pre-existing sector-specific government TRNs, States legitimize these networks while at the same time leveraging their capital and legitimacy. TRN capital results from their prior workings and in particular results from complex intra-network dynamics.

B. Intra-Network Dynamism

TRN coordination takes advantage of the pre-existing intra-network dynamics that exists among networkers. These varying modes of internal social dynamics represent different operationalizing forces in each network. They are main engines of networks that the executive coordinator (G20) maneuvers. While these dynamics have already been present in each network before, it was the advent of the G20 which awakened their genuine regulatory potential in an unprecedented endeavor to deliver desperate regulatory effects to avert the financial crisis.

While TRN participants share mutual trust distilled from the same expert belief, their knowledge base or experience may vary. Several dynamics are at play as they work through these differences, we label them: “persuasion,” “negotiation,” “strategic co-optation,” “willing marginalization,” “responsive engagement” and “expert sympathization.” These features fall neatly into a constructivist toolbox. Constructivist scholars have long posited that institutions shape the preferences of

⁵² See *infra* notes 62 to 83 and accompanying text.

participants.⁵³ By indentifying the dynamics, the tools, the dialogues and discourses that network players use to influence each other we hope to be able to reveal how preferences may change – or appear to change. Coordinated TRNs take advantage of these dynamics to pursue specific regulatory end products that are part of a planned coordinated response to a global problem. Unpacking the dynamics at work is important for the later task of assessing the efficacy and legitimacy of the ultimate response.

First, participants in TRNs may simply influence (“persuade”) each other into changing the other party’s regulatory behavior. Suppose that A is a specific regulatory agency of Country X and B is a corresponding agency in Country Y. By providing better regulatory information or more advanced technology A can persuade B to adjust the latter’s original policy stance. This type of interaction often leads to a diffusive and osmotic mode of regulatory change, rather than a commandeering mode.⁵⁴ Here, for example it is entirely conceivable that a developed country member may provide certain technical assistance or advice with a developing country member to reinforce the former’s persuasive power. After all, networks can explain more subtle dynamics than mere legislation in regulatory agencies’ behavioral change.⁵⁵ To fully capture the intra-network dynamics behind this regulatory persuasion, one needs to recall one of the defining characteristics of a TRN discussed above, i.e., a social bond among sector-specific government agencies or officials (networkers). This endogenous nature of social interaction among networkers enables us to factor in the “normative self-understanding of the ends held by the social groups in question.”⁵⁶ This is why constructivism may provide a richer account than conventional international relations theories, such as realism, as to the “sticky”⁵⁷ bond among social actors (here, networkers).⁵⁸

⁵³ See John Ruggie, *What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge*, 52 INT’L ORG. 855, 856, 870 (1998); Alexander Wendt, *Collective Identity Formation and the International State*, 88 AM. POL. SCI. REV. 384, 385–87 (1994); Claire Kelly, *The Value Vacuum: Self-Enforcing Regimes and the Dilution of the Normative Feedback Loop* 22 MICH. J INT’L L. 673, 678 (2001).

⁵⁴ Raustiala, *supra* note 19, at 51.

⁵⁵ *Id.*, at 54 (observing that networks “touch on issues such as the structure of enforcement and the training of personnel.”).

⁵⁶ Ruggie, *supra* note 53, at 860; see generally MAX WEBER, *THE METHODOLOGY OF THE SOCIAL SCIENCES* (Edward A. Shils & Henry A. Finch, eds. & trans., 1949).

⁵⁷ See Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2603 (1997).

⁵⁸ This normative intersubjectivity generates “critical self-reflection” which “gives us perspective on our social environment and helps us to overcome any false sense of determinism.” ALEXANDER WENDT, *SOCIAL THEORY OF INTERNATIONAL POLITICS* 375 (1999).

Ryan Goodman and Derek Jinks present perhaps the strongest version of persuasion. Adopting a sociological concept of “acculturation,” they raise the possibility of social actors’ assimilation to the “beliefs and behavioral patterns of the surrounding culture.”⁵⁹ Interestingly, this acculturation results more from a structural cognitive pressure to assimilate within the group than from the “merits” of a particular model.⁶⁰ Under this circumstance, however, networking is prone to two types of criticism. First, any behavioral change in this situation might be an ostensible conformity, rather than a genuine modification of an earlier position.⁶¹ Second, politically less powerful members of the group might be pressured into accepting certain regulatory models prescribed by powerful members without due consideration of actual merits of such models.⁶²

Second, in some cases, A and B can “negotiate” over a common subject and reach an agreement on the basis of *quid pro quo*. This may occur in a “Record of Understanding (ROU)” or a “Memorandum of Understanding (MOU)”. While this mode of interaction inevitably involves some type of bargain, it should not necessarily be equated with a political, strategic give-and-take process which is often seen in the conventional international treaty negotiation. Importantly, an intra-network negotiation need not be a zero sum gain. It involves the participants of the TRN continuously adjusting their different interpretations and eventually expanding their shared grounds. In this regard, an intra-network negotiation may be understood as a “cross-persuasion”: one party’s persuasion is contingent on that of the other party. The dynamic outcome of such negotiation as a cross-persuasion is likely to be a positive-sum, which is capable of generating regulatory convergence. For example, the U.S. might accept the EU’s position in favor of stricter CRA regulation in exchange for the latter’s adoption of a variant of the former’s Volker rule.⁶³

Third, a strategic co-optation can take place among network participants. “Strategic co-optation,” as described by Selznick, is the “process of absorbing new elements into the leadership of the policy-determining structure of an organization to avert threats to its stability or existence.”⁶⁴ For example, one network actor might invite another to serve as a “policy advisor” for a regulatory project, perhaps because the first

⁵⁹ Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 626 (2004).

⁶⁰ *Id.* at 643.

⁶¹ *Id.*

⁶² See *infra* sub-pt. IV-B.

⁶³ We owe Pierre-Hugues Verdier for this point.

⁶⁴ See Ronald S. BURT, CORPORATE PROFITS AND COOPTATION 5 (1983).

networker lacks the necessary capacity to act alone.⁶⁵ This self-invoking nature distinguishes co-optation from other modes of intra-network dynamics, such as persuasion or negotiation, in which case the pressure for regulatory behavioral change comes from outside.

Fourth, network members may engage in “willing marginalization.” Willing marginalization happens when network members agree to participate knowing that they will have limited influence. Members may be motivated by the hope that even a reserved mode of participation now will lead to greater future participation. Thus, suppose that a network member A supports a position X, which is generally disfavored by another network member B. Suppose further that B has very little influence. Here, B might still welcome an invitation by A to collaborate. A may be engaging in a persuasion leading to the willing marginalization of B. Lastly, network members may face the real possibility that their choice is to simply remain in the network, with limited influence, or be out of the network. Being in the network may be the better alternative not only because they may hope for greater influence in the future but because membership may signal acceptance or other important values to other constituencies.⁶⁶

Fifth, “responsive engagement” involves a rich set of regulatory dialogues that could potentially result in a certain level of compromise even though the negotiation is not completely successful. Although less than the desired outcome is reached in responsive engagement, the process of engaging itself moves the network forward. It signals that the parties are willing to cooperate, at least on some issues, even if they are unsuccessful on others for the time being. Given the network operation is a dynamic and incremental process, responsive engagement is critical in maintaining a stable level of sociological momentum regardless of any regulatory deal. In other words, the network process is not a binary (on/off) communication but a thread of mutually reinforcing engagement. When this interaction reaches a certain critical point, a certain regulatory product, be it an MOU or a policy guideline, tends to materialize.

Finally, a preliminary regulatory product molded initially by a bilateral dialogue between A and B may spill over and be multilateralized through like-minded regulators from other jurisdictions. This “expert sympathization” is a necessary step to formulate any common regulatory

⁶⁵ Sungjoon Cho, *Non-Violation Issues in the WTO Framework: Are They the Achilles' Heel of the WTO Dispute Settlement Process?*, 39 HARV. INT'L L.J. 311, 346, n.188 (1998).

⁶⁶ See Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 504 (2005) (arguing that one of the collateral consequences of international organization membership, and commitment to its attendant obligations, shapes the way other actors, States, NGO's and domestic individuals, view the state).

guidelines or principles within a government network. This type of intra-network dynamics can be found in most networks, such as the BCBS or the International Civil Aviation Organization (ICAO), which produce policy guidelines or recommendations on a regular basis.

Importantly, these six types of intra-network dynamics offer useful analytical lenses through which one can understand how a TRN functions in an incremental, dialogical, and norm-generating manner. These tools are inherently incremental in one can see how some modes are intermediary steps in others. For example, a persuasion might lead to willing marginalization. Responsive engagement is a step in negotiation. These dynamics comprise the very dialogue of the TRNs. They are the substance of the conferences, informal talks, and telephone calls. There are the constituent parts of both the substantive outcomes and the process of bringing the networks together. Eventually, these dynamics facilitate the norm-generating process. They result in normative end products.

C. End Products: Regulatory Prototypes

TRNs create end products, which we label “regulatory prototypes.”⁶⁷ They generate rules, norms, or standards to deal with specific problems they face. The regulatory prototype is often labeled as a guideline or recommendation, which features the typical “soft law.” These end products logically flow from the network operation that is dialogical, incremental, and norm-generating.⁶⁸ They fulfill the framework or blueprint

⁶⁷ Other scholars have employed different terms. See e.g., Zaring, *supra* note 35, at 303 n.188 (citing Hal Scott, *The Competitive Implications of the Basel Capital Accord*, 39 ST. LOUIS U. L.J. 885, 885 (1995) (referring to the Basel Accord as a “gentlemen’s agreement among central banks.”)). See also JOSEPH JUDE NORTON, *DEVISING INTERNATIONAL BANK SUPERVISORY STANDARDS* 176–77, 261–262 (1995); see Zaring, *supra* note 35, at 303 n.188 (“international soft law”). Cf. Linda M. Harasim, *Global Networks: An Introduction*, in *GLOBAL NETWORK: COMPUTERS AND INTERNATIONAL COMMUNICATION* 13–14 (Linda M. Harasim ed., 1993). Kumon and Aizu propose “co-emulation” as a strategy for developing a global hypernetwork society of the future. To them, co-emulation is a “response to the information age whereby nations can learn from one another to produce a prototype socio-economic model that each country can mold to fit its unique history and culture,” and it encourages nations to “move beyond competitive relationships into more consensual relationships” to address a variety of socio-economic challenges of the twenty-first century. See *id.* See also Eibe Riedel, *Standards and Sources: Farewell to the Exclusivity of the Sources Triad in International Law?*, 2 EUR. J. INT’L L. 58, 79 (1991) (discussing “new economic standards” with the proliferation of international economic transactions).

⁶⁸ This process can also be viewed as “dialectical” in the sense that this process illustrates how prototypes can eventually be transformed into more acceptable, and in a sense more legitimate, norms than one found in a conventional treaty. This dialectical

established by the coordinating States.

A regulatory prototype, such as a guideline or a policy recommendation, tends to represent a converging output of networking results. Considering the incremental nature of networking, an overzealous attempt to envisage quick regulatory change will be futile, or even counterproductive.⁶⁹ Yet, this circumspection does not necessarily mean that a TRN always blocks participants from voluntarily adopting a more advanced regulatory position. As discussed above, a variety of intra-network dynamics, such as persuasion and responsive engagement, encourage network participants to espouse the “best practices”, “regulatory benchmarks” or “regulatory checklists,” which may even exceed the least common denominators, so as to speedily achieve necessary regulatory goals.⁷⁰ While the regulatory prototype may be nonbinding,⁷¹ it also tends to

process represents the whole life cycle of a prototype throughout the sequence of its creation, nationalization (where necessary), enforcement, surveillance, feedback and establishment of a new prototype.

⁶⁹ For instance, the “OECD Recommendation Concerning Effective Action Against ‘Hard Core’ Cartels” represents a minimum common denominator (“hard core” cartels) in the competition policy area that results from a long-standing networking in this regulatory field centering on the “OECD Committee on Competition Law and Policy” which brings together the leaders of the world’s major competition, or antitrust, authorities and provides the chief international forum for the regular exchange of views on important competition policy issues. OECD, Competition Law and Policy: About, http://www.oecd.org/about/0,3347,en_2649_34685_1_1_1_1_1,00.html (last visited Jul. 13, 2011). See also OECD, Recommendation Concerning Effective Action Against Hard Core Cartels, http://www.oecd.org/document/19/0,3746,en_2649_40381615_44942291_1_1_1_1,00.html (last visited Jul. 13, 2011).

⁷⁰ OECD, OECD Reference Checklist for Regulatory Decision-Making, available at <http://www.oecd.org/dataoecd/20/10/35220214.pdf> (last visited July 26, 2011). However, such “best practices” are not necessarily for the sake of harmonization, neither for regulatory competition to a higher level of regulatory quality (race-to-the-top). Best practices are just used as an example or a reference for a future design of a regulation. It should be noted that under some circumstances “regulatory diversity” would be a better option than harmonization or any other type of regulatory cooperation since the diversity of preference, such as the degree of risk-taking is sometimes irreconcilable. Scott H. Jacobs, *Regulatory Competition for an Interdependent World: Issues for Government*, in REGULATORY COOPERATION FOR AN INTERDEPENDENT WORLD, 15, 33 (1994). Cf. DAVID VOGEL, TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY 6 (1995) (discussing the so-called “California effect” which means an upward regulatory competition in the environmental policies among trading states in the US).

⁷¹ See OECD, *Regulatory Reform and International Standardization*, Working Party of the Trade Committee, TD/TC/WP(98)36/FINAL, 28–32 (1999), available at <http://www.oecd.org/dataoecd/33/19/1955309.pdf> (discussing “regulators as players in standardization.”).

be technical and precise.⁷²

Empirical confirmations of regulatory prototype are legion. For example, the *Basel Core Principles for Effective Banking Supervision*, released by the BCBS on September 22, 1997, were intended to “serve as a basic reference” for banking authorities throughout the world in supervising and regulating banks and banking activities within their jurisdiction.⁷³ Likewise, principles included in the *Resolution on the Supervision of Financial Conglomerates* designed by IOSCO in October 1992 were understood to “form the basis for the risk assessment of financial conglomerates and to “guide the development of regulatory practice in the area of financial conglomerates.”⁷⁴ The APEC network serves as another example. One of the most representative sectors in the APEC in which such guidelines and principles proliferate is the “standards and conformance” sector. The Sub-committee on Standards and Conformance⁷⁵ completed *Guidelines for the Preparation, Adoption and Review of Technical Regulations* and *APEC Food MRA (Mutual Recognition Arrangement) Supplementary Material* in 1997.⁷⁶ Regardless of its technical format, the normative value of this prototype can be advanced by the very fact that expert participants of the network sharing the common belief have worked

⁷² Cho, *supra* note 19, at 403.

⁷³ Statement of the Basle Committee on Banking Supervision, BANK FOR INT’L SETTLEMENTS, Jan. 19, 1998, <http://www.bis.org/press/p980119.htm> [hereinafter *Press Release, Basel Committee*].

⁷⁴ INT’L ORG. OF SEC. COMMISSIONS (IOSCO), A RESOLUTION ON THE SUPERVISION OF FINANCIAL CONGLOMERATES (1992) <http://www.iosco.org/library/resolutions/pdf/IOSCORES7.pdf>. More recently, the IOSCO documented a comprehensive set of 30 principles of securities regulations, which are based on three fundamental objectives of securities regulation—the protection of investors; ensuring that markets are fair, efficient and transparent; the reduction of systemic risk. INT’L ORG. OF SEC. COMMISSIONS (IOSCO), OBJECTIVES AND PRINCIPLES OF SECURITIES REGULATION (2003) <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD154.pdf> (last visited on Oct. 31, 2010). These 30 principles—grouped into eight categories (principles relating to the regulator; principles for self-regulations; principles for the enforcement of securities regulation; principles for cooperation in regulation; principles for issuers; principles for collective investment schemes; principles for market intermediaries; principles for the secondary market)—are to be nationalized in due forms considering domestic legal structure and other circumstances. *Id.*

⁷⁵ The Sub-committee on Standards and Conformance (SCSC) was established under the committee for Trade and Investment (CTI), *inter alia*, to encourage alignment of members’ standards with international standards and to achieve mutual recognition among APEC economies of conformity assessment in regulated and voluntary sectors.

⁷⁶ See Asia-Pacific Economic Cooperation, The Sub-Committee on Standards and Conformance, <http://www.apec.org/Groups/Committee-on-Trade-and-Investment/Sub-Committee-on-Standards-and-Conformance.aspx> (last visited on Oct. 31, 2010).

out this prototype via various modes of dynamics.⁷⁷

Guidelines or recommendation prototypes are designed to be nationalized.⁷⁸ Under certain circumstances, a soft prototype may be hardened as a part (or a whole) of a statute in the domestic legal system.⁷⁹

⁷⁷ See also Slaughter, *Government Networks*, *supra* note 18, at 211 (arguing for effectiveness of the Basel Committee's system of enforcement despite its informality). In this sense, one might reasonably speculate that such prototype (soft law) would form a new pattern of "custom" in terms of public international law since the requirements of both established practice and *opinio juris* would be met because transgovernmental regulators repetitively refer to those prototypes with a strong normative attitude regardless of its technical non-bindingness. Cf. Stephen Zamora, *Is There Customary International Economic Law?*, 32 GERMAN Y.B. INT'L L. 9, 34–5 (1989) (discussing the "soft law" nature of customary international economic law). As a matter of fact, this regulatory prototype corresponds to the current reality of harmonization as seen, for example, in the EU context. Contemporary regulatory harmonization is conducted not in light of "specification" standards, but in light of "performance" standards. Giandomenico Majone, *Comparing Strategies of Regulatory Rapprochement*, in REGULATORY COOPERATION FOR AN INTERDEPENDENT WORLD, 155, 163–5 (1994). In other words, instead of attempting to universalize regulatory standards based on detailed specifications, certain "essential requirements" based on functions or performances are highlighted. *Id.* Regarding the "New Approach" to technical harmonization and standardization, see EUROPEAN COMMISSION, GUIDE TO THE IMPLEMENTATION OF DIRECTIVES BASED ON THE NEW APPROACH AND THE GLOBAL APPROACH 7 (2000), http://ec.europa.eu/enterprise/policies/single-market-goods/files/blue-guide/guidepublic_en.pdf [hereinafter *Guide*]. In turn, this approach focusing on essential requirements provides ample room for regulatory maneuvering in implementation stage on a case-by-case basis. Accordingly, the concept of "equivalency" becomes critical in assessing regulations of different jurisdictions and in determining whether a certain regulation is compatible with a harmonized standard. See e.g., Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1 A, 1867 U.N.T.S. at 493, art. 6. This determination is called a "conformity assessment" process. See *Guide*, *supra* note 77, at 8 (regarding the "Global Approach" to certification and testing related to conformity assessment). Therefore, regulatory prototypes symbolize the current harmonization practices in the sense that they represent essential regulatory requirements as principles or guidelines and implementation details are left to each domestic authority. Zaring, *Rulemaking and Adjudication*, *supra* note 2, at 580–87.

⁷⁸ Slaughter submits that this "nationalization of international law" is an important dimension of effectiveness of government networks. She argues that:

"The result is an international rule-making process that directly engages national officials and national promulgation and enforcement mechanisms, without formal translation and implementation mechanisms from the international to the national." Slaughter, *Government Networks*, *supra* note 18, at 217.

Roberta S. Karmel & Claire R. Kelly, *The Hardening of Soft Law in Securities Regulation*, 34 BROOK. J. INT'L L. 883, 924–25 (2009).

⁷⁹ Malloy emphasized on the importance of such "hardening" process crystallizing into the implementation and enforcement. Regarding the BIS capital adequacy guidelines and the Second Banking Directive in the EC, he argues that successful implementation and enforcement of these two initiatives may provided the basis for the future development of a

Notably, certain TRNs provide a variety of strategies to encourage participants to implement and enforce these prototypes in the domestic dimension. For example, they request participants to perform self-evaluations to monitor their compliance with those prototypes.⁸⁰ Harold Koh depicts this implementation aspect as a “transnational legal process” in which “norm-entrepreneurs” from an “interpretive community” mobilize issue networks to embed these regulatory prototypes in the domestic legal-political system via a series of socialization processes, such as interaction, interpretation and internalization.⁸¹

Interestingly, these soft prototypes can also be hardened in the subsequent treaty-making process. As Kal Raustiala aptly observes, “soft law is often seen as a stepping-stone to hard law, permitting states to begin cooperation informally when they fear the impact of a fully legally binding commitment.”⁸² This soft law-turned-treaty phenomenon is particularly fathomable considering the fact that treaties often support the formation of networks by supplying to the latter political support (in terms of acceptance or acquiescence of network phenomena) as well as institutional support (in terms of personnel and budget).⁸³

“strong force” converged pattern of regulation. Michael P. Malloy, *Bumper Cars: Themes of Convergence in International Regulation*, 60 *FORDHAM L. REV.* S1, S21 (1992). However, the hardening process may be hard in a constitutional matter because many supervisory authorities, *e.g.*, central banks, may not have legislative competence to convert those guidelines or principles into a hard statute. *Press Release, Basel Committee, supra* note 73. Nonetheless, the Basel Committee keeps on monitoring the application of such principles “in all material aspects” and indirectly presses domestic legislators to harden such soft laws. *Id.*

⁸⁰ *See.e.g.*, IOSCO, Report on the Self-Evaluation Conducted by IOSCO Members Pursuant to the 1994 IOSCO Resolution on “Commitment to Basic IOSCO Principles of High Regulatory Standards and Mutual Cooperation and Assistance (Nov. 1997), available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD76.pdf> (last visited on July 26, 2011).

⁸¹ Koh, *supra* note 57, at 2602, 2648, 2639.

⁸² Raustiala, *supra* note 19, at 86; Karmel & Kelly, *supra* note 78, at 924–25.

⁸³ Raustiala, *supra* note 19, at 88. In sum, two dominant courses may encapsulate the soft norm-generating mechanism within a government network. First, a contextualized rule (a rule that depends on the circumstance, such as a particular national regulation) may get decontextualized as its core precepts (general principles) are abstracted. As an initial normative reference, those contextualized norms are often labeled “best practices” or “templates.” Second, network participants discuss and debate on these de-contextualized rules (principles) and embody a regulatory prototype. This prototype is a “model” for future application—*e.g.* maybe a model law on cross border insolvency. This prototype can then be re-contextualized or nationalized later in each jurisdiction through various transmission mechanisms. For example, it can be transformed into a domestic statute (from soft to hard) or a domestic administrative guideline (from soft to soft). *See* ROBERT Y. JENNINGS, *THE PROGRESS OF INTERNATIONAL LAW* 48 (1960) (stating that “development of

III. COORDINATING NETWORKS: THE G20 AS A CASE STUDY

The G20 Leaders evolved from a rather mundane network of Finance Ministers to a unique leaders group functioning as an executive coordinator of a response to the financial crisis of 2008. The G20 Leaders coordinate the activities of the Banking and Finance Ministers, the Securities Commissioners, the Insurance Network and the Trade Network. Chronicling the G20's development as an TRN coordinator, and reviewing its coordination of these various issue-specific networks, allows us view examples of intra-network dynamics and raise questions concerning the implications of these dynamics. What *is* new to us concerns the unique "executive" role self-imposed on the G20 to steer this largely discrete set of sector-specific TRNs into a coherent fashion under a long-term time-horizon. We explore the implications of this coordination in light of the network dynamics at play in the TRNs in Part IV.

A. *The Evolution of the G20 into a Coordinating Executive*

For some time, groups of countries have coordinated both economic and foreign affairs policies using periodic meetings of high level officials. These "G" (for Group) meetings started in the 1970s with the G5 (France, Germany, Japan, the United Kingdom and the United States) discussing financial and economic matters.⁸⁴ The meetings involve meetings among heads of state. This group expanded to the G7 in the 1980's (adding Canada and Italy). Russia joined the group, leading to the G8 in 1998 (at least for economic matters).⁸⁵ In 1999, partially in response to the Asian Financial

the law may indeed at first seem to make the law less rather than more certain for it is not unlike metal being tempered for a new purpose, and may have to be softened before it can be reshaped and hardened."). Cf. Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 551 (1993) (arguing that "the augmented role of multilateral forums in devising, launching, refining and promoting general international law has provided the international community with a more formal lawmaking process that is often used."). Of course, after this re-contextualization, feedback can also help shape the original prototype to further improve.

⁸⁴ Peter I. Hajnal, *THE G8 SYSTEM AND THE G20: EVOLUTION, ROLE, AND DOCUMENTATION* 12 (Ashgate Publishing Ltd. 2007)

⁸⁵ *Id.* at 28. In terms of economic matter discussed the group dealt with issues such as exchange rates and balance of payments. See, e.g., Declaration of Rambouillet, Nov. 17, 1975, <http://www.g8.utoronto.ca/summit/1975rambouillet/communique.html> (last visited Jul. 18, 2011); Announcement of the Ministers of Finance and Central Bank Governors of France, Germany, Japan, the United Kingdom, and the United States (Plaza Accord), Sept.

Crisis, the G-20⁸⁶ group formed to bring together finance ministers and central bank governors from both developed and emerging economies.⁸⁷ Notably, unlike the G7 meetings, the G-20 meetings were originally conducted by the “finance” ministers of the various participants, not the heads of state.⁸⁸ The G20 structure emphasized the importance of emerging economies in global economic issues.⁸⁹ The finance ministers and central bank governors would typically meet once a year.⁹⁰

Prior to the 2008 financial crisis the finance ministers and central bank governors had met regularly since the Asian Financial Crisis of 1999.⁹¹ These meetings addressed issues such as financial sector regulation and supervision,⁹² terrorist financing,⁹³ and the reform of the Bretton Woods

22, 1985, <http://www.g8.utoronto.ca/finance/fm850922.htm> (last visited Jul. 18, 2011); Statement of the G6 Finance Ministers and Central Bank Governors (Louvre Accord), Feb. 22, 1987, <http://www.g7.utoronto.ca/finance/fm870222.htm> (last visited Jul. 18, 2011).

⁸⁶ The members of the G-20 are: Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Mexico, Russia, Saudi Arabia, South Africa, Korea, Turkey, United Kingdom, United States, and the European Union. The European Union is by the rotating presidency of the European Council presidency and the European Central Bank. About G-20, What is the G-20, http://www.g20.org/about_what_is_g20.aspx (last visited May 23, 2011). Additionally Spain and the Netherlands have attended as observers. The following organizations have also attended as observers: the European Commission, the European Council. The Association of Southeast Asian Nations (ASEAN), the Financial Stability Board (FSB), the International Monetary Fund (IMF), the New Partnership for Africa’s Development (NEPAD), the United Nations, the World Bank and the World Trade Organization. JENILEE GUEBERT, G20 RESEARCH GROUP, PLANS FOR THE THIRD G20 SUMMIT: PITTSBURGH 2009, 44–45 (2009) <http://www.g20.utoronto.ca/g20plans/g20leaders090818.pdf>.

⁸⁷ See *G20 Home*, G20.ORG, <http://www.g20.org> (last visited Jan. 2, 2011).

⁸⁸ See REBECCA M. NELSON, CONG. RESEARCH SERV., THE G-20 AND INTERNATIONAL ECONOMIC COOPERATION: BACKGROUND AND IMPLICATIONS FOR CONGRESS 1 (2010), www.fas.org/sgp/crs/row/R40977.pdf.

⁸⁹ *Id.* at 4 (noting that emerging economies have become more “active in the international economy.”).

⁹⁰ About G-20, What is the G-20, *supra* note 86 (discussing the normal practices for meetings and activities).

⁹¹ Initially the G20 started out as the G22 and was formed for a one-time meeting. It briefly became the G33 and finally upon the recommendation of the G7 finance ministers became the G20. See Hajnal, *supra* note 84, at 151–52; see also G-20, COMMUNIQUÉ: G-20 FINANCE MINISTERS AND CENTRAL BANK GOVERNORS (1999) <http://www.g20.utoronto.ca/1999/1999communiqué.pdf> [hereinafter G-20 COMMUNIQUÉ 1999]. Deputies met twice a year to prepare for the ministerial meeting. See Hajnal, *supra* note 84, at 1. The G20 also organizes various technical seminars throughout the year. *Id.* The meetings are not open to the public.

⁹² See G-20 COMMUNIQUÉ 1999, *supra* note 91.

⁹³ G-20, COMMUNIQUÉ: G-20 FINANCE MINISTERS AND CENTRAL BANK GOVERNORS,

institutions.⁹⁴ An important turning point for the prominence and future of the G20 came with the 2008 financial crisis. As the crisis deepened, the G7 leaders decided to convene a “summit” of the leaders of the G20 countries. In 2008, George W. Bush called for the first G20 Leaders Summit to be held in Washington D.C.⁹⁵ Since the first summit in November 2008 in Washington, there have been four others: London (2009), Pittsburgh (2009), Toronto (2010) and Seoul (2010). The G20 leaders will begin meeting once annually, in the fall, beginning in France in 2011. Mexico will chair the G20 in 2012.”⁹⁶

The first three G20 Summits moved the group from a crisis responder to a premiere economic institutional forum.⁹⁷ The first summit focused on “short and medium term responses to the crisis”;⁹⁸ the second reached agreement on crisis management; and the third created a “new framework to correct global imbalances, taking steps to address food security issues, and eliminating fossil fuel subsidies.”⁹⁹ The third and fourth summits in particular solidified the G20 network as an executive coordinator of

(2001) <http://www.g20.utoronto.ca/2001/2001communiqu.pdf>; G-20, COMMUNIQUÉ: MEETING OF MINISTERS AND GOVERNORS IN MELBOURNE (2006), <http://www.g20.utoronto.ca/2006/2006communiqu.pdf>.

⁹⁴ G20, COMMUNIQUÉ: MEETING OF FINANCE MINISTERS AND CENTRAL BANK GOVERNORS (2005), <http://www.g20.utoronto.ca/2005/2005communiqu.pdf>.

⁹⁵ Alan S. Alexandroff & John Kirton, *The Great Recession and the Emergence of the G-20 Leaders’ Summit*, in RISING STATES, RISING INSTITUTIONS: CHALLENGES FOR GLOBAL GOVERNANCE 180 (Alan S. Alexandroff & Andrew F. Cooper eds., 2010).

⁹⁶ John Kirton, What is the G20?, <http://www.g20.utoronto.ca/g20whatisit.html> (last visited Jul. 15, 2011).

⁹⁷ Foreign policy issues remain the purview of the G-7 and G-8. NELSON, *supra* note 88, at 1.

⁹⁸ *Id.*

⁹⁹ See e.g., G-20, THE TORONTO SUMMIT DECLARATION at Preamble ¶ 9, (2010) http://www.g20.org/Documents/g20_declaration_en.pdf. See also G-20, THE SEOUL SUMMIT DECLARATION at ¶ 51(e), (2010) http://www.g20.org/Documents2010/11/seoulsummit_declaration.pdf (discussing an enhanced food security policy) [hereinafter TORONTO SUMMIT DECLARATION]; see also *id.* at ¶ 58 (discussing the phase out of fossil fuel subsidies). See also Daniel Cohn-Bendit & Rebecca Harms, *Outcome of the G20 Summit in Pittsburgh (24–25 September 2009)*, EUROPEAN FREE ALLIANCE, Sept. 29, 2009, <http://www.greens-efa.eu/fr/outcome-of-the-g20-summit-in-pittsburgh-24-25-september-2009-1238.html> (discussing the framework for green and global recovery); see also G-20, LEADERS’ STATEMENT THE PITTSBURGH SUMMIT: SEPTEMBER 24–25 2009, ¶ 39 and Preamble ¶ 24, (2009) http://www.g20.org/Documents/pittsburgh_summit_leaders_statement_250909.pdf. See also *The G-20 Summit in Toronto: Acting on Our Global Energy and Climate Change Challenges*, THE WHITE HOUSE, June 27, 2010, <http://www.whitehouse.gov/the-press-office/g-20-summit-toronto-acting-our-global-energy-and-climate-change-challenges> (discussing the background of the Pittsburgh Summit).

international economic policy-making and began a process of extending its reach to other non-financial issue areas for sustainable development, such as energy policy and food security.

Markedly, each of the Leaders' Summits displayed the G20's utilization of previously established TRNs to an incrementally increasing degree. The Washington Summit (2008) dealt with crisis management.¹⁰⁰ The leaders agreed to commit "sufficient resources" to the IMF, World Bank and other development banks so that they could adequately respond to the crisis.¹⁰¹ While the participants had varying views on the need for a new global financial architecture, they finally hammered out one version.¹⁰² The European view favored a more comprehensive international financial architecture, while the US and Canada envisioned a more gradual process of coordination.¹⁰³ Discussion between the IMF and the Financial Stability Forum (FSF) resulted in a division of labor and the expansion of the FSF.¹⁰⁴ The leaders sought to stabilize the financial system, recognize the importance of stimulus to the economy, pledge support to "have sufficient resources to continue playing their role in overcoming the crisis."¹⁰⁵ As part of the new blueprint, the leaders committed to implement policies consistent with an array of broad yet common principles.¹⁰⁶ The principles included: strengthening transparency and accountability;¹⁰⁷ enhancing sound regulation;¹⁰⁸ promoting integrity in financial markets;¹⁰⁹ reinforcing

¹⁰⁰ See G-20, DECLARATION: SUMMIT ON FINANCIAL MARKETS AND THE WORLD ECONOMY (2008), www.g20.org/Documents/g20_summit_declaration.pdf.

¹⁰¹ *Id.* at ¶ 7.

¹⁰² *Id.*

¹⁰³ Alexandroff & Kirton, *supra* note 95, at 181.

¹⁰⁴ Declaration of the Summit on Financial Markets and the World Economy: Washington DC, November 15, 2008, ¶ 8, <http://www.g20.utoronto.ca/2008/2008declaration1115.html> [hereinafter WASHINGTON DECLARATION]. As Alexandroff and Kirton explained the plan was to have a lightly institutionalized FSF would set new standards, but the organizationally powerful IMF would then monitor and enforce compliance with them. Alexandroff & Kirton, *supra* note 95, at 183.

¹⁰⁵ WASHINGTON DECLARATION, *supra* note 104.

¹⁰⁶ *Id.* (discussing the Common Principles for Reform of Financial Markets).

¹⁰⁷ This mainly entails "enhancing required disclosure on complex financial products and ensuring complete and accurate disclosure by firms of their financial conditions. Incentives should be aligned to avoid excessive risk-taking." *Id.*

¹⁰⁸ This measure is aimed at "strengthen[ing] our regulatory regimes, prudential oversight, and risk management, and ensure that all financial markets, products and participants are regulated or subject to oversight, as appropriate to their circumstances." *Id.*

¹⁰⁹ This aims primarily at "bolstering investor and consumer protection, avoiding conflicts of interest, preventing illegal market manipulation, fraudulent activities and abuse, and protecting against illicit finance risks arising from non-cooperative

international cooperation;¹¹⁰ and reforming international financial institutions.¹¹¹ To implement these principles for reform, the leaders set out an action plan that contained immediate and medium-term items with more specificity.¹¹²

At the London Summit (2009), the theme of crisis management continued, but the group also set goals for long-term planning and policy coordination.¹¹³ Given the more long-term view on this summit, it is not surprising that some divergence in policy perspectives and priorities emerged. For example, the U.S. focused its attention more on stimulus while the EU sought better global regulation.¹¹⁴ Emerging powers sought progress on “trade openness, trade finance, development, and reform of international financial institutions.”¹¹⁵ Still other powers, including the UK, broached the subject of adding climate change to the talks.¹¹⁶

jurisdictions.” *Id.*

¹¹⁰ This will facilitate “coordination and cooperation across all segments of financial markets, including with respect to cross-border capital flows.” *Id.*

¹¹¹ The goal is to “reform of the Bretton Woods Institutions so that they can more adequately reflect changing economic weights in the world economy in order to increase their legitimacy and effectiveness. [E]merging and developing economies, including the poorest countries, should have greater voice and representation.” *Id.*

¹¹² See generally *id.*

¹¹³ G-20 LEADERS, THE GLOBAL PLAN FOR RECOVERY AND REFORM, ¶¶ 2, 4 (2009), http://www.g20.org/pub_communiques.aspx [hereinafter Recovery and Reform].

¹¹⁴ Rich Miller & Simon Kennedy, *G-20 Shapes New World Order With Lesser Role for U.S. Markets*, BLOOMBERG, Apr. 2, 2009, http://www.bloomberg.com/apps/news?pid=newsarchive&sid=axEnb_LXw5yc&refer=home (discussing the U.S. taking the lead in getting the summit to agree on an increase in IMF rescue funds to \$750 billion from \$250 billion now); Associated Foreign Press, *G20 Needs to Act: Action on Global Financial Crisis: Analysts*, WATODAY (Austl.), Apr. 1, 2009, <http://www.watoday.com.au/world/g20-needs-to-act-action-on-global-financial-crisis-analysts-20090401-9jor.html> (discussing the divide between United States and Europe); Steve Richards, *Woolly Words Expose Weakness of Leaders' Convictions*, INDEP., Apr. 2, 2009, <http://www.independent.co.uk/opinion/commentators/steve-richards/steve-richards-woolly-words-expose-weakness-of-leaders-conviction-s-1659990.html> (discussing Brown's and Obama's uncertainties going into the summit); José Barroso, EU Commission President, Declaration on the preparation of the G20 Summit, (Mar. 24, 2009) (transcript available at http://www.europa-eu-un.org/articles/en/article_8601_en.htm) (Illustrating EU's urging for a Global Response).

¹¹⁵ Alexandroff & Kirton, *supra* note 95, at 185; Lee Hudson Teslik, Council on Foreign Relations: 20 Agendas at G-20, http://www.cfr.org/publication/18997/twenty_agendas_at_g20.html (last visited Jul. 14, 2011).

¹¹⁶ GORDON BROWN, THE UK CABINET OFFICE, SUPPORTING GLOBAL GROWTH: A PRELIMINARY REPORT ON THE RESPONSIVENESS AND ADAPTABILITY OF THE INTERNATIONAL FINANCIAL INSTITUTIONS, 5, 7 (2009), http://www.g20.org/Documents/cabinet_office_supporting_global_growth_0909.pdf

Despite these divides, the summit was a success because the G20s maintained its role as an executive coordinator and orchestrated a response to the crisis.¹¹⁷ The leaders laid a framework or blueprint for the various sector-specific networks, such as banking and securities networks, to follow as they develop more specific regulatory prototypes with which to achieve corresponding regulatory goals. For example, the leaders facilitated the operation of a financial network by creating the Financial Stability Board (FSB) as the successor to the Financial Stability forum (FSF).¹¹⁸ The FSB was asked to partner with the IMF as a monitoring entity.¹¹⁹ The G20 also agreed to increase funding for the IMF.¹²⁰ It endorsed the OECD efforts to “take action against non-cooperative jurisdictions including tax havens.”¹²¹ It again called on accounting bodies to coordinate with supervisors and regulators to improve standards.¹²² Furthermore, the London Summit committed to concluding the Doha Round,¹²³ a commitment which the G20 later backed off,¹²⁴ reasserted¹²⁵ and then reaffirmed.¹²⁶ It also reaffirmed

(discussing climate change).

¹¹⁷ See Prime Minister Hails Success of G-20 London Summit, <http://pm.gc.ca/eng/media.asp?id=2507> (last visited Jul. 6, 2011); *Obama Hails London Summit as Start of Economic Turnaround*, CBC NEWS, Apr. 2, 2009, <http://www.cbc.ca/world/story/2009/04/02/g20-obama.html>; ERIC HELLEINER & PAOLA SUBACCHI, THE CENTER FOR INT’L GOVERNANCE INNOVATION, FROM LONDON TO L’AQUILA: BUILDING A BRIDGE BETWEEN THE G20 AND THE G8 (2009), <http://www.cigionline.org/sites/default/files/CH%20London%20to%20Laquila%20WEB.pdf>.

¹¹⁸ Recovery and Reform, *supra* note 113, at ¶ 15; History of Financial Stability Board, <http://www.financialstabilityboard.org/about/history.htm> (last visited Jul. 6, 2011) [hereinafter HISTORY OF FSB].

¹¹⁹ Recovery and Reform, *supra* note 118; HISTORY OF FSB, *supra* note 118.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ Recovery and Reform, *supra* note 118, at ¶ 23; HISTORY OF FSB, *supra* note 118. The Leaders saw the importance of not only confronting the present crisis but of forestalling protectionist policies that could worsen it. At the London Summit the G20 asked the WTO along with UNCTAD and the OECD to “monitor and report publicly on G20 adherence to their undertakings on resisting protectionism and promoting global trade and investment.” See OECD, WTO, UNCTAD, REPORT ON G20 TRADE AND INVESTMENT MEASURES 3 (2009), http://www.unctad.org/en/docs/wto_oecd_unctad2009_en.pdf; OECD, WTO, UNCTAD, Report on G20 Trade and Investment (Sept. 2009 to Feb. 2010), http://www.unctad.org/en/docs/wto_oecd_unctad2010d1_en.pdf.

¹²⁴ THE GLOBAL PARTNERSHIP FOR DEVELOPMENT AT A CRITICAL JUNCTURE: MDG GAP TASK FORCE REPORT 31 (2010), http://www.un.org/en/development/desa/policy/mdg_gap/mdg_gap2010/mdg8report2010_engw.pdf (“the goal set by the G-20 to conclude the negotiations in 2010 appears unrealizable, and no new deadline has been set.”).

¹²⁵ TORONTO SUMMIT DECLARATION, *supra* note 99, at ¶ 38.

the commitment to reach the Millennium Development Goals¹²⁷ and to work towards a successful plan to cope with climate change.¹²⁸

The Progress Report following the London Summit attests to the G20 efforts to harness the resources of various TRNs. With the ongoing prompting and guidance of the G20, these networks kept generating various regulatory prototypes. For example, the BCBS issued *Final Capital Requirements Standards for Re-securitizations and Enhanced Risk Management Requirements around Structured Products and Off-balance Sheet Activities*.¹²⁹ IOSCO published *Interim Recommendations about Regulatory Approaches to Be Implemented in the Securitization Markets*.¹³⁰ Subsequently, IOSCO finalized its *Report on Good Practices in relation to Investment Managers Due Diligence when investing in Structured Finance Instruments*.¹³¹

Motivated by the success of the London Summit, the Pittsburgh Summit (2009) revealed even more ambitious blueprints.¹³² The leaders officially ordained the G20 as the premier forum for international economic coordination.¹³³ They stressed the importance of increasing the representation of emerging-market countries at the IMF,¹³⁴ as well as specific commitment on a host of new policy areas, including economic development and the environment.¹³⁵ In addition to reforming the IMF, the Summit announced plans for reform of the development banks. Specifically, the G20 called upon the World Bank to strengthen its focus on food security, human development, economic growth for the poor; and financing a green economy.¹³⁶ The emphasis of the Leaders' Statement was on forward-looking sustainable development, launching the *Framework for*

¹²⁶ THE SEOUL SUMMIT DECLARATION, *supra* note 99, at ¶ 43.

¹²⁷ Recovery and Reform, *supra* note 113, at ¶ 25.

¹²⁸ *Id.* at ¶ 28.

¹²⁹ G-20, PROGRESS REPORT ON THE ACTIONS OF THE LONDON AND WASHINGTON G20 SUMMITS, ¶ 48 (2009), http://www.g20.org/Documents/20090905_G20_progress_update_London_Fin_Mins_final.pdf [hereinafter LONDON AND WASHINGTON PROGRESS REPORT].

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² The Leaders announced the summit as turning the page “on the era of irresponsibility.” LEADERS STATEMENT, THE PITTSBURGH SUMMIT, at Preamble, ¶ 1 (2009), http://www.g20.org/Documents/pittsburgh_summit_leaders_statement_250909.pdf [hereinafter THE PITTSBURGH SUMMIT].

¹³³ *Id.*

¹³⁴ *Id.* at ¶ 1, 20.

¹³⁵ *See, e.g., id.* at Annex ¶ 5.

¹³⁶ *Id.* at ¶¶ 1, 24–29.

Strong, Sustainable and Balanced Growth.¹³⁷ In ushering in these ambitious blueprints, the G20 leaders attempted to coordinate, cross-link, and micro-manage various networks and entities. For example, leaders

asked the IMF to assist our Finance Ministers and Central Bank Governors in this process of mutual assessment by developing a forward-looking analysis of whether policies pursued by individual G-20 countries are collectively consistent with more sustainable and balanced trajectories for the global economy, and to report regularly to both the G-20 and the International Monetary and Financial Committee (IMFC), building on the IMF's existing bilateral and multilateral surveillance analysis, on global economic developments, patterns of growth and suggested policy adjustments. Our Finance Ministers and Central Bank Governors will elaborate this process at their November meeting and we will review the results of the first mutual assessment at our next summit.¹³⁸

With respect to its efforts on energy and sustainable development, G20 tapped into preexisting entities. "We request relevant institutions, such as the IEA, OPEC, OECD, and World Bank, provide an analysis of the scope of energy subsidies and suggestions for the implementation of this initiative and report back at the next summit."¹³⁹

The G20 progress reports play an important role in "monitoring" and moving blueprints forward. The Progress Reports closely detail the work of BCBS, the FSB, the finance ministers, IAIS, IOSCO, IASB, and the BIS among others.¹⁴⁰ For example, the Progress report notes the pressing need for supervision and monitoring to combat systemic risk by nearly every network.¹⁴¹ It chronicles various TRN efforts, such as the IOSCO's *Objectives and Principles of Securities Regulation* (recognizing the need to confront systemic risk); the BCBS' investigation of systemic funding liquidity risks; the FSB and IMF's monitoring of data gaps, and the IAIS beginning investigation of systemic risks.¹⁴²

The Toronto Summit (2010) re-affirmed the G20's role as a premier

¹³⁷ *Id.* at ¶ 5.

¹³⁸ *Id.* at Annex page 6 at ¶ 6.

¹³⁹ *Id.* at Annex page 14 at ¶ 30.

¹⁴⁰ *See, e.g.*, LONDON AND WASHINGTON PROGRESS REPORT, *supra* note 129, at ¶¶ 65, 71, 82–88.

¹⁴¹ *Id.* at 65.

¹⁴² *Id.*

forum for international economic cooperation.¹⁴³ By accepting the recommendations from Labor and Employment Ministers who had met in April,¹⁴⁴ the G20 demonstrated that it did factor in social implications of economic growth and development. It also marked the completion of peer review mechanism, the *Mutual Assessment Process (MAP)*,¹⁴⁵ under which the G20 can collectively evaluate each member's record of compliance with previous blueprints and regulatory prototypes. Relying upon IMF and World Bank assessment, the leaders suggested that a more ambitious plan would result in a speedier, more sustainable, and more equitable recovery.¹⁴⁶ Leaders agreed to at least halve deficits by 2013 and stabilize or reduce government debt to GDP ratios by 2016."¹⁴⁷

The evaluation on the Seoul Summit (2010) has been mixed. One of the pressing issues facing the leaders was currency imbalances and the summit failed to deliver a solution, although it did pledge to develop indicative guidelines to address global imbalances.¹⁴⁸ Nonetheless, some have noted that the summit eased tensions amongst countries over quantitative easing and currency devaluation.¹⁴⁹ Given the incremental nature of the G20 operation, one might not be too disappointed with these efforts. Moreover, there were some more concrete accomplishments that built upon prior work.¹⁵⁰ In particular, the Summit officially endorsed *Basel III* and emphasized the continued importance of macro-prudential

¹⁴³ TORONTO SUMMIT DECLARATION, *supra* note 99, at ¶ 1.

¹⁴⁴ *Id.*, at ¶ 5.

¹⁴⁵ See Factsheet: The G-20 Mutual Assessment Process, International Monetary Fund, <http://www.imf.org/external/np/exr/facts/g20map.htm> (last visited Jul 15, 2011).

¹⁴⁶ TORONTO SUMMIT DECLARATION, *supra* note 99, at ¶ 9.

¹⁴⁷ *Id.*, at ¶ 10.

¹⁴⁸ See generally Laurence Norman and Ian Talley, *No deal: Seoul's G20 summit fails to deliver on currencies, trade imbalances*, THE AUSTRALIAN, November 12, 2010, <http://www.theaustralian.com.au/business/markets/no-deal-seouls-g20-summit-fails-to-deliver-on-currencies-trade-imbalances/story-e6frg926-1225952694281>; and G20 Summit: No accord on 'currency values' or imbalances, <http://www.twinside.org.sg/title2/resurgence/2010/244/econ1.htm> (last visited June 3, 2011) (discussing how the 11-12 November Seoul Summit was unable to establish a solution to the differences on currency values or global imbalances but agreed to develop guidelines).

¹⁴⁹ See G20 Agree to Move toward more Market-driven Exchange Rate, <http://english.cri.cn/6826/2010/11/12/2741s604727.htm> (last visited June 4, 2011) (noting that the Seoul Summit was held amid tensions among G20 nations on several issues, but the nations were able to find a medium on many controversial issues).

¹⁵⁰ *Preparations for the G20 Seoul Summit in November and its Agenda*, KOREA IT TIMES, May 10, 2010, <http://www.koreaitimes.com/story/8713/preparations-g20-seoul-summit-november-and-its-agenda> (discussing the agenda for the G20 Seoul Summit and noting that 60% to 70% of the agenda built off the agendas from prior summit meetings).

frameworks such as the IMF's *MAP*.¹⁵¹

The Seoul Summit perhaps best highlights the successes and limitations of the G20 in coordinating the many diverse networks at its disposal. True, the G20 was instrumental in merging its political will and breadth during times of crisis. At the same time, however, the networks at its disposal act incrementally as they build upon a history of work and relevant epistemic communities. As the crisis has subsided, efforts to coordinate beyond the exigency tend to face greater political hurdles.¹⁵²

¹⁵¹ See *Did the G20 Lose its Seoul?*, SEEKING ALPHA, November 21, 2010, <http://seekingalpha.com/article/237890-did-the-g20-lose-its-seoul> (highlighting the role of the G20 at the Seoul Summit and its endorsement of Basel III and restructuring of IMF). See also *The Basel iii Accord: The new Basel iii framework*, <http://www.basel-iii-accord.com/> (last visited June 3, 2011) (noting that the G20 leaders officially endorsed the Basel III framework at the November 2010 Seoul Summit); and John Lipsky, *The Post-Summit Prospects for Policy Cooperation*, <http://www.imf.org/external/np/speeches/2010/112310.htm> (last visited June 3, 2011) (discussing that the G20 Leaders affirmed the importance of MAP at the Seoul Summit).

¹⁵² Roya Wolverson, *G20's Tepid Economic Reform*, COUNS. ON FOREIGN REL., Oct. 25, 2010, <http://www.cfr.org/economics/g20s-tepid-economic-reform/p23218> ("The G20 finance meeting this weekend in Gyeongju, South Korea, failed to produce concrete measures to tame worsening trade and currency imbalances . . ."); Paul Krugmann, *The Third Depression*, N.Y. TIMES, June 27, 2010, <http://www.nytimes.com/2010/06/28/opinion/28krugman.html?scp=7&sq=g20%20failure&st=cse> ("[M]ost recently at last weekend's deeply discouraging G-20 meeting — governments are obsessing about inflation when the real threat is deflation, preaching the need for belt-tightening when the real problem is inadequate spending."); Simon Johnson, *Capital Failure*, N.Y. TIMES, Nov. 11, 2010, <http://economix.blogs.nytimes.com/2010/11/11/capital-failure/?scp=1&sq=g20%20failure&st=cse> ("The Group of 20 has completely failed to do what is necessary to rein in global megabanks — and to make them safer."); Anat Admati, *Healthy Banking System is the Goal, Not Profitable Banks*, FIN. TIMES, Nov. 9, 2010, <http://www.gsb.stanford.edu/news/research/admatiFTletter11.09.10.pdf> ("Basel III bank regulation proposals that Group of 20 leaders will discuss fail to eliminate key structural flaws in the current system."); *Stiglitz Criticizes Multiple Shortcomings of the G20 Agenda*, INT'L FIN. INST. IN LATIN AMERICA, Sep. 29, 2009, <http://ifis.choike.org/informes/1111.html> ("The fact that the G20 allocated its funds almost entirely to the IMF means in part that the world does not yet have the right kind of institutions for effective crisis response"); Anders Aslung, *The Group of 20 Must be Stopped*, FIN. TIMES, Nov. 26, 2009, <http://www.ft.com/cms/s/0/37deaeb4-dad0-11de-933d-00144feabdc0.html#ixzz1PU5zsLUi> ("[T]he G20 actually violates fundamental principles of international co-operation by arrogating for itself important financial decisions that should be shared by all countries. In so doing it also emasculates the sovereign rights of small countries that have long been the prime defenders of multilateralism and international law as well as the foremost policy innovators."); Hans Debowski, *Criticism of g20 Crisis Management*, D+C, Feb. 2009, <http://www.inwent.org/ez/articles/087261/index.en.shtml> ("Robert Zoellick, the president of the World Bank, bemoaned that, instead of safeguarding free trade as promised in

Therefore, while the G20 still proceeds to administer a host of networks as they develop norms and often gel into legal standards, the kind of political impetus characterizing the G20's initial success appears to wane. As long as the G20 remains a political, and indeed diplomatic, entity as an "Executive Coordinator" amongst different networks,¹⁵³ the G20 might have to live with the disappointment derived from a mismatch between professionalism and politics.

B. Networks at Play

The G20's coordinated response to the global financial crisis provides a rich opportunity to analyze sophisticated network dynamics. Like-minded regulators from different governments in sector specific TRNs display these dynamics while working towards goals set by the G20. At the same time, since any TRN may contain more than one sub-network, such as the BCBS as a sub-network in the Banking Network, the G20's coordination efforts within each network are vital. As discussed above, the evolution of the G20 into a premier international economic forum tracks the increasing manifestation of its coordination efforts to guide, facilitate and even balance these intra-network dynamics.

1. The Banking Network

The most prominent TRN that the G20's Leader Summit coordinates is the Banking Network. The G20 mobilized the pre-existing banking networks already operating at the FSB, the IMF and the BCBS. The G20 linked them altogether to build a larger, more capable TRN. It then directed the network's activities in the financial crisis of 2008.

The G20 Finance Ministers and Central Bank Governors formally established the Banking Network in 1999 at its ministerial. While the ministerial involves finance ministers and central bank governors, lower level officials meet prior to ministerial to begin negotiations, work on logistics and technical matters.¹⁵⁴ Much work goes on prior to ministerial meetings including "two deputies meetings each year as well as extensive technical work, including an array of workshops, reports and case studies on

November, some G20 members had taken protectionist steps. . .").

¹⁵³ Claire R. Kelly, *Financial Crises and Civil Society*, 11 CHI. J. INT'L L. 505 (2011); see also Alexandroff & Kirton, *supra* note 95, at 193 (referring to the group as an "implicit global executive committee.").

¹⁵⁴ NELSON, *supra* note 88, at 7.

specific subjects.”¹⁵⁵ There are also meetings amongst “sherpas,” who are the personal representatives of the ministers and they meet both prior to and following the summits to attend to the details of the proposals for and the conclusions of the summits.

The FSB, while part of the Banking Network could be considered a core coordinator amongst various financial networks within the G20, including the securities and insurance networks, but especially within the banking network. In the 2008 crisis the G20 instructed the FSB to take charge of the coordination of exit strategies,¹⁵⁶ as well as surveillance.¹⁵⁷ The Banking Network also encompasses the World Bank¹⁵⁸ and the IMF, as both institutions employ the networks of national finance ministers and

¹⁵⁵ *Id.*

¹⁵⁶ MICHAEL CROWLEY, THE PEW ECONOMIC POLICY DEPARTMENT, G-20 BACKGROUND NOTE 4 (2009), <http://fic.wharton.upenn.edu/fic/policy%20page/G-20-Note-Final.pdf>.

¹⁵⁷ LONDON AND WASHINGTON PROGRESS REPORT, *supra* note 129, at ¶ 33. The membership of the FSB is all G-20 countries, the former Financial Stability Forum (FSF) members, Spain and the European Commission. The FSF preceded the FSB and was itself preceded by the “Joint Forum on Financial Conglomerates.” SLAUGHTER, *supra* note 2, at 135. The actual members are the central bank governors and finance ministers from Argentina, Australia, Brazil, Canada, China, France, Germany, Hong Kong SAR, India, Indonesia, Italy, Japan, Mexico, the Netherlands, Republic of Korea, Russia, Saudi Arabia, Singapore, South Africa, Spain, Switzerland, Turkey, United Kingdom, United States of America. Financial Stability Board, Links to FSB Members, <http://www.financialstabilityboard.org/members/links.htm> (last visited Jul. 17, 2011). Also, the following organizations take part in the operation of the FSB: IOSCO, the Basel Committee, the Bank for International Settlements, the European Central Bank, the European Commission, the International Monetary Fund, the Organisation for Economic Co-ordination and Development, the World Bank, the Committee on the Global Financial System, the Committee on Payment and Settlement Systems, the International Association of Insurance Supervisors, and the International Accounting Standards Board.

¹⁵⁸ The World Bank consists of five institutions: The International Bank for Reconstruction and Development (“IBRD”), the International Development Association (IDA), the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA), and the International Centre for Settlement of Investment Disputes (ICSID). For a complete description of these five institutions *see* THE WORLD BANK, A GUIDE TO THE WORLD BANK 10–23 (2003). It provides loans to developing countries fostering economic and social development. Articles of Agreement of the International Bank for Reconstruction and Development, July 22, 1944, Art. I, § (i), 60 Stat. 1440, 2 U.N.T.S. 134, *amended* 16 U.S.T. 1942, 606 U.N.T.S. 294.; Articles of Agreement of the International Development Association, Preamble, 11 U.S.T. 2284, 439 U.N.T.S. 249 (entered into force Sept. 24, 1960). *See* The World Bank, <http://www.worldbank.org> (follow “About” hyperlink; then follow “Articles of Agreement” hyperlink under “Key Resources”) (last visited Jul. 17, 2011). Member countries fund it through the purchase of capital stock.

central bankers.¹⁵⁹ The World Bank funds various projects in developing countries, such as “education, health, public administration, infrastructure, financial and private sector development, agriculture and environmental and natural resource management.”¹⁶⁰ It also enforces certain principles and standards by conditioning the provision of those resources on the implementation of those principles and standards.¹⁶¹

The IMF carries out the G20’s action plans in the area of banking regulation mainly due to its expertise. The IMF facilitates global monetary cooperation using three tools:¹⁶² economic surveillance, technical assistance, and lending.¹⁶³ First, the IMF *monitors* the economic health of member countries, alerting them to potential risks. Through its system of “bilateral surveillance,”¹⁶⁴ it annually evaluates all 186 of its member countries and then discusses with that country “whether there are risks to the economy’s domestic and external stability that would argue for adjustments in economic or financial policies.”¹⁶⁵ It may also engage in multilateral consultations involving global stability issues.¹⁶⁶ Its technical assistance focuses on a variety of topics including “fiscal policy, monetary and exchange rate policies, banking and financial system supervision and regulation, and statistics.”¹⁶⁷ It also lends to countries in financial crisis. For example, the IMF recently loaned the Ukraine 16 billion dollars to aid its banking industry.¹⁶⁸ It has also coordinated with the FSB to explore gaps

¹⁵⁹ Anne Marie Slaughter points out that their weighted voted mechanisms elevate them somewhat as a distinct entity rather than merely a forum for a network. SLAUGHTER, *supra* note 2, at 22.

¹⁶⁰ The World Bank, About Us, *See* The World Bank, <http://www.worldbank.org> (follow “About” hyperlink) (last visited Jul. 17, 2011).

¹⁶¹ *See* Stiglitz, *supra* note 152, at 75.

¹⁶² *See* International Monetary Fund (IMF), Our Work, <http://www.imf.org/external/about/ourwork.htm> (last visited Oct. 24, 2010).

¹⁶³ Carlo Gola & Francesco Spadafora, *Financial Sector Surveillance and the IMF 3* (Int’l Monetary Fund, Working Paper No. 247 2009), *available at* <http://www.imf.org/external/pubs/ft/wp/2009/wp09247.pdf>.

¹⁶⁴ *Id.*; *see also* IMF, THE 2007 SURVEILLANCE DECISION: REVISED OPERATIONAL GUIDANCE 9 (2009), <http://www.imf.org/external/np/pp/eng/2009/062209.pdf>.

¹⁶⁵ IMF, How We Do It, <http://www.imf.org/external/about/howwedo.htm> (last visited Mar. 24, 2010).

¹⁶⁶ David Robinson, *IMF-Backed Plan to Cut Global Imbalances*, IMF, Aug. 7, 2007, <http://www.imf.org/external/pubs/ft/survey/so/2007/SurveyartA.htm>.

¹⁶⁷ IMF, How we do it, *supra* note 165.

¹⁶⁸ *IMF To Loan Ukraine Billions To Cope With Global Crisis*, RADIO FREE EUR. RADIO LIBERTY, Mar. 24, 2010, http://www.rferl.org/Content/IMF_To_Loan_Ukraine_Billions_To_Cope_With_Global_Crisis/1335307.html; Press Release, IMF, IMF Completes Second Review Under Stand-By Arrangement with Ukraine and Approves US\$3.3 Billion Disbursement (Jul. 28, 2009).

in data collection at the direction of the G20.¹⁶⁹

Another crucial pillar of the Banking Network is the BCBS comprised of the central bank governors from 27 countries.¹⁷⁰ Housed in the Bank for International Settlements, the BCBS “generates global public goods of information and expertise”¹⁷¹ in the area of banking supervision. It drafts a variety of technical regulatory prototypes relating to capital adequacy and liquidity requirements of banks.¹⁷² These regulatory prototypes, while non-binding in a formal legal sense, are highly respected due to the BCBS’s professional legitimacy. The G20 has invoked the BCBS’s competence and reputation and assigned several roles in its action plans.¹⁷³

The G20 has orchestrated these components of the Banking Network to produce both frameworks and more definite regulatory prototypes in its characteristically incremental manner. For example, in implementing the *Framework for Strong, Sustainable and Balanced Growth*, the G20 first tasked the IMF and the World Bank with a reporting function in the Finance Ministers’ Meeting at St. Andrews, Scotland in November 2009.¹⁷⁴ The Framework specified that the IMF must analyze how countries’ “respective

¹⁶⁹ See THE FINANCIAL CRISIS AND INFORMATION GAPS, REPORT TO THE G20 FINANCE MINISTERS AND CENTRAL BANK GOVERNORS (2009) <http://www.imf.org/external/np/g20/pdf/102909.pdf>.

¹⁷⁰ Bank for International Settlements, Basel II and Revisions to the Capital Requirements Directive, <http://www.bis.org/speeches/sp100503.htm> (last visited June 6, 2011) (discussing the impact, calibration, and implementation of the BCBS).

¹⁷¹ Michael S. Barr & Jeffrey P. Miller, *Global Administration Law: The View from Basel*, 17 EUR. J. INT’L L. 15, 23 (2006).

¹⁷² See Bank for International Settlements, About the Basel Committee, <http://www.bis.org/bcbs/> (last visited June 5, 2011) (noting that the BCBS develops guidelines and supervisory standards for banks, including standards on capital adequacy).

¹⁷³ See G20, DECLARATION SUMMIT ON FINANCIAL MARKETS AND THE WORLD ECONOMY (2008) http://www.g20.org/Documents/g20_summit_declaration.pdf (discussing that the BCBS “should study the need for and help develop firms’ new stress testing models, as appropriate”); see also G20, DECLARATION ON STRENGTHENING THE FINANCIAL SYSTEM—LONDON (2009) http://www.g20.org/Documents/Fin_Deps_Fin_Reg_Annex_020409_-_1615_final.pdf (discussing the role of the BCBS in compensation and its position to strengthen international cooperation and international frameworks for prudential regulation); see also LEADERS’ STATEMENT THE PITTSBURGH SUMMIT, *supra* note 99 (highlighting a way to strengthen the international financial regulatory system by building high quality capital and mitigating pro-cyclicalities).

¹⁷⁴ G-20, COMMUNIQUÉ: MEETING OF FINANCE MINISTERS AND CENTRAL BANK GOVERNORS, ¶ 3 (2010) <http://www.g20.utoronto.ca/2010/g20finance100423.html>. It has also partnered in the G-20 Pittsburgh summit commitment to reduce fossil fuel energy subsidies. See LEADERS’ STATEMENT THE PITTSBURGH SUMMIT, *supra* note 99.

national or regional policy frameworks fit together.”¹⁷⁵ The World Bank had been asked to report of development and poverty reduction.¹⁷⁶ The Framework also initiated a new “mutual assessment” process and constructed a detailed timetable for its operation.¹⁷⁷ Subsequently at the Leaders Meeting in Toronto, Canada in June of 2010, G20 reviewed the policy proposal prepared by the IMF and moved forward on a consultative mutual assessment process. As part of this process they developed a basket of policy options to achieve stronger, more sustainable and more balanced growth.”¹⁷⁸ Of course, the G20’s executive coordination reaches beyond the blueprint level: it also generates more concrete regulatory prototypes, such as the *Basel III*.

The development of *Basel III* eloquently demonstrates how the G20 coordinated the banking network to produce a regulatory prototype. The G20 Summit in Washington DC in November 2008 issued the “Washington Action Plan.” In the Plan, G20 leaders instructed the IMF and the expanded FSF to develop “recommendations,” which would eventually evolve into a new regulatory prototype on bank capital.¹⁷⁹ Upon the instruction, the FSF and its members immediately focused on the bank capital adequacy ratio. The G20 Leaders also agreed that the BCBS would provide new guidelines for harmonized capital requirements by the end of 2009.¹⁸⁰

Admittedly, the BCBS’s role in capital adequacy started long before the 2008 crisis. To understand the role of capital adequacy standards one must remember that when a highly leveraged firm suffers a loss, creditors tend to withdraw funding which might require the firm to sell off assets which may precipitate further losses.¹⁸¹ If other firms are counterparties or hold similar assets, a more systemic risk arises and capital dries up. Regulators who prefer greater capital requirements see these capital requirements as buffers against such losses that might precipitate a crisis.

Prior to the 2008 crisis the BCBS has developed Basel I and Basel II. Both Basel I and Basel II provided capital buffers, yet failed to prevent the 2008 crisis.¹⁸² Some have suggested that the failure of Basel I and Basel

¹⁷⁵ LEADERS’ STATEMENT THE PITTSBURGH SUMMIT, *supra* note 99.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ TORONTO SUMMIT DECLARATION, *supra* note 99.

¹⁷⁹ G-20, PROGRESS REPORT ON THE ACTIONS OF THE WASHINGTON ACTION PLAN (2009), http://www.g20.org/Documents/FINAL_Annex_on_Action_Plan.pdf [hereinafter WASHINGTON ACTION PLAN].

¹⁸⁰ *Id.*

¹⁸¹ REGULATING WALL STREET: THE DODD-FRANK ACT AND THE NEW ARCHITECTURE OF GLOBAL FINANCE 143 (Viral A. Acharya, et al. eds., 2011).

¹⁸² *Id.*

II can be traced to the fact that in each the needed buffer was tied to an individual firm and not the systemic relationship amongst firms.¹⁸³ Moreover, a buffer, which some would suggest only provides a second best solution, might be either too costly or ineffective.¹⁸⁴ The first best solution they would argue is to internalize the cost of risk.¹⁸⁵ *Basel III*, arguably merely tinkers with the model established in Basel I and Basel II. It does not internalize the cost of risk, and indeed some would contend that *Basel III* encourages firms to avoid its strictures by seeking a shadow banking regime, which tends to create risk.¹⁸⁶ Thus, at first glance *Basel III* appears to be one of the failings of intra-network dynamics. The process can be insular and limiting. The virtue of empathetic sympathization that brings network actors together also may stop them from taking a step back to see the failures of their actions. If one starts with a failed product the outgrowth of future intra-network dynamics will arguably be more failure. Thus, the network dynamics involved in *Basel III* might lead to more, not less, failure (if one views of Basel I and Basel II as flawed products).

Apart from the controversial merits, or demerits, of *Basel III*, it is still worth examining the developments leading to *Basel III* to fully evaluate the G20's coordination efforts as well as the intra-network dynamism. The BCBS's goal for *Basel III* was to better hedge against systemic losses by

¹⁸³ *Id.*

¹⁸⁴ WSBI-ESBC, POSITION REGARDING THE BASEL CONSULTATION ON A 'COUNTERCYCLICAL CAPITAL BUFFER PROPOSAL,' 6-7 (2010) http://www.wsbi.org/uploadedFiles/Position_papers/0992-WSBI-ESBG%20Position%20regarding%20the%20Basel%20consultation%20on%20a%20%E2%80%9Ccountercyclical%20buffer%20proposal%E2%80%9D%20_BCBS%20172_.pdf ("An inappropriate level of regulatory requirements (i.e. too low or too high capital buffers) might prove to be either inefficient or excessively expensive"; "Because capital is costly and because investors in times of crisis are looking for secure investments, we believe that there is a risk that the proposed buffers would turn into a set of new minimum requirements thereby missing the initial objective."); BUILDING SOC'Y ASS'N, OUR RESPONSE TO TWO BASEL COMMITTEE CONSULTATIONS: STRENGTHENING THE RESILIENCE OF THE BANKING SECTOR (CP 164) AND INTERNATIONAL FRAMEWORK FOR LIQUIDITY RISK MEASUREMENT, STANDARDS AND MONITORING (CP165) 5 (2010), <http://www.bis.org/publ/bcbs165/tbsa.pdf> ("Another unintended consequence of too costly liquidity requirements will be to push banks into higher risk business to compensate for holding low margin, or unprofitable assets, clearly not the intention of the proposed rules."); BUILDING SOC'Y ASS'N, Independent Commission on Banking: Call for Evidence 2 (2010), <http://bankingcommission.independent.gov.uk/wp-content/uploads/2011/01/Building-Society-Association-Issues-Paper-Response.pdf> ("Overall, the Commission must decide what it is trying to optimize, or whether some sort of second best solution, for example relying on capital buffers, is sufficient.").

¹⁸⁵ Regulating Wall Street, *supra* note 181, at 153.

¹⁸⁶ *Id.* at 144.

providing for greater capital requirements, enhanced liquidity, and countercyclical buffers.¹⁸⁷ Still, disagreements arose over what was meant by capital and how stringent the requirements needed to be.¹⁸⁸ The G20 prodded the BCBS along. By the Pittsburgh Summit in September 2009, the G20 members agreed that a major form of Tier 1 capital must be “common shares and retained earnings.”¹⁸⁹ They also agreed to develop separate rules for “non-joint stock companies” so that these companies could hold equivalent levels of high quality Tier 1 capital. The G20 then instructed the BCBS to issue concrete proposals by the end of 2009, conduct an impact assessment at the beginning of 2010 and complete the task by the end of 2010.

The making of the new bank capital requirements intensified after the G20 Pittsburgh Summit. By the G20 Toronto Meeting in June 2010, the BCBS had undertaken a comprehensive “bottom-up” quantitative impact assessment as well as a detailed “top-down” macroeconomic impact assessment on the bank capital requirements.¹⁹⁰ Meanwhile, the guidelines for bank capital harmonization took solid shape: a considerably higher share of Tier 1 capital had to be “common equity”; the rest of Tier 1 capital base had to include those instruments “that are subordinated, have fully discretionary non-cumulative dividends or coupons and neither have a maturity date nor an incentive to redeem”; any “innovative hybrid capital instruments” had to be phased out; Tier 2 capital base had to be harmonized; Tier 3 capital instruments to cover market risks had to be eliminated. In September 2010, the BCBS finally announced its new capital requirements, *Basel III*, which established a 7% of a minimum

¹⁸⁷ BASEL COMMITTEE ON BANKING SUPERVISION, *BASEL III: A GLOBAL REGULATORY FRAMEWORK FOR MORE RESILIENT BANKS AND BANKING SYSTEMS*, (2010), <http://www.bis.org/publ/bcbs189.pdf> (discussing erosion of quality of capital which led to 2007 financial crisis and listing Basel Committee’s goals for Basel III).

¹⁸⁸ IFAM Group, *Basel III*, <http://www.ifamgroup.com/basel-iii/> (last visited Jul. 15, 2011) (“[T]he industry argues that the committee is going overboard in many areas and doing so in ways that will significantly, and unnecessarily, raise the cost of providing loans and other banking services. . . Banks in every country gain considerable benefit from at least one of the balance sheet items that will no longer count as capital and therefore put forth arguments as to why they should continue to count. . .”).

¹⁸⁹ G20, *PROGRESS REPORT ON THE ACTIONS TO PROMOTE FINANCIAL REGULATORY REFORM ISSUED BY THE U.S. CHAIR OF THE PITTSBURGH G-20 SUMMIT* (2009), http://www.g20.org/Documents/pittsburgh_progress_report_250909.pdf.

¹⁹⁰ G20, *PROGRESS REPORT ON THE ECONOMIC AND FINANCIAL ACTIONS OF THE LONDON, WASHINGTON AND PITTSBURGH G20 SUMMITS PREPARED BY KOREA, CHAIR OF THE G20* (2010), http://www.g20.org/Documents2010/07/July_2010_G20_Progress_Grid.pdf [hereinafter *PROGRESS REPORT ON THE PREVIOUS SUMMITS*].

common equity requirement as well as an additional counter-cyclical buffer including up to 2.5% of risk-weighted assets. The G20 members endorsed the *Basel III* at the Seoul Summit in November 2010. Notably at the same time the G20 leaders and the banking network encouraged States to implement Basel II.¹⁹¹

Basel III required several points of position-shifting and reconciliation where we could expect to see intra-network dynamics at work. First, reports indicate that German and French officials led concerns that the *Basel III* standards would be too stringent and require implementation too quickly.¹⁹² One proposal attributed to the US and the UK was to compromise of the scope of the standards by tinkering with the definition of “capital,” to specifically exclude minority interests of financial institutions held by banks.¹⁹³ Indeed, some saw the willingness of the US and UK to be persuaded as evidence of their belief in the global approach and the legitimacy that had been invested in it.¹⁹⁴ Further, while the *Basel III* timetable has been criticized as too long, some have pointed to the need to compromise on this issue due to the state of the recovery in some countries as well as the need to restructure on behalf of some (particularly European) banks given the new capital definitions.¹⁹⁵ Some issues, such as whether and how to recognize new capital instruments,¹⁹⁶ and the establishment of buffers,¹⁹⁷ remained unresolved. These unresolved issues represent the limit of G20’s coordination, at least at this moment.¹⁹⁸

¹⁹¹ Letter from Michel Pébureau & Clemens Börsig, members of European Financial Services Round Table, to Christine Lagarde, Minister of Finance in France (Feb. 16, 2011) (available at <http://www.efr.be/documents/news/75.2011.02.%20EFR%20Letter%20to%20G20%20Finance%20Minister%20Lagarde%2016.02.2011.pdf>) (urging G20 Commitment to implement Basel II and III); see also THE SEOUL SUMMIT DECLARATION, *supra* note 99.

¹⁹² Yalman Onaran & Simon Clark, *European Banks Poised to Win Reprieve in Basel on Capital Rules*, BLOOMBERG, Jul. 12, 2010, <http://www.bloomberg.com/news/2010-05-16/geithner-meeting-barnier-over-basel-iii-creates-pressure-on-banks-capital.html>.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Basel III Standards for Banks’ Capital and Liquidity is on Track*, GLG RESEARCH, Oct. 9, 2010, <http://www.glgroup.com/News/Basel-III-standards-for-banks-capital-and-liquidity-is-on-track-50915.html>.

¹⁹⁶ *Id.* See also BASEL COMMITTEE ON BANKING SUPERVISION, PROPOSAL TO ENSURE THE LOSS ABSORBENCY OF REGULATORY CAPITAL AT THE POINT OF NON VIABILITY, (2010) <http://www.bis.org/publ/bcbs174.pdf>.

¹⁹⁷ See *Basel III Standards for Banks’ Capital and Liquidity is on Track*, *supra* note 195.

¹⁹⁸ See e.g., Wolverson, *supra* note 152 (“The G20 finance meeting this weekend in Gyeongju, South Korea, failed to produce concrete measures to tame worsening trade and currency imbalances. . . .”); Paul Krugmann, *The Third Depression*, N.Y. TIMES, June 27,

At the same time, the incremental formation of *Basel III* also offers an excellent avenue in locating the intra-network dynamics leading up to this regulatory prototype created by the Banking Network. First of all, the network collaboration in this highly professional area would not have been possible without the widely shared, if not uniform, professional grounds among network participants. Government officials from different countries' Finance Ministries and Central Banks spoke the similar, if not identical, language, similar enough to communicate with each other. They understand what the terms "Tier I capital" and "risk capture" mean. This expert sympathization among network participants expands any otherwise local regulatory dialogue into a multilateral horizon so that like-minded regulators can collaborate on the eventual formulation of a regulatory product, such as *Basel III*.

Admittedly, not every dialogue leads to consensus or convergence. There may be disagreements on a number of issues at a professional level. To narrow the gap of these disagreements among them, some participants attempt to "persuade" other members to accept their positions. When this attempt to persuade occurs simultaneously from both directions, two parties engage in a "negotiation." In the Banking Network, Franco-German regulators persuaded the U.S. and UK counterparts to exclude minority interests of financial institutions held by banks from the definition of "capital." In return, the U.S. and the UK regulators could persuade their European counterparts to accept *Basel III* despite the latter's concern for implementation due to the new capital definition.¹⁹⁹

Unsurprisingly, developing countries played a relatively small role, if at all, in the establishment of *Basel III* mainly due to their limited influence in this area. Nonetheless, they decided to remain engaged to preserve their actor momentum in the network. This is a good example of

2010,

<http://www.nytimes.com/2010/06/28/opinion/28krugman.html?scp=7&sq=g20%20failure&st=cse> ("[M]ost recently at last weekend's deeply discouraging G-20 meeting—governments are obsessing about inflation when the real threat is deflation, preaching the need for belt-tightening when the real problem is inadequate spending."); Simon Johnson, *Capital Failure*, N.Y. TIMES, Nov. 11, 2010, <http://economix.blogs.nytimes.com/2010/11/11/capital-failure/?scp=1&sq=g20%20failure&st=cse> ("The Group of 20 has completely failed to do what is necessary to rein in global megabanks—and to make them safer."); Admati, *supra* note 152 ("Basel III bank regulation proposals that Group of 20 leaders will discuss fail to eliminate key structural flaws in the current system.").

¹⁹⁹ See Elena Logutenkova & Fabio Benedetti-Valentini, *BNP Grows to Biggest Bank as France Says Size Doesn't Matter*, BLOOMBERG, Nov. 4, 2010, <http://www.bloomberg.com/news/2010-11-03/bnp-grows-to-biggest-bank-as-france-says-size-doesn-t-matter.html>.

willing marginalization.

Finally, most participants engaged in deliberation on *Basel III* despite the fact that they could not resolve all the issues on the table. Some issues remain unresolved. Nonetheless, network participants understood the incremental nature of this network operation and could hammer out a modest yet still desirable outcome. The G20 network process over the *Basel III* typifies “responsive engagement” in that it signifies that the network participants are still willing to negotiate, at least on some issues, even if they may fail to conclude on others at present. Such responsive engagement is vital in preserving momentum in regulatory dialogue regardless of any immediate regulatory end product. In sum, their understanding of responsive engagement enabled the network operation to move forward. Possibly, these same participants may produce *Basel IV* or *V* later on as their networking continues.

In sum, to deliver a new regulatory prototype (such as the *Basel III*) the G20 choreographed various component networks, such as the IMF and the BCBS, in a way which the TRN could be geared toward a collective goal. Here, the G20, as an executive coordinator, was able to mobilize its unique political capital in orchestrating these components, generate various regulatory prototypes, and eventually confirm them. At the same time, however, due to a largely self-referential nature of intra-network dynamics the Banking Network operation may still be insular and unresponsive to external debates or criticisms on the merits of its regulatory products such as *Basel III*.

2. Securities Network

The G20 makes use of IOSCO, a broad and active network of securities regulators.²⁰⁰ It develops and promotes “consistent standards of regulation, oversight and enforcement in order to protect investors, maintain

²⁰⁰ See International Organization of Securities Commissions, <http://www.iosco.org> (last visited Jan. 10, 2011). Currently IOSCO has 199 members: 114 ordinary members, 11 associate members, and 74 affiliate members. IOSCO: Membership and Committees List, <http://www.iosco.org/lists/> (last visited Jan. 10, 2011). It has three categories of membership: ordinary, associate, and affiliate. See *id.* Ordinary membership is open to primary national securities regulators. About IOSCO: Membership Categories and Criteria, <http://www.iosco.org/about/index.cfm?section=membership> (last visited Jan. 10, 2011). As ordinary members, national securities regulators each have one vote in the Presidents Committee’s Annual Conference. *Id.* Associate members are other securities and or futures regulators in a jurisdiction. *Id.* Associate members have no vote and are not eligible for the Executive Committee; however, they are members of the Presidents’ Committee. *Id.* Affiliate members are self-regulatory bodies, which are not members of President’s Committee, without a vote or eligibility for the Executive Committee. *Id.*

fair, efficient and transparent markets, and seek to address systemic risks.’²⁰¹ It operates through several committees, the most important of which is the Technical Committee.²⁰²

Over the years IOSCO has developed a number of important standards and best practices: accounting standards;²⁰³ core standards to facilitate cross-border offerings and listings;²⁰⁴ global investment performance standards;²⁰⁵ auditing standards;²⁰⁶ disclosure standards to facilitate cross-border offerings and listings by multinational issuers;²⁰⁷ and international standards for central counterparty clearing organizations.²⁰⁸ These standards and best practices are widely adopted by the leading financial regulators and, as a result, followed by transnational firms.²⁰⁹

IOSCO’s engagement with the G20’s crisis management began with IOSCO sending an open letter to the G20, applauding its efforts to deal with the crisis and offering assistance.²¹⁰ Its Technical Committee created a task force to support the G20’s efforts.²¹¹ It undertook a number of tasks in

²⁰¹ About IOSCO: General Information, <http://www.iosco.org/about> (last visited Jan. 10, 2011).

²⁰² The Technical Committee’s work covers Multinational Disclosure and Accounting, Regulation of Secondary Markets, Regulation of Market Intermediaries, Enforcement and the Exchange of Information, Investment Management, and Credit Rating Agencies. About IOSCO: Working Committees, <http://www.iosco.org/about/index.cfm?section=workingcmnts> (last visited Jul. 17, 2011).

²⁰³ Press Release, IOSCO, IOSCO Technical Committee Statement on Accounting Standards Development and Enforcement (Oct. 21, 2008) (*available at* <http://www.iasplus.com/iosco/0810techcommittee.pdf>).

²⁰⁴ TECHNICAL COMM. OF THE INT’L ORG. OF SECURITIES COMM’NS, IASC STANDARDS: ASSESSMENT REPORT 4 (2000), <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD109.pdf>.

²⁰⁵ EMERGING MARKETS COMM. OF THE INT’L ORG. OF SEC. COMMISSIONS, PERFORMANCE PRESENTATION STANDARDS FOR COLLECTIVE INVESTMENT SCHEMES 2 (Dec. 2000), <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD114.pdf>.

²⁰⁶ Press Release, IOSCO, IOSCO Statement on International Auditing Standards (Nov. 9, 2007), (*available at* <http://www.iasplus.com/iosco/0711isastatement.pdf>).

²⁰⁷ INT’L ORG. OF SECURITIES COMMISSIONS, A RESOLUTION OF THE PRESIDENTS’ COMMITTEE ON IOSCO ENDORSEMENT OF DISCLOSURE STANDARDS TO FACILITATE CROSS-BORDER OFFERINGS AND LISTINGS BY MULTINATIONAL ISSUERS (1998), <http://www.iosco.org/library/resolutions/pdf/IOSCORES17.pdf>.

²⁰⁸ BANK FOR INT’L SETTLEMENTS & INT’L ORG. OF SEC. COMMISSIONS, RECOMMENDATIONS FOR CENTRAL COUNTERPARTIES 2 (2004), <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD176.pdf>.

²⁰⁹ Press Release, IOSCO, IOSCO Publishes Regulatory Standards for Funds of Hedge Funds (Sept. 14, 2009) (*available at* <http://www.iosco.org/news/pdf/IOSCONEWS166.pdf>).

²¹⁰ Open Letter to the G20, <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD282.pdf> (last visited Jul. 21, 2011).

²¹¹ Press Release, IOSCO, IOSCO Technical Committee Launches Task Force to

connection with the G20's efforts including its collaboration with the BCBS and the IAIS as part of a Joint Forum resulting in the report on the *Differentiated Nature and Scope of Financial Regulation*.²¹²

Most illustrative for our purposes though is IOSCO's engagement in the regulation of "credit rating agencies (CRAs)," both before and during the 2008 financial crisis, which reveals the use of intra-network dynamics over a period of time. IOSCO's focus on CRAs emerged after the East Asian Financial Crisis and again after the failures of WorldCom and Enron in 2002. While a high credit rating never meant that something was a good investment (ratings indicate only "the likelihood that a particular debt security will perform according to its terms"),²¹³ the extent to which regulators such as the SEC or the Banking network in Basel II referenced credit ratings tended to infuse them with credibility.²¹⁴ As is widely known now, this veneer of credibility created problems because there were real gaps in CRAs regulation long before the most recent crisis.²¹⁵

The IOSCO Technical Committee targeted the CRA gap starting in

Support G-20 Aims (Nov. 25, 2008) (available at <http://www.iosco.org/news/pdf/IOSCONEWS134.pdf>).

²¹² Containing core principles as well as cross sectoral standards to avoid systemic risk and regulatory arbitrage. PROGRESS REPORT ON THE PREVIOUS SUMMITS, *supra* note 190, at ¶63. The report focused on underwriting standards as well as hedge fund activities. Each of the networks involved, including IOSCO were tasked with developing principles to respond to regulatory deficits while the FSB oversaw policy implementation. IOSCO for example in June 2010 issued its "revised Objectives and Principles of Securities Regulation to incorporate eight new principles." PROGRESS REPORT ON THE PREVIOUS SUMMITS, *supra* note 190, at ¶¶63. The resulting report illustrates the long-standing collaboration of IOSCO with Basel Committee as well as the IAIS over many years. The report relied on numerous prior reports and studies including Supervision of Financial Conglomerates (February 1999), Core Principles: Cross-sectoral Comparison (November 2001), Risk Management Practices and Regulatory Capital: Cross-sectoral Comparison (November 2001), Credit Risk Transfer (March 2005), Regulatory and Market Differences: Issues and Observations (May 2006), Customer Suitability in the Retail Sale of Financial Products and Services (April 2008), Credit Risk Transfer: Developments from 2005 to 2007 (July 2008), Stocktaking on the Use of Credit Ratings (June 2009), and Report on Special Purposes Entities (September 2009). The conclusions and recommendations are based upon this prior work of each of the networks working independently as well as the three working together through the Joint Forum.

²¹³ Karmel & Kelly, *supra* note 78, at 924–25; *see also* STANDARD & POOR'S, GUIDE TO CREDIT RATING ESSENTIALS 3–4 (2010), http://www2.standardandpoors.com/spf/pdf/fixedincome/SP_CreditRatingsGuide.pdf.

²¹⁴ Karmel & Kelly, *supra* note 78, at 925.

²¹⁵ *See, e.g., id.* at 925 ("The failure of the CRAs to promptly adjust ratings or forecast the demise of issuers that went bankrupt when the stock market technology bubble burst then led to scrutiny of their performance and the lack of government regulation.").

2003 with a *Report of the Activities of Credit Rating Agencies*.²¹⁶ IOSCO also published a set of Principles Regarding the Activities of CRAs in 2003.²¹⁷ But critics questioned the sufficiency of these principles to address CRAs problems stemming from Basel II's use of the ratings.²¹⁸ IOSCO responded with a *Code of Conduct Fundamentals for CRAs* offering greater specificity with respect to such issues as conflicts of interest, independence, and transparency.²¹⁹ Interestingly, the rating agencies themselves got into the act, developing their own *Code of Professional Conduct* in the second half of 2005. Indeed, IOSCO's March 2009 *Report Assessing CRAs* found that many of them had adopted Codes of Conduct that reflected IOSCO's *Code of Conduct Fundamentals*.²²⁰

Prior to the most recent crisis, the United States Congress addressed perceived deficiencies in the CRA system in 2006. Following the IOSCO's Code of Conduct for CRAs, Congress passed the Credit Agency Reform Act of 2006 "which established a system of registration and regulation of [CRAs] and instructed the SEC to formulate implementing rules."²²¹ Among other things this act established a system of non-mandatory registration and imposed substantive requirements with respect to conflicts of interest, public information and anticompetitive practices.²²² The SEC passed implementing rules. Among other things the rules "prohibit credit raters from rating their own work, and ban employees who help determine a credit rating from negotiating any fees."²²³

Although IOSCO's CRA prototype had hardened into law in the US, IOSCO continued elaborating its standards. It updated its *Code of Conduct*

²¹⁶ THE TECHNICAL COMMITTEE OF THE INT'L ORG. OF SEC. COMMISSIONS, REPORT ON THE ACTIVITIES OF CREDIT RATING AGENCIES (2003), <http://www.fsa.go.jp/inter/ios/20030930/05.pdf>.

²¹⁷ THE TECHNICAL COMMITTEE OF THE INT'L ORG. OF SEC. COMMISSIONS, IOSCO STATEMENT OF PRINCIPLES REGARDING THE ACTIVITIES OF CREDIT RATING AGENCIES (2003), <http://www.fsa.go.jp/inter/ios/20030930/02.pdf>.

²¹⁸ Karmel & Kelly, *supra* note 78, at 927.

²¹⁹ THE TECHNICAL COMMITTEE OF THE INT'L ORG. OF SEC. COMMISSIONS, CODE OF CONDUCT FUNDAMENTAL FOR CREDIT RATING AGENCIES (2004, revised May 2008), <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD180.pdf>.

²²⁰ PROGRESS REPORT ON THE PREVIOUS SUMMITS, *supra* note 190, at ¶¶ 97. [?]

²²¹ Kelly & Karmel, *supra* note 78, at 927. *See also* Credit Rating Agency Reform Act of 2006, 109 P.L. 291, 120 Stat. 1327 (2006) (codified as amended at 15 U.S.C. § 780-7 (2010)).

²²² Global Legal Information Network, Credit Agency Reform Act of 2006, <http://www.glin.gov/view.action?glinID=190699> (last visited June 12, 2011) (summarizing the Act, including registration system and requirements).

²²³ *EU Lawmakers Back Strict Rules on Credit Agencies*, EURACTIV.COM, Mar. 25, 2009, <http://www.euractiv.com/en/financial-services/eu-lawmakers-back-strict-rules-credit-agencies/article-180606>.

and issued a Consultation Report.²²⁴ But critics persisted. In 2008, EU Commissioner Charles McCreevy called IOSCO's efforts toothless.²²⁵ The EU pushed for and developed stricter standards for the regulation of CRAs, the strictest of any jurisdiction.²²⁶ The EU Parliament initially put the Committee of European Securities Regulators ("CESR") at the center of a CRA registration system that included monitoring and implementation. The substantive provisions called for a review of business models and a decrease in the use of ratings by regulators.²²⁷ The US balked at the extraterritorial application of the EU regulations.²²⁸

Once the 2008 crisis emerged we saw the G20 attempt to coordinate regulatory outcomes. Starting with the very first summit, the G20 called upon national regulators to improve CRA oversight. Previously, the US had pressed for greater cooperation, while the EU seemed committed to tougher regulation.²²⁹ The G20, through the FSB, has asked the U.S. and EU to resolve significant inconsistencies among their CRA regulations.²³⁰ The FSB also urged G20 countries to reduce the use of ratings as the dominant

²²⁴ See THE TECHNICAL COMMITTEE OF THE INT'L ORG. OF SEC. COMMISSIONS, FINAL REPORT: THE ROLE OF CREDIT RATING AGENCIES IN STRUCTURED FINANCE MARKETS (2008), <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD270.pdf>.

²²⁵ Gillian Tett, *Unease as Regulators Call for More Control Over Ratings System*, FINANCIAL TIMES, June 25, 2008, <http://www.ft.com/intl/cms/s/0/c0ee5928-424e-11dd-a5e8-0000779fd2ac.html#axzz1RMNi2Bxi>. It has been suggested that the EU wanted to break the dominance of the US credit rating agencies. Jim Brunsten, *Commission Plans to Get Tough With Rating Agencies*, EUROPEANVOICE.COM, June 3, 2010, <http://www.europeanvoice.com/article/2010/06/commission-plans-to-get-tough-with-rating-agencies/68104.aspx>.

²²⁶ Douglas W. Arner et al., *Central Banks and Central Bank Cooperation in the Global Financial System*, 23 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 1, 380 (2010); see also *Reforming the Ratings Agencies: Will the U.S. Follow Europe's Tougher Rules?*, KNOWLEDGE@WHARTON, May 27, 2009, <http://knowledge.wharton.upenn.edu/article.cfm?articleid=2242>.

²²⁷ The rules further provide the CRAs:

- May not provide advisory services.
- Must disclose the models, methodologies and key assumptions upon which ratings are based.
- Must differentiate the ratings of complex products with a specific symbol.
- Must publish an annual transparency report.
- Must have at least two directors on their boards whose salary does not depend on the ratings agency's business performance.
- Must create an internal function to review the quality of their ratings." *Id.*

²²⁸ *EU Lawmakers Back Strict Rules on Credit Agencies*, *supra* note _.

²²⁹ Kristina St. Charles, Note, *Regulating Imperialism: The Worldwide Export of European Regulatory Principles on Credit Rating Agencies*, 19 MINN. J. INT'L L. 399 (2010) (discussing EU's stricter CRA regulations and the differences from US regulations).

²³⁰ PROGRESS REPORT ON THE PREVIOUS SUMMITS, *supra* note 190, at ¶¶ 93–95.

means of assessing risk. Adhering to the FSB's call, the Dodd-Frank Wall Street Reform and Consumer Protection Act eliminated references to credit ratings in several statutes and the EU is considering similar measures.²³¹ As a related matter, the BCBS has also been asked to address reducing the "use of external ratings in the regulatory capital framework."²³² Likewise, the FSB manages data of for the use of ratings with an eye towards developing principles to minimize their use.²³³ The FSB committed itself to harmonizing CRA regulatory standards in this area.²³⁴

Throughout the crisis, the G20's coordinated work on CRAs continued. It reiterated its calls for improved regulatory oversight at the London, Pittsburg and Toronto Summits.²³⁵ At the Seoul Summit the G20 approved *Basel III's* recommendation to reduce reliance on CRAs.²³⁶ IOSCO responded to this G20 goal with its May 2010 *Principles Regarding Cross-border Supervisory Cooperation*,²³⁷ IOSCO has monitored CRAs adoption of codes of conduct consistent with IOSCO's *Code of Conduct Fundamentals for CRAs*, finding that more CRAs are adopting the IOSCO standards.²³⁸ IOSCO is also monitoring the supervisory initiative of various jurisdictions in light of *IOSCO CRA Principles*.²³⁹

Despite the G20 coordination, the network dynamics seem to have had limited success in moving the key players towards regulatory convergence. Some convergence has occurred. CRAs were originally unregulated.²⁴⁰ The US started to move towards regulation after Enron in 2002 culminating in the 2006 Credit Rating Agency Reform Act.²⁴¹ In the

²³¹ *Id.* See also Kevin Drawbaugh, *Global Regulators Urge Credit Rating Agency available at Curbs*, REUTERS, Oct. 27, 2010, <http://www.reuters.com/article/2010/10/28/financial-regulation-credit-raters-idCNN2728165520101028>.

²³² PROGRESS REPORT ON THE PREVIOUS SUMMITS, *supra* note 190, at ¶¶ 93–95.

²³³ *Id.*

²³⁴ Arner et al., *supra* note 226, at 40.

²³⁵ See *id.* (discussing G20 and Washington Action Plan).

²³⁶ Nagesh Narayana, *G20 Agrees on Reducing Reliance on CRA Ratings*, INT'L BUS. TIMES, Nov. 11, 2010, <http://www.ibtimes.com/articles/80745/20101111/basel-3-cra-bis-ratings.htm>.

²³⁷ PROGRESS REPORT ON THE PREVIOUS SUMMITS, *supra* note 190, at ¶ 46.

²³⁸ *Id.* at 93–95.

²³⁹ *Id.*

²⁴⁰ Claire A. Hill, *Regulating the Rating Agencies*, 82 WASH. U. L.Q. 43 (2004) (explaining that the designation of a CRA by the SEC for example (though the use of a no action letter) merely meant that the CRA or Nationally Recognized Statistical Rating Organization (NRSRO) was one that was accepted by the market place as a "recognized rating agency).

²⁴¹ *Id.* (explaining the rules centered around disclosure and prohibited the SEC from regulating the substance of the CRA's ratings. The SEC followed up with rules focusing on

EU, CRAs were likewise unregulated at first. In 2008, the EU decided to take a tough approach to CRA regulation, tougher than both IOSCO and the US. Therefore, one might observe that even before the onset of the financial crisis the expert community saw the necessity of regulating CRAs. However, the resulting mixture of EU, US, and IOSCO regulatory standards betrays scarcity of the intra-network dynamics, in particular vis-à-vis the Banking Network, as well as the difficulty of executive coordination by the G20.

The problem of conflicts of interests, which plagues the industry, is a case in point. Serious conflicts arose in the industry because issuers chose and paid the CRAs they used. A CRA that wanted business would be better off if it tended to give favorable ratings. Initially, this was not a big problem. As each CRA had an interest in preserving its professional reputation, it would not be advantageous for a CRA to risk its reputation when there was a sufficient supply of potential customers (issuers) in the market.²⁴² Unfortunately, when it came to mortgage-related structured bonds, there were not as many issuers, and therefore there was the increased threat of conflicts.²⁴³ All regulatory bodies recognize conflicts of interest as a problem. The expert community has been persuaded by common experience and understanding that there needs to be some external force that counteracts this inherent conflict. However, as each jurisdiction is developing its own course, intra-network dynamics, such as persuasion, negotiation, responsive engagement and even strategic cooptation, appear to be absent for the time being.

For example, the US regulation under the Dodd-Frank Act seems weak when compared to EU efforts. While the Dodd-Frank Act prohibits CRAs from considering sales and marketing when arriving at its rating, it does little else to confront conflicts risks.²⁴⁴ Instead, it calls for a two year study to determine the feasibility of having another entity assign structured finance projects.²⁴⁵ In contrast, the EU approach requires that an issuer not only supply information to the CRA it chooses so that the CRA can provide the rating, the issuer must also make that information available to all CRAs, allowing other CRAs to rate and thus creating competition.²⁴⁶ Another issue affecting conflicts of interest involves providing consultancy or

record keeping reports and procedures. Following some criticism the SEC amended its rule to address transparency and conflicts of interests issues).

²⁴² Regulating Wall Street, *supra* note 181, at 448.

²⁴³ *Id.* at 448–449.

²⁴⁴ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub.L. 111–203 §§ 932–933, 124 Stat. 1376, 1883–84 (2010) (to be codified at 15 U.S.C. 78o–7, 78u–4(b)(2)).

²⁴⁵ *See id.* § 939.

²⁴⁶ Regulating Wall Street, *supra* note 181, at 460 (explaining EU regulation).

advisory services to a rated entity or its affiliate. The EU prohibits the provision of such services.²⁴⁷ As one commentator notes, this EU provision resembles the requirements of *IOSCO's Code of Conduct*.²⁴⁸ Yet the US has failed to adopt this type of provision in its 2006 legislation.²⁴⁹ While the Dodd-Frank legislation did address the issue, it simply ordered Congress to study the issue, rather than prohibited the practice itself.²⁵⁰

Notably, the G20 has not given up on the matter. Its July 2010 Progress report notes that the “at the request of the FSB, the EU, US and Japan are continuing their discussions to resolve any significant inconsistencies or frictions that may arise as a result of differences among their new CRA regulations.”²⁵¹ At Seoul the Leaders did approve *Basel III* recommendation on reducing reliance on CRAs, but implementation remains with national jurisdictions.²⁵²

In sum, the Securities Network demonstrates a limited success, as measured in terms of regulatory convergence, of the G20's coordination. While the G20 did succeed in establishing a regulatory prototype calling for its members to duly regulate CRAs and minimize their reliance to CRAs, the level of national implementations has not been uniform. Notably, the relative scarcity of intra-network dynamics in this area, vis-à-vis the Banking Network, may explain the current transatlantic gap in regulating CRAs, such as in the area of conflicts of interest.

3. The Insurance Network

The Insurance Network resides in the IAIS, which brings together insurance regulators and supervisors from over 140 countries.²⁵³ The IAIS develops best practices and core principles for insurance supervisions.²⁵⁴ Established in 1994 as a forum to develop international insurance norms,²⁵⁵

²⁴⁷ St. Charles, *supra* note 229, at 433 (citing Council Regulation 1060/2009, annex I, § B(4)).

²⁴⁸ *Id.* at 433 (citing IOSCO, Revised Code of Conduct, § 2.5).

²⁴⁹ *Id.* (citing Credit Rating Agency Reform Act of 2006, Pub. L. No. 109-291, § 4, 120 Stat. 1327 (amending 15 U.S.C. § 78o-7(c)(2)).).

²⁵⁰ Dodd-Frank, *supra* note 244, § 939C(b).

²⁵¹ PROGRESS REPORT ON THE PREVIOUS SUMMITS, *supra* note 190, at ¶ 94.

²⁵² See FIN. STABILITY BOARD, PRINCIPLES FOR REDUCING RELIANCE ON CRA RATINGS, (2010) http://www.financialstabilityboard.org/publications/r_101027.pdf.

²⁵³ International Association of Insurance Supervisors, Principles, <http://www.iaisweb.org/index.cfm?pageID=39> (last visited Jul. 17, 2011).

²⁵⁴ *Id.*

²⁵⁵ Elizabeth F. Brown, *The Development of International Norms for Insurance Regulation*, 34 BROOK. J. INT'L L. 953, 957 (2009).

the IAIS is composed of 190 members from 140 countries.²⁵⁶ The Executive Committee, the governing body of the organization, is composed of 15 representatives from different geographical regions.²⁵⁷ The IAIS is divided into three committees: a Technical Committee, an Implementation Committee, and a Budget Committee.²⁵⁸ Under the Technical Committee are various working parties responsible with drafting IAIS standards.²⁵⁹ The IAIS papers are intended to be implemented “in a flexible manner depending on the circumstances within each jurisdiction.”²⁶⁰ The Implementation Committee assists members by organizing training and seminars, developing implementation tools, facilitating the provision of technical assistance, and supporting the Financial Sector Assessment Programme conducted by the IMF and World Bank.²⁶¹

The G20 Leaders have looked to the IAIS with respect to several issues. It has tapped the IAIS in its efforts to coordinate capital adequacy standards.²⁶² In response to the G20’s request in 2009 it adopted a supervisory guidance paper on the use of supervisory colleges. It has also adopted the *Insurance Core Principles Review Process*.²⁶³ As stated above, it coordinated with the BCBS and IOSCO as part of the Joint Forum. As stated about the IAIS collaboration with the BCBS and IOSCO in the Joint

²⁵⁶ The NAIC and an insurance regulator from each of the fifty-six US jurisdiction serve as members. International Association of Insurance Supervisors (IAIS), About the IAIS, <http://www.iaisweb.org/index.cfm?pageID=28> (last visited Oct. 12, 2010). See also Brown, *supra* note 255, at 963.

²⁵⁷ About the IAIS, *supra* note 256. Yoshi Kawai, Secretary General, IAIS, Remarks at the Royal Institute of International Affairs: IAIS Standards Setting Activities 10 (Feb. 3, 2004) (available at http://www.iaisweb.org/_temp/IAIS_standard_setting_activities__Speech_by_Yoshihiro_Kawai.pdf).

²⁵⁸ INT’L ASS’N. OF INS. SUPERVISORS (IAIS), BY-LAWS art. 15(3) (2009), http://www.iaisweb.org/_temp/By-laws__2009_edition_.pdf.

²⁵⁹ Kawai, *supra* note 257, at 10. After a working party drafts a document, it consults with other IAIS members and observers, and then seeks approval from the Technical Committee and endorsement from the Executive Committee. *Id.* The draft is finally presented at an annual General Meeting where it must be approved by two-thirds of the members. *Id.*

²⁶⁰ IAIS, Overarching Standard Setting Papers, <http://www.iaisweb.org/index.cfm?pageID=37> (last visited Oct. 23, 2010).

²⁶¹ Kawai, *supra* note 257, at 10

²⁶² WASHINGTON ACTION PLAN, *supra* note 179, at ¶ 16. “The IAIS is working to assess issues that have emerged from the financial crisis with respect to the assessment of the solvency of insurance companies and the group-wide solvency requirements for internationally active insurance groups.

²⁶³ INT’L ASS’N OF INS. SUPERVISORS: INSURANCE CORE PRINCIPLES AND METHODOLOGY (2003), http://www.iaisweb.org/_temp/Insurance_core_principles_and_methodology.pdf.

Forum preceded the 2008 financial crisis and the reports that followed the crisis built upon that prior work.²⁶⁴

Finally, in response to the financial crisis and urging from the G20, the IAIS is now “developing group-wide supervisory standards for all insurance groups and a *Common Framework for the Supervision of Internationally Active Insurance Groups* (“*ComFrame*”).²⁶⁵ A task force chaired by a member of the Swiss Financial Market Supervisory Authority (FINMA) designed a work plan meant to provide qualitative and quantitative requirements that would assist in monitoring group structures, group business mixes and intra group transactions.²⁶⁶ In January, 2010, the Executive Committee approved the recommendations on the design and work plan of the framework.²⁶⁷ The Executive Committee will implement the plan, by first starting with a consultative paper in 2011 followed by implementation in 2013.²⁶⁸

In the Insurance Network, as in other Networks, network dynamics complicate the G20’s coordination efforts. The IAIS efforts, and in particular its efforts in connection with the *ComFrame* has spurred US regulatory efforts.²⁶⁹ *ComFrame* addresses holding company capital adequacy, an issue already addressed by the EU in its regulations of insurers²⁷⁰ through its *Solvency II* directive. *Solvency II* establishes a risk-based regulatory regime,²⁷¹ sets new capital adequacy and risk management

²⁶⁴ See Bank for International Settlements: Joint Forum, <http://www.bis.org/bcbs/jointforum.htm> (last visited June 12, 2011). See also International Association of Insurance Supervisors: Joint Forum, <http://www.iaisweb.org/Joint-Forum-49> (last visited June 12, 2011) (showcasing the reports created by the Joint Forum).

²⁶⁵ FIN. STABILITY BOARD, OVERVIEW OF PROGRESS IN THE IMPLEMENTATION OF THE G20 RECOMMENDATIONS FOR STRENGTHENING FINANCIAL STABILITY 5 (2010), http://www.financialstabilityboard.org/publications/r_100627c.pdf [hereinafter STRENGTHENING FINANCIAL STABILITY].

²⁶⁶ *Id.*

²⁶⁷ See Press Release, IAIS, IAIS Improves Development of a Common Framework for the Supervision of Internationall Active Insurance Groups (Jan 19, 2010) (*available at* http://www.iaisweb.org/__temp/19_January_2010__IAIS_approves_development_of_a_Common_Framework_for_the_Supervision_of_Internationally_Active_Insurance_Groups.pdf).

²⁶⁸ STRENGTHENING FINANCIAL STABILITY, *supra* note 265, at 5.

²⁶⁹ Tom Finnell, Invotex Group, Assessing the Solvency of U.S. Insurance Groups—International Pressures Mount, http://www.invotex.com/perspectives_1010.html (last visited Jul. 17, 2011).

²⁷⁰ As one commentator notes “ConFrame is poised to include requirements for quantitative assessments by regulators of group capital.” *Id.*

²⁷¹ Nikki Tait, *EU Insurers Face Solvency II Deadlines*, FIN. TIMES, Jan. 19, 2011, <http://www.ft.com/cms/s/0/36960460-23e2-11e0-8bb1-00144feab49a.html#axzz1Cum99eQO>.

standards, and “aims to change investment behaviour by imposing varying capital charges on assets.”²⁷² A real fear exists as to whether US efforts would pass an EU equivalency test with *Solvency II*.²⁷³ US industry feels that the EU system is too costly.²⁷⁴ Working through the IAIS, as well as the EU, the US is attempting to influence the standards. Working through the National Association of Insurance Commissioners, US insurers have tried to become part of a provisional regime which, at least for some time will be treated as “equivalent” with the EU’s *Solvency II*.²⁷⁵

All in all, there is wide disagreement between the EU and US approaches, which undermines some intra-network dynamics such as persuasion and negotiation. The back and forth between the US and EU takes place at the same time that the IMF as instructed by the G20 is implementing its MAP program which assesses the stability of each country’s financial architecture including the capital adequacy standards for insurers.²⁷⁶ The dynamics in this area largely remain to be seen and it will be interesting to note how the G20’s push for the IMP to implement the MAP influences the dynamics between the EU and the US as well as other key players.

4. The Trade Network

It is controversial whether there exists a genuine trade network that functions at the G20 level. As a result of the 2008 financial crisis, the G20 tapped the WTO along with the OECD and UNCTAD to monitor and report on the trade and investment measures amongst the G20 countries.²⁷⁷ They generated several reports detailing the types and impact of various trade and investment measures. Aside from being tasked with a reporting function that was already being undertaken in some respects by the WTO, the trade

²⁷² Steve Johnson, *Insurers Gear up for New Charges*, FIN. TIMES, Jan. 30, 2011, <http://www.ft.com/cms/s/0/9b9bb046-2b10-11e0-a65f-00144feab49a.html#axzz1Cum99eQO>. Equities will need to be backed by reserves of 30-40 per cent, while European sovereign debt is deemed risk free.” *Id.*

²⁷³ Finnell, *supra* note 269.

²⁷⁴ *Id.*

²⁷⁵ DELOITTE, IAIS ANNUAL UPDATE: ANNUAL MEETING 2 (2010) http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/FSI/US_FSI_IAISUpdate_120910.pdf.

²⁷⁶ Factsheet, The G20 Mutual Assessment Process <http://www.imf.org/external/np/exr/facts/g20map.htm> (July 27, 2010).

²⁷⁷ Press Release, OECD, WTO and UNCTAD renew calls to G20 to resist protectionism, (Aug. 3, 2010) (*available at* http://www.oecd.org/document/60/0,3343,en_2649_34529562_44741628_1_1_1_1,00.htm l).

network has not been linked into the ongoing efforts of the G20. To be fair the very preparation of these reports can be said to have restrained countries enacting taking protectionist measures. But its participation has been somewhat marginalized as the G20 progress reports and Leaders Summit declarations reveal. While there is language calling for the conclusion of the Doha Round and the need to resist protectionist tendencies, the WTO, OECD and UNCTAD joint reports emit a sense of frustration that the G20 has not pushed for more on the trade front. Given the highly plenipotentiary nature of trade officials prone to the domestic politics, it would be difficult to claim that the Trade Network exists in the G20 as an independent network.

IV. EVALUATING THE G20'S COORDINATION

Having identified a model of new global governance in the G20 coordination of multiple TRNs, the next step would be to evaluate the model. One might conceive two basic criteria for this purpose. First, does it work? Critics often point to the tedious process of G20 operation, in particular after the initial success in coordinating anti-crisis measures.²⁷⁸ Some critics simply question the empirical foundation of a “success.”²⁷⁹ Others consider such lack of satisfying progress as a “structural” dilemma inherent in the nature of a network.²⁸⁰ Second, is it legitimate? We would break this second question into sub-questions: is it accountable, equitable and appropriately representative? The G20's invisible nature raises transparency and accountability questions. Also, now that most of network operations are undeniably dominated by the Western developed countries, poor countries' concern for any possible alienation, marginalization and even exploitation should not be readily dismissed.²⁸¹ Finally, even though

²⁷⁸ See, e.g., Marina Larionova, *Assessing G8 and G20 Effectiveness in Global Governance So Far*, 31 INT'L ORG. RES. J. 99 (2010) (noting that there is information questioning G20 success as an anti-crisis management mechanism).

²⁷⁹ See Kenneth Anderson, *Squaring the Circle? Reconciling Sovereignty and Global Governance Through Global Government Networks*, 118 HARV. L. REV. 1255, 1277-78 (2005) (reviewing ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004)).

²⁸⁰ See Verdier, *supra* note 7, at 166. See also Heather Stewart and Larry Elliott, *Hopes Fading for Salvation at the Summit*, THE GUARDIAN, Mar. 22, 2009, <http://www.guardian.co.uk/business/2009/mar/22/g20-global-economy1> (noting that some critics doubt if the diversity of the G20 can come to any agreement whatsoever).

²⁸¹ Interestingly, these criteria themselves might conflict each other. For example, scholars often attribute the initial success of G20 in tackling the financial crisis to the smallness of its membership that facilitated an agile decision-making process, which in turn could be translated into effectiveness. At the same time, however, a number of non-

TRNs may claim legitimacy based on expertise, TRN insularity raises concerns given their influence in a pluralistic world.

A. *The Effectiveness of G20 Operation*

Assessing the G20's efficacy requires an assessment of the coordinated network structure generally and also an inquiry into whether the G20 has in particular accomplished what it has set out to do. Unsurprisingly, neither inquiry will be free from debate. As Alexandroff and Kirton point out, the experts disagree as to whether the G20 structure will be an effective one. Some see it as a step backward away from rules based multilateralism, or as an outright failure, while others see it as a strong start to creating a much needed global governance regime.²⁸² Looking more particularly at the tasks that the G20 has set out for itself and its success in accomplishing those tasks, the response has been varied as well.²⁸³

First, it is vital to recognize that the effectiveness of G20 operation depends largely on that of the TRN itself as a regulatory engine. In this regard, the verdict on the efficacy of the TRN among scholars is a mixed one. Anne-Marie Slaughter argues a government network is the "real new world order,"²⁸⁴ and "the blueprint for the international architecture of the 21st century."²⁸⁵ Kal Raustiala even argues that government networks could

members, in particular developing countries, criticize its exclusive membership that keeps those countries at the margin of global decision-making process.

²⁸² See Alexandroff & Kirton, *supra* note 95, at 177–178.

²⁸³ IVAN SAVIC & NICK ROUDEV, G20 RES. GROUP, PROGRESS ON G20 FINANCIAL REGULATORY COMMITMENTS FROM WASHINGTON 2008 UNTIL TORONTO 2010 (2010) <http://www.g20.utoronto.ca/analysis/g20finregs.html>.

²⁸⁴ SLAUGHTER, *supra* note 2, at 183, 197. Perhaps one should not bundle all networks together in one category for the purpose of evaluation. Each network addresses a different problem, although there might be some functional overlapping among these three kinds. *Id.* Therefore, a different type of network should be subject to a different criterion for its effectiveness. In this regards, Slaughter's three categories of government networks, depending on their major functions (goals) in networking may help. According to Slaughter, there are three different types of network: "information networks" which not only exchange regulatory views but also filter information on regulatory standards; "enforcement networks" which facilitates individual and collective enforcement of network norms; "harmonization networks" in which regulatory standards converge. *Id.* at 167–68. In this sense, the G20 might be said to meet all these three criteria since it facilitates all the regulatory dialogues among government officials (information network), creates regulatory prototypes (harmonization network), and even commits itself to adopt and implement those prototypes subject to peer review (enforcement network). Here, Slaughter uses the term "networks" as referring to relatively loose, cooperative arrangements across borders between and among like agencies that seek to respond to global issues. *Id.* at 14.

²⁸⁵ *Id.*

complement treaties by facilitating their operation or smoothing their negotiation or even supplement them by conducting certain gap-filling functions.²⁸⁶ However, Kenneth Anderson points out, rightly, the difficulty involved in evaluating its worthiness i.e., “whether these government networks are actually solving problems or merely talking about problems.”²⁸⁷

Skeptics challenge the eventual effectiveness, and thus the very rationale, of a TRN. Their skepticism is two-fold: empirical and structural. First, skeptics may contend that the G20 case study suffers a selection bias. They may argue that its alleged success hinges mostly on its subject-matter (“finance”), rather than on the network operation itself. In other words, they contend that the network theory would not work well in more sensitive areas such as arms control or nuclear non-proliferation.²⁸⁸ Likewise, skeptics might point out the lack of empirical confirmations on the political cross-bargain between certain regulatory subjects. In theory, one might reasonably speculate that the U.S. might cede to the EU’s penchants for stricter CRA regulation in exchange for the latter’s adoption of a modified version of the Volker rule.²⁸⁹

Admittedly, the subject-matter of networking is critical for its potential success. As seen in the government networks addressing the Y2K problem, those issues around which networkers share strongly converging interests are more readily prone to a coordinated response from networkers than other issues.²⁹⁰ And while the G20 may claim success in addressing the financial crisis,²⁹¹ it has not been able to agree on the post-crisis measures, in particular the global imbalances. These issues appear to be analogous to those related to “vital national security interests” or those “touching on issues of high domestic political sensitivity.”²⁹² Therefore, the issue-specificity matters in determining the overall success of G20 operation, though it might not be the sole factor.²⁹³

Perhaps a more difficult question might be how to define a success or failure. This question is basically an “empirical” one. If one focuses

²⁸⁶ Raustiala, *supra* note 19, at 6.

²⁸⁷ ANDERSON, *supra* note 279, at 1276 (arguing that Slaughter fails to provide persuasive “empirical” evidence as to whether a government network actually works).

²⁸⁸ VERDIER, *supra* note 7, at 123

²⁸⁹ We thank Pierre-Hugues Verdier for this point.

²⁹⁰ ANDERSON, *supra* note 279, at 1275–76.

²⁹¹ *G20 on Financial Crisis Response: It Worked*, REUTERS, Sept. 25, 2009, <http://www.reuters.com/article/2009/09/25/columns-us-g20-communicate-victory-idUSTRE58O59K20090925>.

²⁹² SLAUGHTER, *supra* note 2, at 208.

²⁹³ Anderson argues in this way. Anderson, *supra* note 279, at 1276.

solely on end products from the G20 coordination, there might be a plenty of proofs for its success, as long as an evaluator fully appreciates an incremental nature of such norm-making process and thus inevitably soft attributes of these prototypes. Yet if one ascribes its success to any real life regulatory changes in people's behaviors, not merely the existence of newly-crafted multiple regulatory standards, we might have to wait for some time before we render any definite judgment. Indeed, what might at first seem a success, can be proven later to be a failure.²⁹⁴ Likewise, one might argue that those new standards would have materialized any way from national, not necessarily global, initiatives. In such case, the G20 would have played a rather modest role.

In contrast, some scholars pin their skepticism in the very *structure* of TRNs. They question the power of the bond or socialization among networkers. They basically view that networkers as government officials, tend to serve and be controlled by their domestic constituencies, rather than loyal to a "hypothetical global polity" such as a government network.²⁹⁵ In this context, Kenneth Anderson observes that:

[Government officials] are primarily fiduciaries acting on behalf of others whose values they represent, not seekers of reason or the truth as such, and they are not free to ignore the constituents they represent and to depart on their own searches for truth with their fellow truth-seekers in an international forum.²⁹⁶

Skeptics also argue that without any formal bargains TRNs cannot effectively handle distributive consequences, such as costs and benefits, of adopting a certain standard which might negatively or positively affect each state.²⁹⁷ Moreover, they argue that networks alone cannot secure

²⁹⁴ See Jeffery Atik, *Basel II: A Post Mortem*, 19 *TRANSNAT'L L. & CONTEMP. PROBS.* 731, 748–59 (2011). For example, see criticisms of Basel II: Amy Scott, *Banks Brace for Basel II*, *MARKETPLACE: AM. PUB. MEDIA*, Jul. 2, 2008, http://marketplace.publicradio.org/display/web/2008/07/02/basel_ii/; Avinash D. Persaud, *Point of View: Banking on the Right Path*, 48 *FIN. & DEV. Q.* (2008), <http://www.imf.org/external/pubs/ft/fandd/2008/06/saurina.htm>; Andrew Crockett, General Manager of the BIS and Chairman of the Financial Stability Forum, Remarks at the 38th SEACEN Governors' Conference (Feb. 13, 2003) (*available at* <http://www.bis.org/speeches/sp030213.htm>) (addressing each of five criticisms generally levied against Basel II); JÓN DANIELSSON ET. AL., *LSE FIN. MARKET GROUP, AN ACADEMIC RESPONSE TO BASEL II*, (2001) (arguing that Basel II proposals failed to address a number of issues that could destabilize the global financial system).

²⁹⁵ Verdier, *supra* note 7, at 115.

²⁹⁶ Anderson, *supra* note 279, at 1292–93.

²⁹⁷ Verdier, *supra* note **Error! Bookmark not defined.**, at 115, 129.

enforcement of those standards once they are adopted.²⁹⁸ Finally, skeptics predict that networkers are forced to defect from previously established standards if domestic lobbies pressure those networkers.²⁹⁹

Unlike the empirical critique, however, these structural attacks against the effectiveness of government networks betray some “realist” assumptions. They nearly equate global governance with the world government. As long as we live in an anarchy, all treaties, even if they are technically binding, are basically vague any way and unenforceable in the domestic sense in many occasions. In other words, international cooperation – formal and informal – may not bring forth any immediate compliance which can be secured by direct remedies in the domestic sense. Also in our view, the structural critique is over-consequentialist. Insofar as realists are readily inclined to dismiss the effectiveness of government network based on the lack of domestic enforcement mechanisms, they largely lose sight of the value microscopic networking processes. We would argue that the realist world is too simplistic: realists are blinded by their fidelity to enforcement. Simply, there are more dynamics going on within the TRN than realists conceive.

True, networkers as regulators are subject to various domestic checks and pressures from not only their governments but also the media and the public. Yet they are not “masterless ronin”³⁰⁰ or mere mechanical tools of their government. They also “shape” their governments’ policies. Most of them are not political appointees. On the contrary, many are career officials who sit on the same issue area for decades. Even politicians cannot ignore their judgments. Likewise, skeptics assume that the domestic power dynamics on a given regulatory issue is always linear and domestic constituencies’ preferences unitary. The reality is far more complicated. There is simply more room for regulators, as norm-sponsors, to advocate and internalize network standards which enjoy professional (expert) legitimacy.³⁰¹

More importantly, the soft nature of standards recommends them because they will be reviewed by national regulators prior to implementation. As seen in the example of EU Directives, it is up to each domestic jurisdiction how to implement the network standards, more precisely how to “fine-tune” them in accordance with its domestic legal system. In addition, a TRN can have a monitoring/surveillance mechanism, as seen in the G20 Progress Report, thereby securing opportunities for self-

²⁹⁸ *Id.* at 115–16.

²⁹⁹ *Id.* at 129.

³⁰⁰ Anderson, *supra* note 279, at 1296.

³⁰¹ Indeed as discussed *infra*, this may be an independent criticism of TRNs.

correction via feedback. Finally, the G20, as the Leaders' Summit, itself holds some ability to encourage compliance.

In sum, the empirical line of critique on TRNs has a point in that this new model of global governance still needs to be further vetted. Nonetheless, insofar as the G20 has succeeded to generate various frameworks and regulatory prototypes, its operation could be called a success.

While the ability of the G20 to generate prototypes can be used to proclaim the G20 a success, before doing so we should critique whether these are at least the prototypes called for by the circumstances. In other words, did the G20 do what it had intended to do? The Washington Action Plan speaks in broad terms of "effectively regulated financial markets"³⁰² but it also sets some more specific tasks for itself including reinforcing international cooperation, reforming international financial institutions and even more specific goals such as exercising strong oversight over credit rating agencies.³⁰³ We believe that the G20 set for itself a primary goal of developing an architecture to coordinate the workings of the various TRNs to combat the crisis and that it was successful in doing so.

The construction of the architecture had several key components. Early on leaders worked out the structure and role of the Financial Stability Forum transforming it into the FSB.³⁰⁴ During the Washington Summit FSF Chair Mario Draghi and IMF Managing Director Strauss-Kahn resolved their disagreement about the role and relationship of their respective institutions to the new global financial architecture. The two agreed that a lightly institutionalized FSF would set new standards, but the organizationally powerful IMF would then monitor and enforce compliance with them.³⁰⁵ The resulting action plan reflected this agreement.³⁰⁶

The Leaders tapped the Finance Ministers to initiate an "action plan" and "timeline."³⁰⁷ That action plan called upon the resources and efforts of the IMF, the FSF, the Finance Ministers, the BCBS, the World Bank, the OECD, and the key global accounting standards bodies (IASB and FASB, IASCF).³⁰⁸ The G20 "Progress Reports" on its actions plans reveal a carefully choreographed response to the crisis.³⁰⁹ The Washington

³⁰² WASHINGTON ACTION PLAN, *supra* note 179, at ¶ 2.

³⁰³ *Id.* at ¶ 9.

³⁰⁴ FIN. STABILITY BOARD, FINANCIAL STABILITY BOARD CHARTER (2009) http://www.financialstabilityboard.org/publications/r_090925d.pdf.

³⁰⁵ Alexandroff & Kirton, *supra* note 95, at 182

³⁰⁶ WASHINGTON DECLARATION, *supra* note 104.

³⁰⁷ *Id.* at ¶ 10.

³⁰⁸ *Id.*

³⁰⁹ For example, WASHINGTON ACTION PLAN, *supra* note 179, at ¶ 14 reports that "The

Action Plan for example, asked the FSF to assist private sector bodies as well as key global accounting standard setting bodies with strengthening transparency and accountability; the FSF and IMF were asked to develop “recommendations to mitigate pro-cyclicality”; the BCBS was asked to study stress testing models; the OECD was asked to facilitate tax information exchange among other things.³¹⁰

Interestingly, in some ways the G20, acted somewhat like a *mega-network*,³¹¹ conducting both a norm-making and a coordinative function. Its coordination spurred regulatory prototypes, with swiftly implementable guidelines and recommendations, as well as frameworks consisting of long-term action plans or policy directions to coordinate between and among sector-specific regulatory prototypes.³¹² In addition, the G20’s unique surveillance (peer review) mechanism, such as the MAP,³¹³ under which the G20 can collectively evaluate each member’s record of compliance with previous blueprints and regulatory prototypes, is yet another sign of

Trustee of the International Accounting Standard Committee Foundation (IASCF) have agreed to establish a formal link to a newly created external Monitoring Board composed of public authorities, including chairs of the expanded IOSCO Technical Committee and the IOSCO Emerging Markets Committee. The success of this monitoring body will be reviewed by summer 2010. Members also approved to expand the International Accounting Standards Board (IASB) membership to 16 members and provided guidelines for geographic diversity”) *Id.* a 4. The progress reports are extremely detailed and focus on each of the bodies tasked with any duty under the action plans.

³¹⁰ WASHINGTON ACTION PLAN, *supra* note 179, at 1–5.

³¹¹ Such notion of “*mega-network*” or a horizontal “network of networks” is not new. Slaughter locates such a network of networks in the Financial Stability Forum (FSF) formed in 1996 by amalgamating three independent government networks – the Basel Committee, the International Organization of Securities Commissioners (IOSCO), and the International Association of Insurance Supervisors (IAIS) – in order to addressing those regulatory issues common to different types of financial institutions (banks, securities companies and insurance companies), such as the capital adequacy ratio and other risk-related rules. *See* SLAUGHTER, *supra* note 2, at 135.

³¹² Admittedly the leaders (prime ministers or presidents) are not professional regulators themselves and probably do not know anything about how the international finance is actually operating. But they offer critical political “glues” which hold those individual networks together as well as some aura of legitimacy. As a corollary, the G20 will move on even if all the current leaders are replaced in the next elections as long as those professional regulators still manage the micro-level regulatory networking. The networks that it coordinates have existed for some time and have been strengthened by the G20 Leaders coordination. Alexandroff and Kirton for example describe the actual negotiations in the Washington Summit as “going well” stating that there was a “substantial degree of personal involvement, passion and even spontaneous discussion among the leaders.” Alexandroff & Kirton, *supra* note 95, at 183.

³¹³ *See* Factsheet: The G-20 Mutual Assessment Process, International Monetary Fund, <http://www.imf.org/external/np/exr/facts/g20map.htm> (last visited Jul 15, 2011).

effectiveness in executive coordination. Importantly, the G20 Leaders coordination resulted in part from their shared belief in the needed response to the crisis. Undeniably though despite some shared beliefs the Leaders group remains a *political* grouping subject to typical political pressures from diverse constituencies.

B. Legitimacy Questions: Accountability, Equity, and Representation of the G20 Operation

While the ineffectiveness critique of the TRN assumes the lack of autonomy of network participants, the legitimacy critique takes a diametrically opposite position on the nature of network participants. The legitimacy critiques include concerns over accountability, equity, and representation. While we think that the legitimacy critiques have merit we believe that they can be ameliorated. In fact, we hope that our dissection of the coordinated network phenomenon aids in that effort.

Some scholars fear that the disaggregation of a unitary state, which forms a foundation of TRNs, would unduly weaken the state authority.³¹⁴ They fear that those regulators would acculturate themselves too much with the network norms or their ideals in a way which may go against the traditional value of state sovereignty or national interest.³¹⁵ Therefore, they suspect that the government network would “tip[] in favor of global governance in ways that devalue democracy and democratic accountability”³¹⁶ For example, there is a real question of whether G20 nations are going to hand over sovereignty to the G20 or any other institution to institute changes that might be needed to ameliorate the tension between globalization and financial risk.³¹⁷

There are responses to these concerns. TRNs are still subject to various domestic mechanisms of check and balance. While network participants as norm-entrepreneurs internalize network standards by creating new domestic legal and political dynamics, these standards are still subject to domestic judicial/legislative challenges in a post-internalization stage.³¹⁸ One could even argue that TRNs may enhance accountability by providing counterforce against domestic special interests which often capture domestic regulators and undermine the public policy. Nonetheless,

³¹⁴ Anderson, *supra* note 279, at 1299 (“In the case of a unitary state, giving substate agencies sovereign powers within a particular subject matter really does weaken the state”).

³¹⁵ *Id.*

³¹⁶ *Id.* at 1301

³¹⁷ JEAN PISANI-FERRY, INT’L GOVERNANCE, IS THE G20 THE RIGHT FORUM?, 4 (2009) <http://aei.pitt.edu/10666/>.

³¹⁸ Raustiala, *supra* note 19, at 80–81 (discussing the transnational legal process).

the government network's soft, informal nature may still be a double-edged sword. Although it may facilitate interstate cooperation, it may sidestep various checks and disciplines secured by a formal mechanism, such as administrative or constitutional law, or the concern of transparency and democratic accountability.³¹⁹ Ideally, national lawmakers should be attuned to these concerns and not allow the TRN process to foreclose national checks and balances.³²⁰

Another potential criticism against the government network is that the whole network operation is biased in favor of the powerful developed countries.³²¹ The end products of the network, such as regulatory prototypes, might already reflect those of the dominant states.³²² Based on his empirical study on various government networks, Kal Raustiala observes that networks tend to impose powerful nations' regulatory model upon less powerful countries since the former dominate in the networking process.³²³ Therefore, the North may be a standard-setter, while the South may be a standard-taker.³²⁴

³¹⁹ Verdier, *supra* note 7, at 115 (observing that TRN's very advantages, such as informality, tend to raise some problems which remain largely unattended by pre-existing literatures). *Id.* at 169. See also Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490, 1530–34 (2006); Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 34–35, 37–39 (2005).

³²⁰ See discussion, Karmel & Kelly Section III.

³²¹ Ashwani Kumar, *G20 and Global Governance: A New "New" Deal for the Global Poor!*, in HOW CAN THE NEW SUMMIT ARCHITECTURE PROMOTE PRO-POOR GROWTH AND SUSTAINABILITY 36–38 (Thomas Fues & Peter Wolff eds., 2010); Sir Richard Jolly, *Future Directions for the G20: Towards Legitimacy and Universality*, in HOW CAN THE NEW SUMMIT ARCHITECTURE PROMOTE PRO-POOR GROWTH AND SUSTAINABILITY? 32–35 (Thomas Fues & Peter Wolff eds., 2010).

³²² Julia Black, *Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes* 13 (London Sch. of Econ. Legal Stud. Working Papers No. 2, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1091783. See also Susanne Soederberg, *The Politics of Representation and Financial Fetishism: the Case of the G20 Summits*, 31 THIRD WORLD Q. 523 (2010) (arguing that the G20 served to “naturalise and depoliticise the crisis, thereby legitimating a narrow and very particular response to it” under what she dubbed the “financial fetishism”).

³²³ ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *supra* note 19, at 24–25.

³²⁴ “The analysis here predicts that powerful jurisdictions will, as a result, compete as standard-setters within the network; weak jurisdictions will often import these standards.” (ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *supra* note 19, at 68). “[C]ooperative arrangements modelled [sic] after the SEC's [MOUs] are now used by securities regulators around the world. Consequently, . . . the SEC is able to obtain enforcement-related information from numerous jurisdictions, including emerging and developed markets.” PICCIOTTO, *supra* note 21, at 1047; Practising Law Institute,

In this vein, Anne-Marie Slaughter, the chief advocate of TRN, herself acknowledges that regulatory convergence toward network norms, often pressured by the very dynamics of a network, might be seen as illegitimate in a certain domestic political context.³²⁵ Stephen Toope even argues that “[n]etworks...are sites of power, and potentially of exclusion and inequality.”³²⁶ Likewise, networks might undermine a traditional space of more formal public international law under which less powerful countries might receive better protection via sovereign equality.³²⁷

While this power disparity critique holds water in general, particular advantages may still exist under certain circumstances for less developed members of the network when they adopt pre-made, pre-tested regulatory standards of major advanced countries, in particular through a “strategic co-optation,” discussed above.³²⁸ First, such regulatory importation may reduce regulatory costs in that importing jurisdictions need not create those standards from scratch.³²⁹ Second, from the standpoint of less developed members adopting the dominant member’s standards tends to accord the former’s standards an aura of legitimacy, which in turn encourages more members to adopt the dominant standards, such as those of the United States.³³⁰ Third, as more members within the government network adopt a certain (dominant) standard, the utility generated by adopting the standard tends to increase. Economists label this phenomenon of self-proliferation of dominant standards as the “network effect.”³³¹ Moreover, at least as far as the G20 is concerned, the new geography of power embodied in the G20 membership could mitigate the power disparity concerns to some extent. Admittedly, questions still remain as to whether this is the right representation, whether there are countries missing, and whether the Northern countries have too much influence.³³²

International Affairs: The SEC Speaks in 2001, 1235 PLI/Corp 977 (2001), at 996.

³²⁵ SLAUGHTER, *supra* note 2, at 171–72.

³²⁶ Stephen Toope, *Emerging Patterns of Governance and International Law*, in THE ROLE OF LAW IN INTERNATIONAL POLITICS 91, 96–97 (Michael Byers ed., 2000). *See also* Verdier, *supra* note 7, at 130.

³²⁷ Philip Alston, *The Myopia of the Handmaidens: International Lawyers and Globalization*, 8 EUR. J. INT’L L. 435, 446 (1997).

³²⁸ *See supra* sub-pt. II-B.

³²⁹ ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *supra* note 19, at 59–60.

³³⁰ *Id.*

³³¹ Michael L. Katz & Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 AM. ECON. REV. 424 (1985) (quoted in ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *supra* note 19, at 63).

³³² REBECCA M. NELSON, CONGR. RES. SERVICE, THE G20 AND INTERNATIONAL ECONOMIC COOPERATION: IMPLICATIONS FOR CONGRESS 24 (2009)

The use of coordinated networks also raises a host of other legitimacy questions. Representativeness, or input legitimacy,³³³ seems weak because as we know networkers are not elected, they tend to be civil servants. The career regulator status of network participant means that network legitimacy is based more on expertise, or output legitimacy,³³⁴ than on representativeness. TRNs may be perceived as legitimate because they produce good work.³³⁵ Of course, what constitutes good work assumes a normative position, so even the expertise justification is not perfect. Financial regulation impacts environmental efforts,³³⁶ labor,³³⁷ pensions,³³⁸ health care³³⁹ and even food security.³⁴⁰ Specialized career regulators are poorly situated to consider the externalities imposed on other issue areas. Bank regulators in the banking network come from a common background and experience. Their ability to tolerate risk may be different from someone who focuses on labor or healthcare or even trade. However we conceive

http://assets.opencrs.com/rpts/R40977_20091209.pdf. See also Stephen Fidler, *WTO Chief Blasts Top Economies Financial Oversight*, WALL ST. J., May 17, 2010 (noting that Pascal Lamy has questioned the G20 legitimacy and what incentives exist for non-G20 nations to follow the rules set by the G20); David Bosco, *Who's Afraid of the G20?*, FOREIGN POLICY, Sep. 28, 2010, http://bosco.foreignpolicy.com/posts/2010/09/28/does_the_g_20_need_a_secretariat (reporting that some non-G20 members think that the G20 is a "fundamentally illegitimate, self-selected body").

³³³ Robert Keohane & Joseph S. Nye, *Between Centralization and Fragmentation: the Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy* 12–15 (Kennedy Sch. of Gov't Working Paper Series, No. 01–004, 2001), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=262175 (discussing input legitimacy criteria).

³³⁴ Claire R. Kelly, *The Politics of Legitimacy in the UNCITRAL Working Methods*, in THE POLITICS OF INTERNATIONAL ECONOMIC LAW Page 106 (Broude et al. eds., 2011).

³³⁵ FRITZ SCHARPF, GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC? 2 (1999) (discussing input and output legitimacy).

³³⁶ See Ambassador Stuart Eizenstat, *The U.S. Role in Solving Climate Change: Green Growth Policies Can Enable Leadership Despite Economic Downturn*, 30 ENER L J 1, 1 (Nov 14, 2008) (noting the cloud the economic crisis had placed over climate change efforts).

³³⁷ Claire R. Kelly, *Financial Crisis and Civil Society*, 11 CHI. J. INT'L L. 505, 546 (2010); See *Something's Not Working; America's Labour Market*, THE ECONOMIST, Apr. 29, 2010, http://www.economist.com/node/16010303?story_id=16010303; Catherine Rampell, *In a Job Market Shift, Some Workers Are Left Behind*, N.Y. TIMES, May 12, 2010,

http://www.nytimes.com/2010/05/13/business/economy/13obsolete.html?_r=1&fta=y.

³³⁸ See *Something's Not Working; America's Labour Market*, supra note 337.

³³⁹ Claire R. Kelly, *Conceptions of Legitimacy*, in LAW, CONTESTATION, AND POWER IN THE GLOBAL POLITICAL ECONOMY (Forthcoming) [hereinafter Kelly, *Legitimacy*].

³⁴⁰ *Id.*

of legitimacy,³⁴¹ we need to be able to evaluate to what extent unrepresentative or expert institutions reach beyond their expertise to account for the values of a pluralistic society.

One might claim that it is the coordination of the G20 that legitimizes the goals of the TRNs. We would argue that such a claim would need careful examination. One would have to consider to what extent the G20 could (and did) take account of the interests and constituencies affected by the TRNs. Our concern here is not that a political grouping such as the G20 could never legitimize the work of the TRNs, simply that we should not assume that it does. Nor should we allow the expert status of the TRNs to supply the G20 with a veneer of legitimacy that may be undeserved.

In addition to the general concerns of representativeness there are some specific representativeness concerns that stem from the work that TRNs do. Networkers' expertise, their insular dealings, and the matters at stake, subject them to a unique danger of capture. Most agencies face capture by special interests because those special interests have tremendous incentives to focus their efforts on persuading the agency to adopt favorable positions.³⁴² More dispersed groups that may be affected by the agency have less ability to coordinate.³⁴³ Capture at the TRN level is especially problematic for several reasons. The networks collect an elite set of regulators working, at times, far away in secluded settings. These regulators are already known to industry and in some instances move between government work and industry. These regulators are particularly attractive to special interest groups because capturing just one of the regulators may allow an interest group a veto over the entire process.³⁴⁴ But what is particularly problematic is the influence of different states' positions on any particular proposal. Suppose that regulator from country A wants a rule regulating hedge funds that is fairly strict and enforceable. Regulator from Country B agrees that hedge funds should be regulated but prefers a softer approach. Lobbyist C (working for the hedge fund industry) will not only lobby State A to change its position but will also Lobby State B to press hard on regulator from State A.

The fluid and incremental nature of network also calls for a new conception of legitimacy. Networks operate over a period of time. Their tasks change, sometimes at their own insistence. Our conception of

³⁴¹ For a description of various legitimacy frameworks see, Kelly, *supra* note 334.

³⁴² Edward J. Janger, *Predicting When the Uniform Law Process Will Fail: Article 9, Capture, and the Race-to-the-bottom*, 83 IOWA L. REV. 569, 584 (1998) (explaining capture).

³⁴³ *Id.* (explaining capture).

³⁴⁴ *Id.* at 569.

legitimacy must account for the fact that networks may sometimes act as semi-autonomous norm generators working over time.³⁴⁵ The combination of this incremental work combined with the fact that their end products often harden into domestic law, leads to the possibility of a gloss of unwarranted legitimacy.³⁴⁶ Further because their work spans decades, they invest time, credibility, and capital that creates a certain amount of path dependence. Once a national jurisdiction considers hardening a network prototype or recommendation through regulation or legislation there has already been considerable buy-in because of the amount of time and expertise expanded at the network level. Thus, there is a real concern whether the national checks and balances discussed above will be side stepped. We would worry that the incremental process could undermine national debate. Thus, our conception of legitimacy must account for the incremental and semi-autonomous operations of networks. TRNs need to manage their legitimacy, proactively, and seek input and processes that justify their work over a period of time. States must ensure that their national processes are not short circuited.

Networks insularity and technical focus also creates a challenge for representative legitimacy. Networks hear from the same voices, in part because in order to converse intelligently in their world one must speak the technical language they speak.³⁴⁷ One might wish to complement networks' expertise with input legitimacy in the form of additional process or indirect representation. For example transparency can help. One might perceive networks as more legitimate if their proceedings were viewed and understood by more people. But transparency has costs as well. Transparency can sometimes thwart negotiations.³⁴⁸ And one can never assure transparency to all aspect of negotiations.³⁴⁹ Alternatively, opening up the network process to members of civil society for example might improve process, representation, and transparency, but it is less than a perfect solution. More participation might mean more delays³⁵⁰ or even

³⁴⁵ See Kelly, *Legitimacy*, *supra* note 338.

³⁴⁶ Karmel & Kelly, *supra* note 78, at 930–935.

³⁴⁷ See Kelly, *supra* note 153.

³⁴⁸ Richard Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?*, 68 LAW & CONTEMP. PROBS. 63, 68 (2005) (discussing “norms of confidentiality in negotiation”).

³⁴⁹ See BARR & MILLER, *supra* note 171, at 23.

³⁵⁰ “The delay and possible derailment may result from greater participation where special interest groups may seek to distort outcomes.” Claire R Kelly, *Financial Crisis and Civil Society*, 11 CHI. J. INT’L L. 505, 546 (2010). See Esty, *supra* note 319, at 1531–32 (discussing the potential for interest groups to take over the debate).

derailment of regulatory efforts.³⁵¹ Allowing for more participation does not mean it will be forthcoming. Both the BCBS and IOSCO have public comment procedures but receive comments almost exclusively from industry insiders. Finally, one should not assume that civil society is itself accountable, or representative in all respects.³⁵² The type of process or procedure needs to be coordinated as well. Our conception of legitimacy may need to be more contextual.³⁵³

In sum, while the G20 coordination tends to raise a number of accountability and legitimacy concerns, they are not insurmountable. Yet the G20 should first acknowledge, not dismiss, the validity of those concerns. Then, the G20 should find ways to address each concern focusing its unique context. One solution might not serve all occasions. For example, measures enhancing transparency, if implemented randomly, might in fact unduly slow down the decision-making process at a professional level.

CONCLUSION

Coordinated TRNs herald a new model of global governance that is flexible, spontaneous and effective. As seen in the G20 example, the coordinated TRN model can deliver prompt regulatory responses to global challenges of our time, such as the recent financial crisis. One might reasonably speculate that a conventional international response via pure diplomacy or treaty-making would not have achieved the same result. As the G20 leaders themselves declared with confidence, it “worked.”³⁵⁴

Nonetheless, this nascent paradigm of global governance has attracted various criticisms from different standpoints, such as efficacy and legitimacy. As discussed above, some of these criticisms are not without merits, while others may be exaggerated. Certainly we want to consider the meritorious concerns.

First, governments, including the G20 members, should facilitate more communications and better networking among like-minded networkers (government officials) and between these networkers and

³⁵¹ See Benedict Kingsbury, *The Concept of Law in Global Administrative Law*, 20 EUR. J. INT'L L. 23, 35 (2009); Esty, *supra* note 319, at 1520 (noting that participation can bog down the process).

³⁵² See Dana Brakman Reiser & Claire R. Kelly, *Linking NGO Accountability and the Legitimacy of Global Governance*, 36 BROOK. J. INT'L L. 1001 (2011).

³⁵³ See Kelly, *supra* note 153.

³⁵⁴ *G20 on Financial Crisis Response: It Worked*, REUTERS, Sept. 25, 2009, <http://www.reuters.com/article/2009/09/25/columns-us-g20-communicate-victory-idUSTRE58O59K20090925>.

international organizations which often offer forums for such networking. For this purpose, governments should encourage personnel exchanges and hold many policy discussion forums, such as workshops and seminars, so that regulators in the same sector from different countries can brainstorm and deliberate on areas of their common interest. As Kal Raustiala argues, government networks could complement treaties by facilitating their operation or smoothing their negotiation or even supplement them by conducting certain gap-filling functions.³⁵⁵ In a related vein though government should also consider issue areas that these networks affect which are beyond their area of expertise and take steps to include voices that speak to those issue areas. Civil society may be able to offer assistance in this regard, however, government must be mindful of whether civil society participants are themselves legitimate.

Second, developed countries should offer a genuine, not mere lip-service, level of development aid to developing countries to boost the latter's human capital. Without serious capacity-building, developing countries cannot effectively participate in this networking process. Under this situation, any network standard (regulatory prototype) would be hard to survive the dominance critique.

Third, government networks should establish more active, rigorous and consistent surveillance mechanisms to increase the overall efficacy of their network standards. Without this policy evaluation/feedback process, any initial blueprints or regulatory prototypes would soon cease to evolve. Importantly, it is the characteristic nature of a government network that a network standard should continuously evolve toward a more solid outcome.

Fourth, government should invest more in social marketing or PR over the network phenomenon. For most people, the network phenomenon remains esoteric. Insofar as people are ill-informed of this new model of global governance, its prospect is not bright. Moreover, government networks can anticipate any constructive criticisms from domestic constituencies and civil society only when they are well-informed of the network phenomenon.

Finally, the G20 as a *mega-network* or a network of networks embraces unique challenges which may not be shared by other individual networks. While a network symbolizes the "disaggregation" of state³⁵⁶ in that each network is a sector (issue)-specific and de-centralized phenomenon, the G20 "re-aggregates" those multiple networks and project a mega-network, which inevitably restores a conventional *inter-national*

³⁵⁵ ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *supra* note 19, at 6.

³⁵⁶ SLAUGHTER, *supra* note 2, at 12.

representativeness. As long as the G20 holds this plenipotentiary nature, the current *size* of membership will continue to be debated, probably without any immediate consensus. Moreover, as the exigency of financial crisis eventually ebbs away, the political capital bestowed on the G20 network will also decline.³⁵⁷ Under this circumstance, the erstwhile strong professional cohesion that bonds various individual networks together may disappear. Then, the G20 may degrade into an empty talk shop.

To avoid this worst case scenario and preserve the G20 momentum, some pundits, including the next G20 Summit host, the French President Nicolas Sarkozy, propose that a permanent secretary be instituted for the G20. Plausible as this proposal may sound in the first place, it also generates new dilemmas for the G20. First, the G20, as a mega-network, has in fact been successful due to soft institutionalization. Yet with this hard institutionalization and consequent augmented bureaucratization, the G20 may lose its characteristic agility in policy response. Second, this new mega-bureaucracy, which may only parallel the UN in its magnitude, may invite a familiar foreboding of a World Government among sovereigntists. Such foreboding may cost the G20 some reputation (legitimacy) regardless of its merits.

In conclusion, it is fair to state that the hitherto success of government network in general, as well as that of the G20 in particular, may not offer a firm guarantee for their future prosperity. Although this new model of global governance is salutary, the jury is still out there for a final verdict on it. Meanwhile, however, the G20 has enough room to further evolve into a better paradigm of global governance.

³⁵⁷ See Kay McLellan, *Global Regulatory Reform Consensus “Weakening,”* MORTGAGE SOLUTIONS, Oct. 4, 2010, <http://www.mortgagesolutions.co.uk/mortgage-solutions/news/1740292/global-regulatory-reform-consensus-weakening>.