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Informal Procedure, Hard and Soft, in International Administration

David Zaring*

I. INTRODUCTION

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

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

Even though areas of rulemaking that affect millions of people have changed, the phenomenon, as a form of procedure, remains largely

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

¹ Anne-Marie Slaughter, in particular, has identified, described, and classified this transformation. See generally Anne-Marie Slaughter, *A New World Order* (Princeton 2004). See also Anne-Marie Slaughter, *Governing the Global Economy through Government Networks*, in Michael Byers, ed, *The Role of Law in International Politics: Essays in International Relations and International Law* 177 (Oxford 2000) (discussing the development of transgovernmental regulatory organizations); Anne-Marie Slaughter, *Government Networks: The Heart of the Liberal Democratic Order*, in Gregory H. Fox and Brad R. Roth, eds, *Democratic Governance and International Law* 199 (Cambridge 2000).

unexamined.² It is not a part of administrative law syllabi, nor is it taught in many international law courses. Scholars have examined particular areas of harmonization with an eye to their substance while neglecting their process, and efforts to look at global administrative practice as a coherent body of lawmaking are still nascent.³

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

In this article, I seek not just to site regulatory cooperation in the framework of international rulemaking, but also to identify the direction in which this cooperation might be going. I go into detail about the types of rules generated by the phenomenon, and I analyze some of its successes. I also identify the real problems with the phenomenon. The problems do not lie, as many observers have argued, with a democratic deficit and a bias in favor of the United States—at least not as those problems are usually defined. Rights of participation in informal international rulemaking are afforded rather broadly across the First World. However, developing countries enjoyed much more limited access, and it is in the developed/developing divide that informal regulatory cooperation is at its perhaps most problematic.

These problems, as well as successes, arise from the way that regulatory cooperative organizations make rules. The entities, although they began as informal regimes, have developed into recognizable forms of international administration over the last decade.

Call it hard and soft international administrative procedure. I interpret the phrase broadly to cover the three principal achievements of international regulatory cooperation—at least in my case study. These achievements range from hard procedural law to soft harmonization-through-example. They include: 1) hard international rules that constrain financial institutions in developed

² In addition to Anne-Marie Slaughter, Kal Raustiala has successfully avoided this problem. See, for example, Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 Va J Int'l L 2 (2002); Kal Raustiala, *Compliance & Effectiveness in International Regulatory Cooperation*, 32 Case W Res J Int'l L 387, 399, 409–11 (2000) (discussing liberal theories that disaggregate the state into a series of substate actors).

³ One happy exception to this rule may be found at NYU Law School, where Benedict Kingsbury and Dick Stewart have started a program designed to explore the dimensions and theory of global administrative law. See Benedict Kingsbury, Richard B. Stewart, and Nico Krisch, *Administrative Law and Global Governance: Research Project Outline, Colloquium, Globalism and Its Discontents* (Spring 2004), available online at <<http://www.law.nyu.edu/kingsburyb/spring04/globalization/program.html>> (visited Nov 18, 2004) (considering various specific aspects of a global administrative law). See also Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 NYU L Rev 437, 455 (2003).

countries; 2) softer principles of supervision that bureaucrats in developing countries may emulate; and 3) models for regulators in adjacent issue areas.

Nowhere is internationalization of administration more clear than in the area of financial regulation. Agencies like the Securities and Exchange Commission (“SEC”) and the Federal Reserve Board now play roles as international lawmakers, and, in turn, are increasingly constrained by international agreement. Some observers think the informal agreements that these agencies have made over the past two decades limited the spread and impact of the international financial crises of the past ten years.⁴ Others believe that those agreements contributed to the worldwide recession of the early 1990s.⁵

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

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

⁴ See text accompanying note 58.

⁵ See text accompanying notes 59–60.

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

⁷ The International Competition Network (“ICN”) is the mechanism for regulatory cooperation most like the Basle Committee and IOSCO. It is “focused on improving worldwide cooperation and enhancing convergence through dialogue.” See ICN, *About Us*, available online at <<http://www.internationalcompetitionnetwork.org/aboutus.html>> (visited Nov 8, 2004). In the network, “[m]embership is voluntary and open to any national or multinational competition authority entrusted with the enforcement of antitrust laws.” *Id.* For a particularly helpful discussion of other aspects of regulatory cooperation in antitrust, and a call for the selective internationalization of the field, see Eleanor M. Fox, *Antitrust and Regulatory Federalism: Races Up, Down, and Sideways*, 75 *NYU L Rev* 1781, 1785–87, 1802–07 (2000). For recent discussions of antitrust cooperation, see Anu Piiola, *Assessing Theories of Global Governance: A Case Study of International Antitrust Regulation*, 39 *Stan J Intl L* 207 (2003); Julian Epstein, *The Other Side of Harmony: Can Trade and Competition Laws Work Together in the International Marketplace?*, 17 *Am U Intl L Rev* 343, 358–59 (2002).

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

It is in attempting to adopt hard rules that we see the escalating procedural formality of these organizations—their first principle achievement. I take, by way of example of this process, the Basle Committee’s revision of its capital adequacy accord, which governs the reserve levels of most of the banks in the world. I argue that the additional process offered by the committee as it has revised the accord—which is dramatically different from the process it used only

⁸ The Codex Alimentarius Commission is one of the primary, but not only, organizations around which labeling and food safety standards are harmonized. See generally Codex Alimentarius, *Welcome*, available online at <<http://www.codexalimentarius.net>> (visited Nov 8, 2004). The Food and Drug Administration and the Department of Agriculture both send representatives to the Codex process, with the USDA’s Food Safety and Inspection Service in charge of coordinating the participation of American regulators. See USDA, Food Safety and Inspection Service, *Regulations and Policies*, available online at <<http://www.fsis.usda.gov/OA/codex/>> (visited Nov 8, 2004). For a perspective on the involvement of the Codex commission and other international regulatory efforts with the WTO’s Sanitary and Phytosanitary Agreement, see generally David G. Victor, *The Sanitary and Phytosanitary Agreement of the World Trade Organization: An Assessment After Five Years*, 32 NYU J Intl L & Pol 865 (2000). For an overview of other harmonization projects from the perspective of the FDA, see generally Sharon Smith Holston, *An Overview of International Cooperation*, 52 Food & Drug L J 197 (1997). See also Joseph G. Contrera, *The Food and Drug Administration and the International Conference on Harmonization: How Harmonized Will International Pharmaceutical Regulations Become?*, 8 Admin L J Am U 927 (1995); Rosemarie Kanusky, *Pharmaceutical Harmonization: Standardizing Regulations among the United States, the European Economic Community, and Japan*, 16 Houston J Intl L 665, 667 (1994); David W. Jordan, *International Regulatory Harmonization: A New Era in Prescription Drug Approval*, 25 Vand J Transnatl L 471, 491 (1992).

⁹ For a brief overview of interactions between US and EU regulatory authorities in telecommunications regulatory cooperation, see George A. Bermann, *Regulatory Cooperation between the European Commission and U.S. Administrative Agencies*, 9 Admin L J Am U 933, 968 (1996).

¹⁰ See George A. Bermann, *Regulatory Cooperation with Counterpart Agencies Abroad: The FAA’s Aircraft Certification Experience*, 24 L & Poly in Intl Bus 669, 774 (1993).

¹¹ See Stewart, 78 NYU L Rev at 455 (cited in note 3).

Such coordination helps to reduce barriers to trade and commerce created by differing national regulations and to address transnational regulatory problems that exceed purely domestic capabilities. For example, national regulators may agree to accept each others’ product regulatory standards as mutually equivalent or pool information and coordinate antitrust measures with the practices of multinational firms.

Id.

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

a few years earlier—is due to a self-imposed interest in attaining *legitimacy* for committee regulation.

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

Third, IOSCO and the Basle Committee have begotten a hoard of similar IFROs. They also have served as the host for a large number of bilateral arrangements between regulators. I sketch some of these successor organizations and arrangements briefly, to give readers a sense of the breadth of their development. While some observers might conclude that the proliferation of imitators of the Basle Committee and IOSCO amounts to little more than the meaningless colonization of increasingly scarce regulatory acronyms, I cautiously turn to neofunctional theory to explain the phenomenon.¹⁴ That theory predicts a congealing of international actors through a progressive enmeshment in transborder cooperation. I argue that neofunctionalism can provide us with some insights into why these developments in regulatory cooperation might offer the most important long-range implications for the nature and development of an international system of administration.

In Part II of this article, I describe the origins and structure of the Basle Committee and IOSCO. As we will see, both IFROs look rather nontraditional to both classically trained international lawyers and to domestic administrative law practitioners used to formal agency process. As Benedict Kingsbury has put it, the ways that regulators interact with one another and with other actors in international life "are not well captured in standard international legal typologies (e.g., the sharp sources-based distinction often drawn between binding and non-binding norms)."¹⁵ Nor are domestic analogies, which turn on the important

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

¹⁴ See text accompanying notes 216–22.

¹⁵ Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 Mich J Int L 345, 368 (1998).

roles played by legislatures and courts, well-suited to an international system that has a strong version of neither.¹⁶

For example, the Basle Committee and IOSCO were founded by regulators themselves, who comprise the entirety of the membership.¹⁷ They are informal—governed not by treaties or treaty-type documents, but instead by unconstraining and flexible bylaws. They are decentralized, claim small budgets, and permit regulators from the wealthiest countries to play outsized roles in the development of rules; therefore, there is none of the formal equality that marks the United Nations or other mid-twentieth century international organizations like it. The organizations have traditionally been secretive, but, at least in the case of the Basle Committee and IOSCO, have recently found it difficult to remain so.

In my descriptions of these organizations, I pay particular attention to how their efforts have been received by American regulators. I do so because, as Dick Stewart has put it, “The future evolution of administrative law in the United States must also confront the international aspects of regulation, a subject that will assume great significance in the coming decades.”¹⁸

So the Basle Committee, IOSCO, and their kin in other regulatory areas, are not typical agencies,¹⁹ nor typical international organizations.²⁰ In part III of

¹⁶ See Stewart, 78 NYU L Rev at 459 (cited in note 3).

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

Id.

¹⁷ With a caveat: IOSCO permits members to be self-regulatory organizations, such as stock exchanges, in the absence of (or, on occasion, in tandem with) a government regulator. It also permits affiliate membership of organizations that include members of the regulated industry. See IOSCO, *Applications for Membership*, available online at <<http://www.iosco.org/about/about.cfm?whereami=page6>> (visited Nov 8, 2004).

¹⁸ Stewart, 78 NYU L Rev at 455 (cited in note 3).

¹⁹ It is not my intention here to define with precision what a “proper” agency is (such an effort would be unhappily formalistic), except to note that the intergovernmental organizations offered by the Basle Committee and IOSCO do not resemble the bureaucracies that compose their membership in size, budget, rulemaking procedure, statutory guidance, and so on. Of course, under the traditional conception of American administrative law, “agencies” have been defined broadly. The Administrative Procedure Act (“APA”) simply adopted the term “agency” to mean “each authority of the Government of the United States, whether or not it is within or subject to review by another agency,” with the exception of Congress, the courts, the governments of the “territories or possessions of the United States” and the Armed Forces, among others. See 5 USC § 551(1) (1994). The Freedom of Information Act (“FOIA”) further clarified the APA’s definition

this article, I identify the paradigmatic ways in which these organizations operate.

Finally, in part IV, I conclude with some observations about what IFROs mean to theories of international regulation. As I explain, their existence is yet another vindication for the disaggregated approach to international law taken by liberal theorists such as Anne-Marie Slaughter.²¹ However, in practice, the agencies that enjoy their own subjectivity in the international arena certainly act consistently with rationalist paradigms of regime theory.

I also engage the recent controversy over the vibrancy of “soft law” raised by writers such as Kal Raustiala and Andrew Guzman.²² IFROs would seem to epitomize soft law, and their existence suggests that the concept may retain some value—but not if it is inseparable from high degrees of compliance that the consensus-based organizations enjoy.

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

A caveat: in this article, I focus on the lawlike rules and institutions generated by IFROs (and consider the implications thereof for administrative practice more generally). But formal rules and institutions are not the only products generated by international regulatory cooperation. The organizations provide informal introductions and access to regulators, and generate advice

of agency—at least for the purposes of the open information law. FOIA defined “agency” to include “any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.” See 5 USC § 552(f) (1994). See also 5 USC § 2302(a)(2)(C) (1994) (“[A]gency,” for the purposes of labor law, “means an Executive agency and the Government Printing Office,” with a list of exceptions, most related to national security.). Courts have long tried to avoid defining the term. See, for example, *Washington Research Project v Department of Health, Education, and Welfare*, 504 F2d 238, 245–46 (DC Cir 1974) (“[R]ecent cases have made it clear that any general definition can be of only limited utility to a court confronted with one of the myriad organizational arrangements for getting the business of government done.”).

²⁰ For a discussion of the usual legal prerequisites of international organizations, see text accompanying notes 111–18.

²¹ See, for example, Anne-Marie Slaughter, *The Liberal Agenda for Peace: International Relations Theory and the Future of The United Nations*, 4 *Transnat L & Contemp Probs* 377, 409 (1994) (“State authority can be disaggregated into distinct institutions performing specific governmental functions: legislative, executive, and judicial. Each of these sub-entities interacts with individuals and groups that are self-consciously part of transnational society.”).

²² See text accompanying notes 233–35.

through the publication of reports and surveys.²³ I have discussed these interesting aspects of cooperation elsewhere; here I focus on the more administrative and procedural products of the process of regulatory cooperation.²⁴

II. THE ORGANIZATIONS THEMSELVES: TWO CASE STUDIES AND A MODEL

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

²³ Both the Basle Committee and the IOSCO, in addition to serving as models for other organizations, set the groundwork for other agreements between regulators, commonly known as Memoranda of Understanding (“MOUs”). MOUs are agreements between regulators; the IOSCO collects them. See IOSCO, Memoranda of Understanding, available online at <<http://www.iosco.org/library/index.cfm?whereami=mou>> (visited Nov 8, 2004). It has also recently issued a framework for MOUs between securities regulators. See IOSCO, *Multilateral Memorandum of Understanding: Concerning Consultation and Cooperation and the Exchange of Information* (May 2002), available online at <<http://www.iosco.org/library/index.cfm?whereami=pubdocs&publicDocID=126>> (visited Nov 8, 2004). The United Nations Treaty Reference Guide sets forth basic definitions of the “international instruments binding at international law: treaties, agreements, conventions, charters, protocols, declarations, memoranda of understanding, modus vivendi, and exchange of notes.” See United Nations Treaty Collection, *Treaty Reference Guide*, available online at <<http://untreaty.un.org/English/guide.asp>> (visited Nov 8, 2004). IOSCO is particularly active in this regard. It serves as a forum in which bilateral MOUs on information sharing or other supervisory issues may be concluded. Hundreds of these MOUs have been drafted under the organization’s auspices, and it has formed a repository for them. For a complete list of these MOUs, see <<http://www.iosco.org/library/index.cfm?whereami=mou>> (visited Sept 14, 2004). The Basle Committee has “always encouraged contacts and cooperation between its members and other banking supervisory authorities.” BIS, *The Basle Committee on Banking Supervision*, available online at <<http://www.bis.org/bcbs/aboutbcbs.htm>> (visited Nov 8, 2004). It has also suggested that its members enter into MOUs with other banking supervisors. See BIS, Basle Committee on Banking Supervision, *Supervisory Guidance on Dealing with Weak Banks* 16, ¶ 59 (Mar 2002), available online at <<http://www.bis.org/publ/bcbs88.pdf#xml=http://search.atomz.com/search/pdfhelper.tk?sp-o=19,100000,0>> (visited Nov 8, 2004).

²⁴ See Zaring, 33 Tex Int'l L J at 281 (cited in note 6).

A. THE BASLE COMMITTEE ON BANKING SUPERVISION

Prompted by three large international bank failures in 1974,²⁵ the central bank governors of the Group of Ten Countries (G-10), Luxembourg, and Switzerland agreed to establish the Basle Committee on Banking Supervision.²⁶ The central bankers declared, via a press release, that the primary purpose of the committee would be to provide its members with a regular forum for discussing cooperative approaches to the supervision of multinational banks.²⁷ Since its founding, the committee, pursuant to this mandate, has served both as the venue for the exchange of information about supervisory practices and as the mechanism for the promulgation of hard standards to which all members of the committee must subscribe.

The Basle Committee's organizational structure is fluid, and it acts informally. It rotates its chairmanship and operates through consensus.²⁸ Although the committee has recently held a number of comment periods for matters related to the revision of its capital accord, it has not subjected itself to open-meeting requirements or submitted its promulgations for review by an international adjudicative tribunal.²⁹ It has traditionally maintained a low profile.³⁰ As former committee chairman Huib J. Muller observed, "[w]e don't like publicity. We prefer, I might say, our hidden secret world of the supervisory

²⁵ On June 26, 1974, German regulators forced the Bank Herstatt into liquidation, which left without remedy a number of banks that had released payment of marks to Herstatt in Frankfurt in exchange for dollars that were to be delivered in New York. See Riskglossary.com, *Basle Committee on Banking Supervision*, available online at <http://www.riskglossary.com/articles/basle_committee.htm> (visited Nov 8, 2004). The British-Israel Bank, based in the United Kingdom, and the Franklin National Bank, based in the United States, also failed. Ethan B. Kapstein, *Supervising International Banks: Origins and Implications of the Basle Accord* 4–5 (Princeton 1991) (discussing the history surrounding the establishment of the Basle Committee).

²⁶ The Committee's members come from Belgium, Canada, France, Germany, Italy, Japan, Luxembourg, the Netherlands, Spain, Sweden, Switzerland, the United Kingdom and the United States. See BIS, *The Basle Committee on Banking Supervision*, available online at <<http://www.bis.org/bcbs/aboutbcbs.htm>> (cited in note 23).

²⁷ See BIS, Press Communiqué (Feb 12, 1975); Joseph J. Norton, *Trends in International Bank Supervision and the Basle Committee on Banking Supervision*, 48 *Consumer Fin L Q* 415, 415 n 1 (1994).

²⁸ Joseph J. Norton, *Privatization of Public Pension Systems in Developing Nations: A Call for International Standards*, 64 *Brooklyn L Rev* 817, 857 (1998); Tony Porter, *States, Markets, and Regimes in Global Finance* 66 (St Martin's 1993).

²⁹ As one employee of the Federal Reserve Board said, "[T]he Basle Committee is not subject to any administrative procedure" requirements. Interview with a Staff Attorney, Federal Reserve Board (Jan 9, 2004).

³⁰ See Zaring, 33 *Tex Intl L J* at 288–89 (cited in note 6). See also Joseph Jude Norton, *Devising International Bank Supervisory Standards* 177 (Kluwer 1995).

continent.”³¹ In fact, the details of the Basle Committee's 1975 founding agreement were not released to the public until more than five years after their adoption.³²

Times have changed—to some extent. Now the committee publicly circulates many of its decisions, as well as research conducted under its aegis, although it has been cagey about detailing its governing instruments.³³ However, its meetings, which occur four times per year in Basle, remain closed to the public³⁴ (although the committee has adopted the practice of issuing ex post brief press releases describing the approximate agenda of these gatherings).³⁵ It has also announced the opening of comment periods on consultative documents, also by press release, accompanied by a rough schedule for further action.³⁶

³¹ Huib J. Muller, Address to International Conference of Bank Supervisors (May 16, 1988), quoted in Porter, *States, Markets, and Regimes in Global Finance* at 66 (cited in note 28).

³² See GAO, *International Banking: Strengthening the Framework for Supervising International Banks* 41 (Mar 1994), available online at <<http://161.203.16.4/t2pbat4/151053.pdf>> (visited Nov 8, 2004).

³³ The Committee's website makes this clear. See, for example, BIS, Basel Committee publications, available online at <<http://www.bis.org/bcbs/publ.htm>> (visited Nov 8, 2004). See also Heath Price Tarbert, *Rethinking Capital Adequacy: The Basle Accord and the New Framework*, 56 *Bus Law* 767, 781 (2001) (“Most publications and Consultative Papers are available to the members of the general public via the Basle Committee's portion of the Bank of International Settlements's Internet site.”).

³⁴ Zaring, 33 *Tex Intl L J* at 288 (cited in note 6); Charles Freeland, *The Work of the Basle Committee*, in Robert C. Effros, ed, 2 *Current Legal Issues Affecting Cent Banks* 231, 232 (May 1994).

³⁵ See, for example, BIS, Press Release, *Meeting of G10 central bank governors and heads of banking supervision* (Mar 10, 2003), available online at <<http://www.bis.org/press/p030311a.htm>> (visited Nov 8, 2004).

³⁶ See, for example, BIS, Press Release, *The New Basel Capital Accord* (Apr 29, 2003), available online at <<http://www.bis.org/press/p030429.htm>> (visited Nov 8, 2004). The Committee suggests that “[c]omments . . . should be submitted to relevant national supervisory authorities and central banks.” *Id.* However, it also invites direct comments: “[C]omments may be sent to the Basel Committee on Banking Supervision at the Bank for International Settlements, CH-4002 Basel, Switzerland. Comments may also be sent by e-mail: BCBS.Capital@bis.org or by fax: 41 61 280 9100 and should be directed to the attention of the Basel Committee Secretariat.” *Id.* One recent example of the sort of schedule that the committee has taken to issuing may be found in an October 11, 2003 press release:

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

BIS, Press Release, *Basel II: Significant Progress on Major Issues* (Oct 11, 2003), available online at <<http://www.bis.org/press/p031011.htm>> (visited Nov 8, 2004).

For example, for its new capital adequacy accord, which I discuss in more detail below, the committee has welcomed comments, which it has concluded “will be helpful to the Committee as it makes the final modifications to its proposal for a new capital adequacy framework.”³⁷ When issuing statements about the progress of the accord, the Committee has also tended to issue a timetable. For the capital accord, “[t]he goal of the Committee is . . . implementation to take effect in member countries by year-end 2006.”³⁸

The use of press releases to announce an organization’s purpose and activity is rather far removed from a conventional international legal treaty and accompanying annals of drafting, and it illustrates how different the Basle Committee is from a formally constituted international organization. It has promulgated no bylaws, its founding instrument is sparse, and it has no facilities of its own.³⁹ *The Economist* has characterized it as nothing more than an “international club for banking regulators.”⁴⁰ The Committee does not even have its own staff: its secretariat is comprised of twelve professional supervisors on temporary secondment from member banks to the Bank for International Settlements (“BIS”)—a private bank mostly owned and operated by the central banks of 31 countries, including the Federal Reserve⁴¹—in Basle.⁴² (The BIS was begun after World War I “to promote the co-operation of central banks and to provide additional facilities for international financial operations.”⁴³)

Moreover, many of the Basle Committee’s promulgations do not look very lawlike. In striking comparison to the length of domestic banking regulations, its

³⁷ BIS, *The New Basel Capital Accord* (cited in note 36). See also BIS, Press Release, *Update on the New Basel Capital Accord* (June 25, 2001), available online at <<http://www.bis.org/press/p010625.htm>> (visited Nov 8, 2004) (“The Committee intends to continue promoting an open dialogue as its work continues and believes that such efforts will help to ensure that the new Accord meets its objectives.”).

³⁸ BIS, Press Release, *The New Basel Capital Accord*, available online at <<http://www.bis.org/press/p030429.htm>> (cited in note 36).

³⁹ See Norton, *Devising International Bank Supervisory Standards* at 177 (cited in note 30).

⁴⁰ *Getting Closer?*, *Economist* 82 (May 25, 1996).

⁴¹ See BIS, *The Bank for International Settlements: A Profile of an International Organization 2* (June 1995). See also BIS, *The Basle Committee on Banking Supervision*, available online at <<http://www.bis.org/bcbs/aboutbcbs.htm>> (cited in note 23). Interestingly, the predecessor to the European Central Bank, deemed a major achievement of the European unification, was the loosely organized Committee of Central Bank Governors, which met, as the Basle Committee does now, under the auspices of the BIS in Basle, beginning in 1964. See Kathleen R. McNamara, *Where Do Rules Come From? The Creation of the European Central Bank*, in Alec Stone Sweet, Wayne Sandholtz, and Neil Fligstein, eds, *The Institutionalization of Europe* 155, 165–66 (Oxford 2001).

⁴² See <<http://www.bis.org/bcbs/aboutbcbs.htm>> (cited in note 23) (describing the twelve BIS staffers who serve as the committee’s secretariat).

⁴³ Statutes of the Bank for International Settlements, art 3 (2003), available online at <<http://www.bis.org/about/statutes-en.pdf>> (visited Nov 8, 2004).

initial concordat was just ten pages long, and its first capital accord only twenty-eight pages long.⁴⁴ Promulgations such as its Principles of Banking Supervision are worded unspecifically and flexibly.⁴⁵

The committee itself avows that it “does not possess any formal supranational supervisory authority, and its conclusions do not, and were never intended to, have legal force.”⁴⁶ Instead, it “reports to the central bank Governors of the Group of Ten countries and seeks the Governors' endorsement for its major initiatives.”⁴⁷

Moreover, in the Basle regime, monitoring noncompliance is a decentralized, largely self-reported task. Neither the BIS nor any other international organization takes on a monitoring role, although the Committee has vowed in the past that it “intends to monitor and review the application of . . . [its agreements] in the period ahead with a view to achieving ever greater consistency” and now surveys its members on their progress with implementation.⁴⁸

Do, then, the members of the committee experience the agreements reached as binding? The reports of some participants suggest that they do. Former supervisor Charles Freeland claims that “[w]ithout in any way approaching the legal status of a treaty, . . . [an] agreement is considered to be binding on its members.”⁴⁹ BIS supervisor Andrew Crockett similarly concludes

⁴⁴ BIS, *Information Flows between Banking Supervisory Authorities* (Apr 1990), available online at <<http://www.bis.org/publ/bcbsc313.pdf>> (visited Nov 8, 2004) (Basle Concordat); Basle Committee on Banking Supervision, *International Convergence of Capital Measurement and Capital Standards* (July 1988), available online at <<http://www.bis.org/publ/bcbs04A.pdf>> (visited Nov 8, 2004) (original Basle Accord); John D. Hawke, Jr., Comptroller of the Treasury, *Basel II: A Brave New World for Financial Institutions?*, Address at the American Academy in Berlin (Dec 15, 2003), available online at <<http://www.occ.treas.gov/ftp/release/2003-99a.pdf>> (visited Nov 8, 2004).

⁴⁵ See note 179–80.

⁴⁶ See BIS, *The Basle Committee on Banking Supervision*, <<http://www.bis.org/bcbs/aboutbcbs.htm>> (cited in note 23).

⁴⁷ Id.

⁴⁸ Basle Committee on Banking Supervision, *International Convergence of Capital Measurements and Capital Standards* ¶ 6 (1997), reprinted in 1 *Compendium of Documents Produced by the Basle Committee on Banking Supervision* 58–82, at ¶ 6 (BIS 1997); Basle Committee on Banking Supervision, *Working Papers: Supervisory risk assessment and early warning systems* (2000), available online at <http://www.bis.org/publ/bcbs_wp4.htm> (visited Nov 8, 2004) (survey of new bank monitoring systems used by regulators in the ten largest economies).

⁴⁹ Freeland, 2 *Current Legal Issues Affecting Cent Banks* at 233 (cited in note 34). According to the General Accounting Office (“GAO”), the Basle Committee itself has concluded that it “must continue to rely on moral suasion rather than legal authority to encourage adoption of its standards and monitor their implementation.” See GAO, *International Banking: Strengthening the Framework* at 34 (cited in note 32).

that even though Basle Committee recommendations “have no legal force,” they have been “applied in all countries represented on the Committee” and “almost universally applied in non-member countries.”⁵⁰

For example, American banking regulators⁵¹ have generally treated the Committee’s theoretically voluntary proposals as the basis for rapid domestic regulatory action.⁵² The banking regulators have quickly adopted rules implementing the Basle Committee’s capital accord for American banks and bank holding companies.⁵³

In September 1996, US bank regulators issued a final rule based on the Basle Committee’s January 1996 amendment to the Basle Accord. That rule required that banks use their own internal models to provide a measure of the

⁵⁰ Andrew Crockett, General Manager, BIS, *International standard setting in financial supervision*, Lecture at the Cass Business School, City University, London (Feb 5, 2003), available online at <<http://www.bis.org/speeches/sp030205.htm>> (visited Nov 8, 2004). Crockett concludes that this is “a telling example of the power of peer pressure and market forces to promote the adoption of best practice and to enforce what I have elsewhere called ‘soft law.’” John Braithwaite and Peter Drahos theorize that this sort of regulatory interaction can result in “developed dialogic webs” in which “praise and shame are institutionalized,” which can create an impetus to harmonization. John Braithwaite and Peter Drahos, *Global Business Regulation* 555 (Cambridge 2000). Of course, the Committee itself has recognized that implementation depends on many factors, and that there is a difference between having a regulation in place and having the regulation effectively implemented. There are also difficulties inherent in some jurisdictions having qualified staff to fully implement the Core Principles and having a framework setting limits on concentration of lending and on connected lending. See GAO, *International Finance: Actions Taken to Reform Financial Sectors in Asian Emerging Markets: Report to Congressional Requesters* (Sept 1999), available online at <<http://www.gao.gov/archive/1999/gg99157.pdf>> (visited Nov 8, 2004).

⁵¹ To enact Basle requirements domestically, the four agencies principally charged with banking regulation—the Federal Reserve, the OCC, the FDIC, and the OTS—announce coauthored rulemakings in the Federal Register. See text accompanying note 53.

⁵² Tarbert, 56 Bus Law at 792 (cited in note 33).

When the Basle Accord was assembled in 1988, members of the “club of giants” likely had no idea that their capital adequacy standards would become so far-reaching. This is especially remarkable for standards that were simply a gentlemen’s agreement among a small group of central bankers and never ratified into international law. Even though the Basle countries “are not legally bound, the Basle Accords’ methodology now applies to virtually all financial institutions worldwide.”

Id, quoting Lawrence L.C. Lee, *The Basle Accords as Soft Law: Strengthening International Banking Supervision*, 39 Va J Intl L 1, 6 (1998).

⁵³ See SEC, OTC Derivatives Dealers, 63 Fed Reg 59362, 59384 (1998). The rules comprised Federal Reserve System, Docket No. R-0884; Department of the Treasury, Office of the Comptroller of the Currency, Docket No. 96-18; and Federal Deposit Insurance Corporation, RIN 3064-AB64 (Sept 6, 1996). See Department of the Treasury, Federal Reserve System, and Federal Deposit Insurance Corporation, Rules and Regulations, 61 Fed Reg 47358 (1996). The Basle standard was adopted by the Federal Reserve on March 15, 1989. See 12 CFR §§ 208.1.127 & app A–B (1991); 12 CFR § 160–88 app A–B (1991).

institutions' "value at risk," subject to regulatory modeling criteria.⁵⁴ Here's how domestic banking regulators characterize the impact of the Basle Committee process:

In December 1995, the G-10 Governors endorsed the Basle Committee's amendment to the Accord (effective by year-end 1997) to incorporate a measure for exposure to market risk (market risk amendment) into the capital adequacy assessment. On September 6, 1996, the [federal banking supervision] agencies issued revisions to their risk-based capital standards implementing the Basle Committee's market risk amendment (market risk rules). . . . In September 1997, the Basle Committee modified the market risk amendment and on December 30, 1997, the agencies issued an interim rule implementing that modification . . .⁵⁵

Thus, the American banking regulators themselves have described how they have turned Basle pronouncements into hard regulations within a year of the international agreement to do so. Nor are the implementation of modifications to the capital adequacy accord unique.⁵⁶ Recently, the Federal Reserve, the Office of the Comptroller of the Currency ("OCC"), and the other domestic banking agencies with memberships on the committee acted in unison, with a single unified rulemaking designed to offer quick domestic implementation of the international rule.⁵⁷

The widespread implementation of the capital adequacy accord has been both acclaimed for its real impact and accused of the usual sorts of inefficiencies *laissez-faire* aficionados attribute to hard regulations. Andrew Crockett, General Manager of the BIS and Chairman of the Financial Stability Forum, believes that "the absence of significant difficulties in the banking systems of Europe and America in the past couple of years, despite significant economic shocks, owes much to the strengthening of risk management that has taken place under the aegis of the Basle Committee's standards."⁵⁸

Others agree that the committee has affected banking supervision, but argue that it has done so in insalubrious ways. Hal Scott has contended that the

⁵⁴ GAO, *Financial Derivatives: Actions Taken or Proposed Since May 1994*, 56 (Nov 1996), available online at <<http://www.gao.gov/archive/1997/g197008.pdf>> (visited Nov 8, 2004).

⁵⁵ OCC, Federal Reserve, and FDIC, *Risk-Based Capital Standards: Market Risk*, 64 Fed Reg 19034, 19035 (1999).

⁵⁶ See, for example, *Bank One Corporation v Commissioner of Internal Revenue*, 120 TC 174, 222–23 (2003) (discussing "the OCC's acceptance of a 1986 recommendation of the Basel Committee on Banking Supervision (Basel Committee) that banks should build a cautious bias into their estimates of the replacement costs of off-balance-sheet instruments").

⁵⁷ Internal Ratings-Based Systems for Retail Credit Risk for Regulatory Capital, 69 Fed. Reg. 62748 (October 27, 2004) (couched as "supervisory guidance").

⁵⁸ Andrew Crockett, Lecture at City University, London (cited in note 50).

uniform rules of the Accord have been bad for competition.⁵⁹ Jonathan Macey similarly believes that the sort of regulatory globalization required by the Accord has done little good to the financial markets. Instead, he argues that it is simply a reflection of the inclinations of bureaucrats to maximize power.⁶⁰

B. INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS (“IOSCO”)

IOSCO is a regulatory organization that developed out of the Interamerican Association of Securities Commissions and Similar Agencies in 1984, when the members of that body passed bylaws transforming it from a regional group founded a decade earlier into a global collection of securities regulators.⁶¹ IOSCO’s members have agreed to “cooperate together to promote high standards of regulation in order to maintain just, efficient and sound markets; to exchange information on their respective experiences in order to promote the development of domestic markets; to unite their efforts to establish standards and an effective surveillance of international securities transactions; to provide mutual assistance to promote the integrity of the markets by a rigorous application of the standards and by effective enforcement against offenses.”⁶²

⁵⁹ Hal S. Scott, *The Competitive Implications of the Basle Capital Accord*, 39 SLU L J 885, 894 (1995) (concluding of the Accord that “we should be less sanguine about competitive benefits of international banking agreements given the fundamental differences that remain between countries”).

⁶⁰ Macey accordingly believes that:

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

52 Emory L J at 1353–54 (cited in note 13).

⁶¹ See Paul Guy, *Regulatory Harmonization to Achieve Effective International Competition*, in Franklin R. Edwards and Hugh T. Patrick, eds, *Regulating International Financial Markets: Issues and Policies* 291, 291 (Kluwer 1992). The bylaws of IOSCO declare that “[t]he securities commissions or similar agencies of the countries of the American Continent, as well as the Commission des valeurs mobilières du Québec and the Ontario Securities Commission, are charter members of the Organization.” Bylaws of the International Organization of Securities Commissions pt 2, ¶ 2.

⁶² IOSCO, *2002 Annual Report* 22 (2002), available online at <http://dev.iosco.org/annual_report/PDF/IOSCO_2002.pdf> (visited Nov 7, 2004).

IOSCO is a much less selective organization than the Basle Committee—it claims 174 members, overseeing almost all of the world’s capital markets.⁶³ However, in other matters of form, the two organizations are very similar. As with the Basle Committee, IOSCO combines informal structure, an absence of claims that its pronouncements rise to the level of law, and internal opacity. As *The Economist* has done with the Basle Committee, the *Financial Times* has characterized IOSCO as the “international securities regulators club.”⁶⁴

Still, few international organizations, including even the Basle Committee, can claim origins as humble and informal as those of IOSCO, which was incorporated by a private bill of the Quebec National Assembly.⁶⁵ It has since created and funded a small permanent secretariat, which in 2001 moved from Montreal to Madrid.⁶⁶ The organization does not limit membership to prosperous countries, or even government agencies, the way the Basle Committee does. Among its many affiliate members are private securities regulators such as the London Stock Exchange, the Chicago Mercantile Exchange, and the International Securities Market Association, an organization that “exceeds 600 financial entities,” including investment banks and securities brokers.⁶⁷

⁶³ See the IOSCO membership lists available online at <http://www.iosco.org/lists/display_members.cfm?memid=1> (visited Nov 9, 2004); <http://www.iosco.org/lists/display_members.cfm?memID=3&orderBy=Jurisdiction> (visited Nov 9, 2004); <http://www.iosco.org/lists/display_members.cfm?memID=2&orderBy=Jurisdiction> (visited Nov 9, 2004).

⁶⁴ *Getting Closer?*, *Economist* at 82 (cited in note 40); *Listing to Port*, *Fin Times* 13 (May 28, 1998). See also Tarbert, 56 *Bus Law* at 782 (cited in note 33), citing Christos D. Hadjiemmanuil, *Central Bankers' "Club" Law and Transitional Economies: Banking Reform and the Reception of the Basle Standards of Prudential Supervision in Eastern Europe and the Former Soviet Union*, in Joseph J. Norton and Mads Andenas, eds., *Emerging Financial Markets and the Role of International Financial Organizations* 184 (Kluwer 1996) (“[S]ome commentators have glibly referred to this new genre of legal species as ‘club’ law.”).

⁶⁵ See Guy, *Regulatory Harmonization* at 291 (cited in note 61); IOSCO, *1999 Annual Report*, Notes to Financial Statements, available online at <http://www.iosco.org/annual_report/Archive_1999/append2/24.htm> (visited Oct 31, 2004) (IOSCO was “incorporated under a private act (L.Q. 1987, Chapter 143) sanctioned by the Quebec National Assembly”). See also IOSCO, *2002 Annual Report* at 33 (cited in note 62).

⁶⁶ See IOSCO, *2002 Annual Report* at 33 (cited in note 62) (stating that “[d]uring 2001 the organization changed its domicile to Madrid”); Kathryn M. Trkla, *Financial Stability: Major Focus of IOSCO Conference*, *Future Indus Mag* (June/July 1999), available online at <<http://www.futuresindustry.org/fimagazi-1929.asp?a=576>> (visited Sept 19, 2004) (stating that the IOSCO Presidents’ Committee approved relocation of the IOSCO General Secretariat from Montreal to Madrid).

⁶⁷ See <http://www.iosco.org/lists/display_members.cfm?memid=1> (cited in note 63) (listing members, 105 of which are ordinary members (that is, the principal securities regulators of a particular jurisdiction, such as the SEC), 9 are associate members, including other government regulators such as the CFTC, and 60 are affiliate members, such as the NYSE). For the

This membership is organized in a somewhat complicated—but nonetheless unconstrained—way, with broad grants of authority more typical of corporate bylaws than the complex treaties governing international organizations. IOSCO's Presidents' Committee, for example, which is comprised of the presidents of the member agencies (but not the private nongovernment members), meets annually and "has all the powers necessary or convenient to achieve the purpose of the Organization."⁶⁸ Its nineteen-member Executive Committee oversees IOSCO's operations, and "subject to the By-Laws of the Organization, takes all decisions and undertakes all actions necessary or convenient to achieve the objectives of the Organization."⁶⁹

IOSCO's General Secretariat coordinates the organization's activities, and responds to requests for information and assistance from members and from the organization's committees.⁷⁰ The Secretariat consists of ten employees.⁷¹ The organization is financed by membership dues of \$6,750 per member per year.⁷² In 2001, IOSCO's revenues amounted to \$2,670,051—approximately 40 percent of which was a subsidy from the Government of Spain "to cover expenses incurred to relocate its General Secretariat from Montreal (Canada) to Madrid (Spain)."⁷³ By contrast, the World Trade Organization's 2004 budget was 162 million Swiss francs (approximately \$107 million),⁷⁴ the United Nation's annual budget is approximately \$1.3 billion,⁷⁵ and the SEC's annual budget for fiscal 2004 has been proposed at \$841.5 million.⁷⁶

membership of the International Securities Markets Association, see ISMA, *About ISMA*, available online at <<http://www.isma.org/about1.html>> (visited Nov 9, 2004).

⁶⁸ IOSCO, *2002 Annual Report* at 22 (cited in note 62).

⁶⁹ Id. See also Isaac C. Hunt, Jr., *It's a Small World after All: The SEC's Role in Securities Regulation Globalization*, 51 Admin L Rev 1105, 1107–08 (1999) (giving former SEC Commissioner Isaac Hunt's perspective on the organization of IOSCO, and the place of the executive committee). The Executive Committee is composed of nineteen members: the chairs of the organization's Technical and Emerging Markets Committees, the chairs of its four Regional Committee, one ordinary member elected by each Regional Committee from among the ordinary members of that region, and ordinary members elected by the Presidents' Committee. See id.

⁷⁰ IOSCO, *2002 Annual Report* at 14–16 (cited in note 62).

⁷¹ IOSCO's website lists ten people on its list of contacts. See <<http://www.iosco.org/about/>> (visited Nov 9, 2004).

⁷² IOSCO, *2002 Annual Report* at 26 (cited in note 62).

⁷³ Id. at 30, 34.

⁷⁴ See The World Trade Organization, *Information about the Institution*, available online at <http://www.wto.org/english/thewto_e/thewto_e.htm> (visited Nov 9, 2004).

⁷⁵ See World Federation of United Nations Associations, *UN Facts*, available online at <<http://www.wfuna.org/link/toolkits/unfacts.cfm>> (visited Oct 31, 2004) ("The regular budget of the UN is some \$1.3 billion per year."); *Kitchen Diplomacy*, 140 Foreign Poly 18 (Jan 2004) (discussing "U.N.'s annual budget of \$1.25 billion"); US Mission to the United Nations, Fact

Like the Basle Committee, IOSCO now provides a lot of material on its website. In 2002, for example, it issued fifteen “public documents,” including reports on “sound practices” and statements of “principles of supervision.”⁷⁷ It also issues an annual report, sells records of some of the sessions of its annual conference, and catalogs press releases, memoranda of understanding, and IOSCO resolutions in its online library.⁷⁸

Most of these principles were developed in IOSCO’s Technical Committee, which is where the sort of regulatory action most comparable to that of the Basle Committee may be found.⁷⁹ Like the Basle Committee, the Technical Committee is limited in membership to the world’s most advanced financial regulators (IOSCO’s Technical Committee has sixteen members, while the Basle Committee is limited to regulators from twelve countries).⁸⁰ The Technical Committee, which was established by IOSCO in 1987 and then reorganized at the behest of the SEC in the early 1990s, receives the lion’s share of the agency’s attention in the world’s financial press. The *Toronto Globe and Mail* has characterized the Technical Committee as “the central policy-making group at” IOSCO.⁸¹ It is the source of IOSCO promulgations that have required the SEC and Commodity Futures Trading Commission (“CFTC”) to engage domestic rulemaking.⁸²

Although many of IOSCO’s promulgations remain undisclosed, like those of the Basle Committee, the organization’s output has increasingly become available for public scrutiny. The presidents still operate secretly at IOSCO

Sheet, *The United Nations—Myth and Reality: UN Budget and Bureaucracy*, available online at <<http://www.un.int/usa/fact3.htm>> (visited Oct 31, 2004).

⁷⁶ *House Approves Measure to Speed Staffing of SEC*, Wall St J C5 (Jun 18, 2003) (The amount would be nearly double its fiscal 2002 level.).

⁷⁷ See IOSCO, *Public Documents*, available online at <<http://www.iosco.org/library/index.cfm?whereami=pubdocs&year=2002>> (visited Nov 9, 2004).

⁷⁸ See IOSCO, *Library of Public Documents*, available online at <<http://www.iosco.org/library/index.cfm?whereami=library>> (visited Nov 9, 2004). As of this writing, the organization lists approximately 21 resolutions and 175 other public documents in its online library. Id.

⁷⁹ A.A. Somer, for example, interviewed a number of leading officials in the SEC, and concluded that “[t]he committee which might be said to do the ‘grunt work’ with respect to the most developed markets is the Technical Committee.” A.A. Somer, *Iosco: Its Mission and Achievement*, 17 Nw J Intl L & Bus 15, 18 (1995).

⁸⁰ IOSCO, *2002 Annual Report* at 7 (cited in note 62).

⁸¹ Richard Blackwell, *OSC Head to Lead International Group*, Toronto Globe & Mail B3 (Mar 23, 2002). See also Nancy Worth, *Harmonizing Capital Adequacy Rules for International Banks and Securities Firms*, 18 NC J Intl L & Comm Reg 133, 134 n 1 (1992), citing IOSCO, Annual Reports from 1989–91; Karen Cooper, *World Watchdog for Securities*, Sydney Morning Herald 38 (Aug 8, 1987) (describing initial founding of the Technical Committee); Somer, 17 Nw J Intl L at 19 (cited in note 79) (describing the role of the SEC and Richard Breeden, then its chairman).

⁸² See notes 91–110 and accompanying text.

meetings—under its bylaws, “[o]bservers and special guests may not attend meetings of the Presidents Committee unless invited by the Chairman with the concurrence of a majority of the members.”⁸³ Now, however, IOSCO “recognizes the importance of maintaining a close dialogue with” the self-regulatory organizations and interest groups “that make up its affiliate membership and of allowing them to make a constructive input in the work of the Organization.”⁸⁴

Like the Basle Committee, IOSCO’s administrative procedures are ad hoc and flexible. It creates informal agreements on financial regulation and tells its members to go home and implement them.⁸⁵ It holds comment periods, but is not subject to open-meeting laws,⁸⁶ judicial review, or any other criteria such as those found in the Administrative Procedure Act (“APA”). For comment, it appears to rely on the participation of its affiliate membership. IOSCO has not announced ways for nonparticipants to make comments in the way that the Basle Committee has.⁸⁷

However, like the Basle Committee, IOSCO also aspires to achieve its goals of regulatory harmonization through consensus.⁸⁸ In the words of the SEC, “IOSCO is an organization that operates on the basis of consensus, rather than majority votes. Its resolutions are non-binding on its member organizations.”⁸⁹ However, unlike the Basle Committee, and perhaps in order to achieve that consensus, IOSCO defines harmonization broadly. German Stock Exchange Federation Executive Vice President Ruediger von Rosen emphasized at one IOSCO meeting that, whatever the merits of harmonization, “value should be attached to the possibility of giving issuers and investors a choice between quite different rules and regulations.”⁹⁰ Thus, when IOSCO passes a

⁸³ IOSCO, Bylaws at pt 4, ¶ 23 (cited in note 61).

⁸⁴ IOSCO, *2002 Annual Report* at 24 (cited in note 62). To this end, “the SRO Consultative Committee has designated contact persons with the Technical Committee Standing Committees and Project Teams and is therefore able to provide substantive input related to their regulatory initiatives.” *Id.*

⁸⁵ Even American regulators say that they benefit from the best practices style exploration of options that characterize some of the recommendations of the international organization. Interview with a Staff Attorney, CFTC (Jan 23, 2004).

⁸⁶ Indeed, IOSCO holds its meetings in secret. See Somer, 17 *Nw J Intl L & Bus* at 19 (cited in note 79) (observing that “all committee meetings of IOSCO are closed”).

⁸⁷ See note 36.

⁸⁸ See Guy, *Regulatory Harmonization* at 296 (cited in note 61).

⁸⁹ SEC, *Report on Promoting Global Preeminence of American Securities Markets pursuant to Section 509(5) of the National Securities Markets Improvement Act of 1996 § 5A (Oct 1997)*, available online at <<http://www.sec.gov/news/studies/acctgsp.htm#sec5>> (visited Sept 19, 2004).

⁹⁰ See “Convergence,” *More than Harmonization, Is Key Word in Cautious Working Group Sessions*, 2 *Intl Sec Reg Rep* No 20, at 8 (Sept 27, 1989). IOSCO has gingerly pursued regulatory cooperation in the

resolution, the SEC has announced that “each IOSCO member would have to determine whether and how to consider adoption of these standards at a domestic level.”⁹¹ IOSCO’s general principles argue that “[t]here is often no single correct approach to a regulatory issue.”⁹²

So what about standardization in America? Both the SEC and the CFTC have played a role in the organization’s membership since its inception, and both have clearly acted pursuant to those IOSCO resolutions that have required compliance from them. For example, the recent revisions to the SEC’s treatment of auditor independence were occasioned by the passage of domestic legislation—the Sarbanes-Oxley Act—but also, as the agency acknowledged, “with the Principles of Auditor Independence and the Role of Corporate Governance in Monitoring an Auditor’s Independence issued by . . . IOSCO . . . in October 2002 in mind.”⁹³

The SEC has “fundamentally conformed the non-financial statement disclosure requirements for foreign private issuers to the non-financial statement disclosure requirements adopted by . . . [IOSCO].”⁹⁴ It has also referred foreign investors considering investments in American stocks to IOSCO for information about the process⁹⁵ and has praised the organization for “mov[ing] regulators around the globe to work more closely together.”⁹⁶

context of national differences since its inception. In 1988, it resolved that “despite the national differences, which are narrowing, cooperation among the countries should be encouraged by IOSCO.” *Regulators Agree to Move Cautiously on Enforcement, Information Exchanges*, 20 Sec Reg & L Rep 1861, 1862 (July-Dec 1988). Why tolerate such differences? Traditionally, observers have pointed to a distinction between public shareholder (in other words, the US and the UK) and creditor (in other words, Germany and France) perspectives, in determining how to handle accounting questions. Andrew Crockett, *Towards Global Financial Reporting Standards: A Critical Pillar in the International Financial Architecture*, Address at the US-Europe Symposium 2002 (Feb 27, 2002), available online at <<http://www.bis.org/speeches/sp020227.htm>> (visited Sept 19, 2004).

⁹¹ SEC, *Report on Promoting Global Preeminence of American Securities* § 5A (cited in note 89). Guy also argues that “[h]armonization does not necessarily mean that regulations must be identical.” Guy, *Regulatory Harmonization* at 297 (cited in note 61). Guillermo Harteneck, the president of Argentina’s security commission, similarly told IOSCO that the implementation of harmonizing agreements “may change from country to country.” *Harmonization Key for World Capital Markets, Officials at IOSCO Declare*, 63 BNA Banking Rep No 15, at 609 (Oct 1994).

⁹² IOSCO, *Objectives and Principles of Security Regulation 2* (Sept 1998), available online at <<http://www.iosco.org/pubdocs/pdf/IOSCPD82-English.pdf>> (visited Sept 19, 2004).

⁹³ SEC, *Strengthening the Commission’s Requirements Regarding Auditor Independence*, 67 Fed Reg 76780, 76780 n 7 (2002).

⁹⁴ SEC, *Disclosure in Management’s Discussion and Analysis About the Application of Critical Accounting Policies*, 67 Fed Reg 35620, 35637 (2002).

⁹⁵ SEC, Press Release, *The Fleecing of Foreign Investors: Avoid Getting Burned by “Hot” U.S. Stocks* (Mar 2001), available online at <<http://www.sec.gov/investor/pubs/fleecing.htm>> (visited Sept 19, 2004) (“Are the Broker and the Firm Licensed? Contact your securities regulator to find out. The

Perhaps most tangibly, the SEC has adopted the International Disclosure Standards developed by IOSCO for nonfinancial statement information.⁹⁷ As one SEC official has put it, the standards “represent an international consensus on the type of disclosure that should be provided when foreign issuers make a public offering of equity securities or list their equity securities on a foreign exchange.”⁹⁸ IOSCO issued these standards in 1998; in 1999, the SEC promulgated changes to its Form 20-F, the “lynchpin of its foreign integrated disclosure system, to fully incorporate the Standards.”⁹⁹

Finally, the SEC conducts self-assessments to monitor its compliance with IOSCO’s concise and broadly defined Core Principles, as well as with specific initiatives such as the International Disclosure Standards.¹⁰⁰

The SEC’s stated support of IOSCO has a lengthy pedigree. In 1988, the SEC issued a policy statement noting that “all securities regulators should work together diligently to create sound international regulatory frameworks that will

International Organization of Securities Commissioners (IOSCO) provides contact information for most securities regulators on its website.”)

⁹⁶ Annette L. Nazareth, Address at the Practising Law Institute Conference on International Securities Markets (May 9, 2003), available online at <<http://www.sec.gov/news/speech/spch050903aln.htm>> (visited Sept 19, 2004) (“Our active participation in the work of IOSCO in the areas of credit rating agencies and analyst conflicts of interest is evidence of the fact that events here in the U.S. have moved regulators around the globe to work more closely together.”).

⁹⁷ SEC, Rulings, International Disclosure Standards, Fed Secs L Rep (CCH) ¶ 86208, at 82365 (Sept 28, 1999); SEC, International Accounting Standards, 65 Fed Reg 8896, 8897 (2000); IOSCO, *International Disclosure Standards For Cross-Border Offerings And Initial Listings By Foreign Issuers* (Sept 1998), available online at <<http://www.iosco.org/pubdocs/pdf/IOSCOPD81.pdf>> (visited Sept 19, 2004). Recently, the SEC has admitted that its “decision to adopt the International Disclosure Standards was based on our conclusion that the standards were of high quality and that their adoption would provide information comparable to the amount and quality of information that U.S. investors receive today.” SEC, International Accounting Standards at 8897.

⁹⁸ Felicia H. Kung, *The Rationalization of Regulatory Internationalization*, 33 L & Poly in Intl Bus 443, 467 (2002). IOSCO’s standards “cover the gamut of expected disclosure topics, including description of an issuer’s business, operating and financial review and prospects, compensation paid to an issuer’s directors and officers, and the identification of major shareholders and related party transactions.” Id. I interviewed an SEC official, who characterized the standards as an important tangible change in the way the SEC conducts its regulatory business. Interview with a Staff Attorney, SEC (Jan 22, 2004).

⁹⁹ Kung, 33 L & Poly in Intl Bus at 468 (cited in note 98); IOSCO, *International Disclosure Standards* at 82365 (cited in note 97). For a very detailed example of the congruence between American law and IOSCO principles for funds regulation, see Robert W. Helm, *Creating, Managing and Distributing Offshore Investment Products: A Legal Perspective*, 1360 PLI/Corp 243, 292–98 (concluding that there is almost identical congruence in many, but not all, fields).

¹⁰⁰ SEC, *2002 Annual Report* 20 (2002), available online at <<http://www.sec.gov/pdf/annrep02/ar02full.pdf>> (visited Sept 19, 2004); IOSCO, Technical Committee, *Report On Implementation Of International Disclosure Standards* 1 (May 2000), available online at <<http://www.iosco.org/library/index.cfm?whereami=orderdocs&docID=IOSCOPD106>> (visited Sept 19, 2004). I discuss the Core Principles in greater detail later in this article.

enhance the vitality of capital markets.”¹⁰¹ To be sure, the agency does not change its standards to reflect every particular IOSCO standard—Beth Simmons is particularly skeptical of the closeness of the relationship between the international organization and the agency¹⁰²—but it deems itself to be in compliance with the IFRO’s Core Principles and to have harmonized its international disclosure requirements with those of IOSCO.

The CFTC has also cited IOSCO as the authority and basis for agency action. The futures regulator, an associate member of IOSCO and, like the SEC, subject to APA review of its rulemakings, has also cited IOSCO’s pronouncements as bases for its promulgations.¹⁰³ The CFTC has “amended our nonfinancial statement disclosure requirements for offerings by foreign issuers to conform to the international disclosure standards adopted by IOSCO in 1998,”¹⁰⁴ and it has cited guidelines issued by IOSCO as “appropriate” ones for automated clearing systems,¹⁰⁵ screen-based trading systems,¹⁰⁶ and electronic trading systems.¹⁰⁷ One CFTC employee has told me that the agency does most of its cooperative regulatory work with foreign regulators through IOSCO.¹⁰⁸

¹⁰¹ SEC, 65 Fed Reg at 8897 (cited in note 97), citing SEC, Regulation of International Securities Markets, Securities Act Release No 6807, 53 Fed Reg 4693 (1988).

¹⁰² See Beth A. Simmons, *The International Politics of Harmonization: The Case of Capital Market Regulation*, 55 Intl Org 589, 595 (2001) (“The size of the internal U.S. market gives U.S. regulators an incentive to make unilateral regulatory decisions, even if foreign regulators do not follow suit.”).

¹⁰³ See text accompanying notes 104–09.

¹⁰⁴ CFTC, A New Regulatory Framework for Clearing Organizations, 65 Fed Reg 76008, 76029 (2001), citing SEC, International Disclosure Standards, 64 Fed Reg 53,900 (1999).

¹⁰⁵ CFTC, A New Regulatory Framework for Clearing Organizations, 66 Fed Reg 45604, 45613 (2001) (“The Commission believes that the guidelines issued by the IOSCO in 1990 and adopted by the Commission on November 21, 1990 (55 Fed. Reg. 48670), as supplemented in October 2000, are appropriate guidelines for an automated clearing system to apply.”).

¹⁰⁶ CFTC, A New Regulatory Framework for Trading Facilities, Intermediaries and Clearing Organizations, 66 Fed Reg 42256, 42275 (2001) (“The Commission believes that the guidelines issued by the International Organization of Securities Commissions (IOSCO) in 1990 (which have been referred to as the “Principles for Screen-Based Trading Systems”), and adopted by the Commission on November 21, 1990 (55 Fed. Reg. 48670), as supplemented in October 2000, are appropriate guidelines for an electronic trading facility to apply to electronic trading systems.”).

¹⁰⁷ CFTC, Petition of the Chicago Board of Trade, the Chicago Mercantile Exchange, and the New York Mercantile Exchange for Exemption pursuant to Section 4(c) of the Commodity Exchange Act, 64 Fed Reg 46356, 46358–59 (1999) (“The Commission notes that its review of newly created electronic trading systems has been, and continues to be, based on principles developed by the international regulatory community—specifically the International Organization of Securities Commissions (“IOSCO”). Should the Commission’s review of electronic trading systems be based on standards other than or different from those contained in the IOSCO principles?”).

¹⁰⁸ Interview with a Staff Attorney, CFTC (cited in note 85). However, cooperative enforcement work also involves the regulators who have signed on to the so-called “Boca Declaration,” which

The CFTC has also used IOSCO standards in specific rule applications, as well as in rulemaking. For example, in evaluating whether a Norwegian clearinghouse could operate on the International Maritime exchange, the agency “evaluated the oversight activities undertaken by [the clearinghouse’s Norwegian regulator] in the context of the Principles and Objectives of Securities Regulation issued by [IOSCO].”¹⁰⁹ The CFTC accordingly did “not ma[ke] any independent investigation or assessment of the Norwegian regulatory program.”¹¹⁰

C. A MODEL OF REGULATORY COOPERATION

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

Membership of Regulators. The organizations are comprised of regulators, not states. The SEC, the CFTC, and the stock exchanges are members of IOSCO. The United States is not—and the Federal Reserve, OCC, Federal Deposit Insurance Corporation (along with the Office of Thrift Supervision and the Federal Reserve’s New York branch), not the State Department, represent this country in the Basle Committee. The American officials who attend these meetings are not diplomats and have not been trained as Foreign Service officers; instead, they are banking supervisors who began their careers working on ordinary matters of domestic supervision.¹¹¹

Informally Constituted. IFROs are not created by treaties made between countries duly signed and ratified. Their founding documents would not be recognized by the Vienna Convention on the Law of Treaties,¹¹² because in

was coordinated by the CFTC in 1997. *Id.* See CFTC, *Declaration on Cooperation and Supervision of International Futures Markets and Clearing Organizations (March 1998 Boca Declaration)*, available online at <<http://www.cftc.gov/oia/oiabocadec0398.htm>> (visited Nov 9, 2004). For a description of its intent, see IOSCO, International Conference on Financing for Development, *Causes, Effects and Regulatory Implications of Financial and Economic Turbulence in Emerging Markets* n 71, available online at <<http://esa.un.org/ffd/policydb/PolicyTexts/IOSCO-1.htm>> (visited Oct 31, 2004) (stating that “the *Declaration on Co-operation and Supervision of International Futures Exchanges Clearing Organizations*, jointly signed by 55 derivatives exchanges and clearing houses signed in Boca Raton, Florida in March 1996, defines specific events that will trigger a request for information from another exchange or clearing house. These events include a large decrease in a member’s capital position, large cash flows in proprietary or customer accounts, or a concentration of positions in any futures or options contract.”).

¹⁰⁹ CFTC, *Recognition of Multilateral Clearing Organizations*, 67 Fed Reg 2419, 2420 (2002).

¹¹⁰ *Id.*

¹¹¹ Interview with a Staff Attorney, Federal Reserve Board (Jan 9, 2004).

¹¹² See generally Vienna Convention on the Law of Treaties, 1155 UNTS 331, 333 (1969) (“The present Convention applies to treaties between States”).

international law all treaties apply only to states.¹¹³ Moreover, the documents that do create the IFROs—and any governing bylaws or rules constraining the organization—tend to be broad and flexible, not specific, detailed, and constraining, as are many treaties that create traditional international organizations (the United Nations is an example here).¹¹⁴ It is thus quite clear that IFROs do not meet the standards of classic international law as international organizations subject to its strictures. To list just two divergences, the Restatement on US Foreign Relations Law suggests that an international organization “is created by an international agreement and has a membership consisting entirely or principally of states”¹¹⁵ and that “statehood . . . is generally a minimum qualification for membership in international organizations.”¹¹⁶ But bureaucrats from the SEC, the CFTC, and the Federal Reserve attend IFRO meetings as representatives of their agencies rather than their nation.¹¹⁷ To the Restatement, the term “organization” in international organization is to be given a restrictive reading—international organizations generally have a headquarters, staff, and budget to truly qualify as international subjects.¹¹⁸ IFROs barely possess these attributes.¹¹⁹ Instead, as Sol Picciotto has observed, “they are informal in nature: even where they are publicly visible, they are often not

¹¹³ See, for example, Nguyen Quoc Dinh, *Droit International Public* 618 (Librairie Générale de Droit et de Jurisprudence 1994). Eleanor Kinney calls these networks “networks of national regulators . . . that evolve outside any formal framework” which “are generally comprised of domestic regulators that meet without treaty or executive authorization.” Eleanor Kinney, *The Emerging Field of International Administrative Law: Its Content and Potential*, 54 Admin L Rev 415, 426 (2002). She cites the Basle Committee as a principle example of these networks. *Id.*

¹¹⁴ The UN’s rules and regulations are vast, and possibly unwieldy. See, for example, A. Peter Mutharika, *The Role of the United Nations Security Council in African Peace Management: Some Proposals*, 17 Mich J Intl L 537, 554 (1996) (“The United Nations as presently structured is unwieldy, bureaucratic, and too expensive.”); Frederic Kirgis, *Book Review*, 83 Am J Intl L 674, 675 (1989), reviewing C.F. Amerasinghe’s two-volume treatise on international civil service rules, *The Law of International Civil Service* (Oxford 1988) (“Amerasinghe’s two volumes are not for everyone interested in international law. They should be invaluable, though, to the researcher or practitioner concerned with the specialized field of international (or even national) civil service law.”).

¹¹⁵ American Law Institute, Restatement (Third), Foreign Relations Law of the United States § 221 (ALI 1987). Non-Americans also insist that traditionally defined international organizations be created by states. See Henry G. Schermers, *International Institutional Law* 6–7 (A.W. Sijthoff 1972) (positing that “[t]he founding agreement must be an agreement between States”).

¹¹⁶ Restatement (Third), Foreign Relations Law § 222 comment A (cited in note 115).

¹¹⁷ See text accompanying note 111; Zaring, 33 Tex Intl L J at n 203 (cited in note 6).

¹¹⁸ See Restatement (Third), Foreign Relations Law § 221, comment B (cited in note 115).

¹¹⁹ See text accompanying notes 28–50 and 62–92.

founded on conventional legal instruments, such as treaties, but rather on 'gentlemen's agreements,' which may be semi-secret."¹²⁰

Lightly Institutionalized. IFROs have little permanent presence. Their secretariats, if they exist at all, are very small. They have few, if any, employees. Their annual budgets are minute. And other than regular meeting schedules, there is little permanent presence to the entities. The Basle Committee does not have its own secretariat: It relies on another international organization, the Bank for International Settlements, in Basle, to meet this need, which itself relies for governance on twelve banking supervisors from member countries on temporary secondment.¹²¹ The IOSCO Secretariat in Madrid administers an annual budget dwarfed by that of the UN and one percent the size of the WTO's.¹²²

Little Substantive Equality. Although gauging influence within a quietly run institution is difficult, this informality of organization means that it is possible for important financial regulators to play a particularly influential role in the organizations. Thus, in IOSCO, the SEC has traditionally been thought to be a particularly important player, although the organization now operates in a European milieu,¹²³ while in the Basle Committee, the Federal Reserve Bank and the Bank of England have been thought driving forces.¹²⁴ American regulators are thought to play a similar role in the Financial Action Task Force, another second-generation IFRO, which, in the view of Beth Simmons, would not exist absent heavy American interest in money laundering.¹²⁵

Secret Decisionmaking, But Open to Input. IFROs generally operate through closed meetings, and it is, therefore, difficult to discern how they deliberate and agree on common supervisory standards. However, one recent development in the administrative process of the Basle Committee and IOSCO is that both organizations now make an effort to invite comment from interested parties on their most significant regulatory efforts.

IOSCO has done so in part through its large class of affiliate members, which includes some representatives of private market participants, and through comment periods. Moreover, the organization has created an easily accessible

¹²⁰ Sol Picciotto, *Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-Liberalism*, 17 Nw J Intl L & Bus 1014, 1047 (1997).

¹²¹ Zaring, 33 Tex Intl L J at 287–88 (cited in note 6).

¹²² See text accompanying notes 73–76.

¹²³ See text accompanying notes 164–86.

¹²⁴ See, for example, Picciotto, 17 Nw J Intl L & Bus at 1040 (cited in note 120); Porter, *States, Markets, and Regimes* at 122–23 (cited in note 28); Gary N. Klieman, *Better Forum Needed to Negotiate Terms of Foreign Competition*, Am Banker 5 (Jan 4, 1995).

¹²⁵ Simmons, 55 Intl Org at 595 (cited in note 102).

public library, which contains releases about what happened in the private meetings of the organization and its committees, any resolutions made by the IFRO, a variety of white papers, and annual reports. All of these documents are available on the Internet.¹²⁶

The Basle Committee has similarly invited a number of rounds of comments on its proposed revisions to its capital accord, and it also makes a substantial number of documents available in its public library, many of which, again, are available online.¹²⁷

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

Proselytizers. One reason for this commitment to public availability lies in the proselytizing roles these organizations play. In attempting to spread best practices to fellow regulators, and, particularly, to nonmembers, IFROs have generated a blizzard of materials, frequently beginning with a set of core standards to which all members must commit.¹²⁸

III. THREE PRODUCTS OF THE NEW PROCEDURE

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

A. HARD RULES AND THE TURN TO FORMAL PROCESS

One aspect of the evolution of the organizations has been, surprisingly, an increased formality to the procedures employed by the organizations for those

¹²⁶ See IOSCO, *Library of Public Documents*, available online at <<http://www.iosco.org/library/>> (visited Oct 31, 2004).

¹²⁷ For comments received by the Committee, see, for example, BIS, *The Basle Capital Accord: Comments received on the Third Consultative Paper* (Aug 20, 2003), available online at <<http://www.bis.org/bcbs/cp3comments.htm>> (visited Oct 31, 2004). For the BIS library, see BIS, *Basel Committee Publications*, available online at <<http://www.bis.org/bcbs/publ.htm>> (visited Oct 31, 2004).

¹²⁸ See text accompanying notes 177–86 for a discussion of the implications of this proselytization.

actions that threaten to impact regulated industry the most. The Basle Committee is an example.

1. A Case Study

The Basle Committee's most tangible achievement thus far has been the 1988 Capital Accord. That informal agreement—running “little more than two dozen pages and . . . adopted within seven months after the Committee's first (and only) consultative paper was published for comment,” as one American regulator has observed¹²⁹—provided for the implementation of a credit risk measurement framework for all banks. The framework provided for a minimum capital standard of 8 percent of risk-weighted assets (riskiness was assessed in four “buckets,” under which bank loans to the private sector had to be covered by the most capital and loans to OECD governments, which were deemed to be safer, by the least).¹³⁰ The capital adequacy standards promulgated in the 1988 Accord were fully implemented by all the committee member countries by 1992—to notable effect on the banks in those countries.¹³¹ The implementation of the accord required American banks to add \$10 billion to \$15 billion to their capital reserves, French banks, \$13 billion, and Japanese banks, \$26 billion to \$50 billion.¹³² In fact, some observers have concluded that the implementation of the 1988 Basle Accord forced Japanese banks to raise so much cash that the

¹²⁹ See Hawke, Address at the American Academy in Berlin (cited in note 44).

¹³⁰ *Stronger Foundations*, Economist (Jan 20, 2001) (“Basle required banks to hold capital equal to at least 8% of their risk-weighted loans to the non-bank private sector. Government debt from OECD countries required no capital, because these supposedly bore no credit risk. Non-OECD sovereign debt had some capital requirements, but fewer than for any private-sector loans. Loans between banks also entailed modest capital requirements.”). See also OCC, Report to the Congress Regarding the Differences in Capital and Accounting Standards Among the Federal Banking and Thrift Agencies, 62 Fed Reg 26355–56 (May 13, 1997) (“The risk-based capital guidelines establish a framework for imposing capital requirements generally based on credit risk. Under the risk-based capital guidelines, balance sheet assets and off-balance sheet items are categorized, or ‘risk-weighted,’ according to the relative degree of credit risk inherent in the asset or off-balance sheet item. The risk-based capital guidelines specify four risk-weight categories—zero percent, 20 percent, 50 percent, and 100 percent. Assets or off-balance sheet items with the lowest levels of credit risk are risk-weighted in the lowest risk weight category; those presenting greater levels of credit risk receive a higher risk weight. Thus, for example, securities issued by the US government are risk-weighted at zero percent; one- to four-family home mortgages are risk-weighted at 50 percent; unsecured commercial loans are risk-weighted at 100 percent.”); Barbara C. Matthews, *Capital Adequacy, Netting, and Derivatives*, 2 Stan J L, Bus & Fin 167, 170 (1995) (describing how the accord works).

¹³¹ See GAO, *International Banking: Strengthening the Framework for Supervising International Banks* at 4 (cited in note 32).

¹³² See Zaring, 33 Tex Int'l L J at 283, citing Peter Norman, *Capital Ratio Is Set by Banks of 12 Nations*, Wall St J 3, 7 (July 12, 1988) (cited in note 6). But see John D. Wagster, *Impact of the 1988 Basle Accord on International Banks*, 51 J Fin 1321 (1996) (arguing that the Basle Committee failed to increase the pricing advantage of Japanese banks).

country's domestic markets were flooded with assets that depressed prices and the value of collateral, thereby forcing more sales and creating a "vicious circle" that contributed to that country's recession of the 1990s.¹³³

Moreover, the committee's work on the capital accord has been challenged as an example of agencies on the loose.¹³⁴ Tony Porter has concluded that US banking regulators have used the Basle Committee to justify the imposition of standards on US banks, even when those banks opposed implementation of the standards.¹³⁵ As a former chair of the Basle Committee has noted, in the preliminary agreements to the capital adequacy accord "[t]he U.S. authorities were anxious to move forward their proposals in the face of opposition on a number of points from their banks."¹³⁶ Indeed, in Porter's view "[t]he 1988 accord was also used by the US as a basis to impose standards on firms that the accord itself had exempted because they were not primarily international."¹³⁷

For example, the Basle Committee released its final version of the 1988 Capital Accord on July 15, 1988.¹³⁸ At that point, all the members of the Committee, including the US banking regulators, had committed themselves to the implementation of the Accord. But some US regulators released the Accord for comment at home on December 15, 1988.¹³⁹ By receiving comment on the Accord after they had promulgated it, US bank regulators placed would-be commentators in the position of only being able to comment on the implementation of the Accord, rather than the wisdom of agreeing to it. Similarly, six months after announcing that a Basle Committee announcement had been "endorsed by the G-10 governors," American banking regulators proposed it as a rule in the United States and requested comment.¹⁴⁰

¹³³ See generally Kristen Nordhaug, *The Political Economy of the Dollar and the Yen in East Asia*, J Contemp Asia 517 (Jan 1, 2002).

¹³⁴ Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, 24 Mich J Int'l L 1041, 1052 (2003) (coining the phrase "agencies on the loose").

¹³⁵ Porter, *States, Markets, and Regimes* at 3 (cited in note 28).

¹³⁶ W.P. Cooke, *International Convergence of Capital Adequacy Measurement and Standards*, in Edward P. M. Gardener, ed, *The Future of Financial Systems and Services: Essays in Honour of Jack Revell* 310, 325 (Macmillan 1990).

¹³⁷ See Porter, *States, Markets, and Regimes* at 70 (cited in note 28).

¹³⁸ See Ethan Kapstein, *Governing the Global Economy* 118 (Harvard 1994).

¹³⁹ See Federal Home Loan Bank Board, *Regulating Capital Requirements for Insured Institutions*, 53 Fed Reg 51800, 51800 (1988) for the release of the "proposed rule."

¹⁴⁰ See OCC, Board of Governors of the Federal Reserve System, and FDIC, *Risk-Based Capital Standards; Market Risk; Internal Models Backtesting*, 61 Fed Reg 9114 (1996); Board of Governors of the Federal Reserve System, *Capital Requirements for Market Risk*, 60 Fed Reg 38142, 38142 (1995).

Ordinarily, the supervisory decisions of the Federal Reserve, as well as those of other Federal banking regulators, are subject to a familiar sort of administrative law review. Within the executive branch, the decisions must be approved by the Office of Management and Budget (“OMB”) before publication in the Federal Register.¹⁴¹ After being issued as a final rule, “[a]ny party aggrieved by an order of the Board”—including prospective competitors—may seek review in the federal courts of appeals.¹⁴² Moreover, the Federal Deposit Insurance Commission (“FDIC”), OCC, and Federal Reserve rules are reviewable pursuant to the APA. But in light of the way the Fed has integrated rules promulgated by the Basle Committee, it is not clear that this domestic judicial review would occur in a way meaningfully related to the crucial regulatory event—agreement at Basle.

After a decade of experience with the 1988 Accord, the Basle Committee decided to try to improve it.¹⁴³ In January 2001, it issued a proposal for a revised accord—scheduled to be fully implemented in 2006—that will replace the 1988 Accord.¹⁴⁴ As the committee has explained, the New Basle Capital Accord will focus on: 1) new minimum capital requirements, with a more sophisticated weighting of the soundness of types of assets in assessing capital adequacy, 2) common standards of “supervisory review of an institution's capital adequacy and internal assessment process,” and 3) “effective disclosure” that will, in

¹⁴¹ Executive Order 12291 mandated that agencies submit all proposed and final regulations to OMB's OIRA for review before publication in the Federal Register. See 3 CFR § 3(f) (1981).

¹⁴² Review may be had pursuant to the Bank Holding Company Act, 12 USC §§ 1848, 1850 (2001), or the Administrative Procedure Act, 5 USC § 702 et seq (2001). See also Interview with a Staff Attorney, Federal Reserve Bank; Interview with a Staff Attorney, OCC (Jan 25, 2004).

¹⁴³ The 8 percent standard, for example, has been criticized as an unwarrantedly hard and fast rule, with little specific justification. See *Stronger Foundations*, Economist (Jan 20, 2001) (cited in note 130). Moreover, as Roland Kirstein has explained, it creates distorting incentives for banks: “If the credit cost burden is the same for high and low risks, and banks charge higher interest rates for more risky loans, then profit-maximizing bank managers are tempted to replace low-risk customers with high risk customers.” Roland Kirstein, *The New Basle Accord, Internal Ratings, and the Incentives of Banks*, 21 Intl Rev L & Econ 393, 394 (2002). In addition, the Basle Committee found itself repeatedly amending the accord—it did so seven times between 1993 and 1996—to handle unforeseen developments at the time of the Accord's passage. For a discussion, see Raj Bhala, *Equilibrium Theory, The FICAS Model, And International Banking Law*, 38 Harv Intl L J 1, 19–20 (1997) (noting and discussing Basle's 1993 Market Risk Proposal, 1993 Netting Proposal, 1993 Interest Rate Risk Proposal, 1994 Netting Amendment, 1995 Netting Amendment, 1995 Market Risk Proposal, and 1996 Market Risk Amendment).

¹⁴⁴ See BIS, Press Release, *Continued Progress Toward Basel II* (Jan 15, 2004), available online at <<http://www.bis.org/press/p040115.htm>> (visited Nov 1, 2004); see also BIS, Press Release, *Update on the New Basle Capital Accord* (June 25, 2001), available online at <<http://www.bis.org/press/p010625.htm>> (visited Nov 1, 2004).

theory, encourage “market discipline.”¹⁴⁵ The Accord is designed to reap “important public policy benefits” by “improving the capital adequacy framework along two important dimensions. First, by developing capital regulation that encompasses not only minimum capital requirements, but also supervisory review and market discipline. Second, by increasing substantially the risk sensitivity of the minimum capital requirements.”¹⁴⁶ This risk sensitivity places much of the responsibility for weighting the riskiness of bank assets on banks themselves. The banks use three different models here. One is a complex set of requirements that obligates banks to calculate the probability of default of each loan, the loss given default, the exposure at default, and a number of other risk weights.¹⁴⁷

Substantively, there is no doubt that the draft accord is important.¹⁴⁸ It has been the subject of a lead editorial in *The Economist* and has prompted warnings by the BIS that some lenders will need to spend \$50 million to \$100 million to put into place systems that can adequately assess their capital adequacy under the new scheme—an amount that some predict will put small lenders out of business.¹⁴⁹ The proposed regulations run hundreds of pages—many times the size of the first accord, as one American regulator has complained.¹⁵⁰ Moreover, they look much more similar to eye-glazing domestic regulations than to international treaties.¹⁵¹ American regulators have worried that applying the most

¹⁴⁵ BIS, Executive Summary, *A New Capital Adequacy Framework*, available online at <<http://www.bis.org/publ/bcbs50.htm>> (visited Nov 1, 2004).

¹⁴⁶ Basel Committee on Banking Supervision, Consultative Document, *Overview of the New Basel Capital Accord* (Apr 2003), available online at <<http://www.bis.org/bcbs/cp3ov.pdf>> (visited Nov 1, 2004).

¹⁴⁷ The New Basle Capital Accord (Basle II), Hearings on HR 2043 before the Subcommittee on Financial Institutions and Consumer Credit of the Committee on Financial Services, 108th Cong, 1st Sess, appendix (2003) (statement by John D. Hawke, Jr., OCC), available online at <<http://www.occ.treas.gov/ftp/release/2003-51a.pdf>> (visited Nov 1, 2004).

¹⁴⁸ One Federal Reserve Board employee described it to me as a “really big deal.” Interview with a Staff Attorney, Federal Reserve Bank.

¹⁴⁹ See Louis Beckerling, *New Basle Capital Accord Seen Taking Heavy Toll on Small Lenders*, S China Morn Post 5 (Dec 18, 2002); Karen Krebsbach, *Risk Management Braving Basel II Storm*, US Banker 30 (Sept 2, 2003) (“European banks expect to spend between \$50 million and \$100 million each to comply with Basel II” while Credit Suisse First Boston has concluded that it will cost “\$70 million to \$100 million to implement the accord.”); The New Basle Capital Accord (Basle II), Hearings on HR 2043 before the Subcommittee on Financial Institutions and Consumer Credit of the Committee on Financial Services, 108th Cong, 1st Sess (2003) (statement by Benton E. Gup, University of Alabama), available online at <<http://financialservices.house.gov/media/pdf/061903bg.pdf>> (visited Nov 1, 2004).

¹⁵⁰ See Statement of John D. Hawke, Hearings before the Subcommittee on Financial Institutions and Consumer Credit (cited in note 147).

¹⁵¹ See id.

complicated models proposed in the regulations to all of their banks would be needlessly complicated and expensive; on the other hand, the chair of the FDIC has testified that “Basel II will confer some degree of regulatory capital benefits on the . . . banks that qualify, in exchange for their substantial investments in systems and infrastructure intended to improve risk management.”¹⁵²

But the most interesting aspect of the second accord for lawyers is how procedurally different it is from the first one. The second accord has been opened to serial waves of comments, 250 of which were received on the first public draft—including comments from banks, self-regulatory organizations, and other regulators,¹⁵³ and 200 on a consultative paper about the accord in 2003.¹⁵⁴ Moreover, as Anne-Marie Slaughter has predicted, the Basle Committee has continually updated its progress on reaching a new accord on the Internet, as have its members.¹⁵⁵ The Fed has devoted an entire section on its web site to updating interested parties on developments in the revised accord. In fact, the Fed’s discussion of “Basel II” shares space—and is given equal stature—with the broadest possible categories of supervisory responsibilities on the agency’s Banking Information and Supervision site, including “Actions and Applications,” “Regulations,” “Supervision,” and “Banking Structure.”¹⁵⁶ The OCC and FDIC have made the congressional testimony of their officials on the Basel II process available on their websites as well.¹⁵⁷

¹⁵² The New Basle Capital Accord (Basle II), Hearings on HR 2043 before the Committee on Banking, Housing, and Urban Affairs, 108th Cong, 1st Sess (2003) (statement of the Hon. Donald E. Powell, FDIC, available online at <<http://banking.senate.gov/index.cfm?Fuseaction=Hearings.Testimony&HearingID=42&WitnessID=145&suppresslayouts=true>> (visited Nov 1, 2004).

¹⁵³ BIS, *The New Basle Capital Accord: Comments Received on the Second Consultative Package* (Aug 21, 2001), available online at <<http://www.bis.org/bcbs/cacomments.htm>> (visited Nov 1, 2004). IOSCO has also submitted its comments to the Basle Committee on the proposed revisions to the Basle Accord.

¹⁵⁴ BIS, *The New Basle Capital Accord: Comments Received on the Third Consultative Paper* (Aug 20, 2003), available online at <<http://www.bis.org/bcbs/cp3comments.htm>> (visited Nov 1, 2004). Moreover, 188 banks from Basle Committee countries, with 177 banks from thirty other countries, participated in the study that went with the consultative paper. See BIS, Basle Committee on Banking Supervision, *Quantitative Impact Study 3—Overview of Global Results 2/33* (May 5, 2003), available online at <<http://www.bis.org/bcbs/qis/qis3results.pdf>> (visited Nov 10, 2004).

¹⁵⁵ Slaughter, 24 Mich J Intl L at 1052 (cited in note 134).

¹⁵⁶ See Federal Reserve Board, *Banking Information and Regulation*, available online at <<http://www.federalreserve.gov/banknreg.htm>> (visited Nov 1, 2004).

¹⁵⁷ See FDIC, Speeches, Testimony, and Articles, available online at <<http://www.fdic.gov/news/news/speeches/chairman/index.html>> (visited Nov 1, 2004); OCC, Speeches, available online at <<http://www.occ.gov/speeches.htm>> (visited Nov 1, 2004).

2. Analysis

Thus, in the development of a new capital accord, we see an attempt to obtain *legitimacy* for increasingly substantive regulation through *process*. To be sure, this new procedural formality is not identical to the sorts of procedure to which domestic regulators ordinarily subject themselves. For example, Harm Schepel contends that “[s]tandardisation procedures have developed into a remarkably consistent set of truly global principles of ‘internal administrative law.’”¹⁵⁸ His rather European- and private-sector-influenced view posits that these principles include:

1. Elaboration of draft standards in technical committees with a balance of represented interests (manufacturers, consumers, social partners, public authorities).
2. A requirement of consensus on the committee before the draft goes public.
3. A round of public notice and comment, with the obligation on the committee to take received comments into account.
4. A ratification vote, again with the requirement of consensus rather than a mere majority, among the constituency of the standards body.
5. The obligation to review standards periodically.¹⁵⁹

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

Nor is it identical to American domestic regulation, most crucially because such regulation includes the possibility of judicial review.¹⁶⁰

Nonetheless, I find this development to be striking, for reasons both promising and troubling. Most surprisingly, there is every indication that the regulators who first devised these organizations prized their informality. Originally, a financial regulator interested in persuading other regulators to use a common standard—perhaps to solve problems of externalities or to gain the advantages of network effects, or perhaps for ideological reasons—might go about the task in two stylized ways. The regulator could prevail upon his

¹⁵⁸ Harm Schepel, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets*, in Christian Joerges, Inger-Johanne Sand and Gunther Teubner, eds, *Transnational Governance and Constitutionalism*, 166–67 (Oxford 2004).

¹⁵⁹ Id.

¹⁶⁰ See text accompanying notes 250–54.

government to go to the United Nations, or to convene a multilateral treaty conference, in an effort to develop a centralized body whose standards all nations that consented to the regime would be obliged to follow. Then, the regulator could persuade the regime to adopt its preferred standard. Or, the regulator could, in conjunction with other regulators, form an informal regulatory organization. If we think of these organizations as informal nexuses through which national regulators meet to collaborate on international problems, we can guess at an understanding of why they were so attractive to regulators in the 1970s and 1980s.

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

I do not want to be overly whiggish about this evolution. It is worth noting how uneasy this turn to formalization as a means of obtaining legitimacy is. IFROs remain much less formal than their counterparts in developed states.¹⁶¹ The usual problems of democratic deficits apply, as does, notably, the lack of a supranational check that serves the equivalent of domestic judicial review.¹⁶²

¹⁶¹ This sort of mobilization of stakeholders in an arena in which consensus is sought (as far as possible) is reminiscent of another venerable, but rarely actualized, concept in administrative law: regulatory negotiation. In 1990, Congress enacted the Negotiated Rulemaking Act, which essentially codified an informal practice employed by agencies to form a consensus among interested parties prior to initiating the notice-and-comment procedure. See 5 USC § 561 et seq (2002). Under negotiated regulation or “neg-reg,”

[t]he agency selects a facilitator to convene meetings of interested parties. They will meet with staff to propose rules, to discuss their own proposals, and to try to come up with a final, agreed-upon rule, including the rule’s specific language. The agency promises to adopt the consensus proposal, at least, if subsequent notice and comment do not reveal serious flaws.

Stephen G. Breyer and Richard B. Stewart, *Administrative Law and Regulatory Policy: Problems, Text, and Cases* 609 (Aspen 3d ed 1992). What happens in IFROs is not a negotiated regulation as that process has been (relatively) standardized, but the paradigm reflects interestingly on what happens in the organizations. See generally, Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L Rev 1 (1997). In addition, as with all neg-regs, the organizations raise concerns of representativeness. The idea of letting stakeholders participate in the process of a negotiated regulation derives its legitimacy in part from ensuring that all stakeholders participate in the process. The Basle Committee and IOSCO produce negotiated decisions, but they do so in a way that particularly empowers the regulators themselves who participate on the committees that matter.

¹⁶² Although these problems are frequently overstated in the case of the entities studied here. See notes 244–54 and accompanying text.

Finally, it isn't clear that the development of procedural niceties by the Basle Committee should assuage those concerned with its substantive work. As domestic scholars have noted time and again—Laurence Tribe is an apposite example—it is difficult to draw normatively rich conclusions about the substantive outcomes of procedurally legitimate decisions.¹⁶³ “[P]erfecting the processes of governmental decision is radically indeterminate and fundamentally incomplete. The process theme by itself determines almost nothing unless its presuppositions are specific and its content supplemented, by a full theory of substantive rights and values.”¹⁶⁴ There is no indication that these international organizations, or their American members, have defined the values that collaboration through IFROs is designed to vindicate.

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

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

B. SOFT RULES AND THE PROSELYTIZATION IMPERATIVE

IOSCO's principal achievement consists of its Core Principles of Securities Regulation (“Core Principles”), which its members have pledged to adopt.¹⁶⁵ Promulgating broadly worded core principles are also how most of the second wave of IFROs—again, more about them later—began their operations. I argue that these sorts of declaration of principle are designed not for the regulators of developed economies, who generally deem themselves in compliance with them, but for emerging markets. I argue that this function of IFROs—proselytization—is a second way that their products should be understood. I sketch the proselytization function through the lens of IOSCO, and I consider, in the context of the history of that organization, why it has imposed soft, as opposed to hard, rules on its members.

¹⁶³ See generally Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 Yale L.J. 1063 (1980).

¹⁶⁴ Id. at 1064.

¹⁶⁵ IOSCO, Report of the Joint Forum, *Core Principles—Cross-Sectoral Comparison* (Nov 2001), available online at <<http://www.iosco.org/library/pubdocs/pdf/IOSCOPD121.pdf>> (visited Nov 1, 2004).

1. A Case Study and Survey

According to the SEC, “[t]he Core Principles, which SEC staff developed together with a number of foreign counterparts, represent international consensus on the key objectives of, and sound prudential principles for, securities regulation.”¹⁶⁶ The Core Principles are broadly phrased, and generally represent standards that most of its most sophisticated members purport to have in place: “There is often no single correct approach to a regulatory issue,” IOSCO warns at the beginning of the Principles.¹⁶⁷

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

Capital standards should be designed to provide supervisory authorities with time to intervene to accomplish the objective of orderly wind down. A firm should ensure that it maintains adequate financial resources to meet its business commitments and to withstand the risks to which its business is subject.¹⁶⁸

The organization’s recommended “legal framework,” on which “effective securities regulation depends,” is only one page long. The framework includes bullet points advising the creation of “taxation laws” with “clarity and consistency, including, but not limited to the treatment of investments”; a “dispute resolution system” that is “fair and efficient,” and that provides for “the enforceability of court orders and arbitrations awards”; and a “banking law,” about which no more is said.¹⁶⁹

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

In addition to promulgating the Core Principles, IOSCO has issued a flurry of white papers on best practices, appropriate technical regulations, and other advice. In October 2003, for example, the Technical Committee issued reports on “Collective Investment Schemes As Shareholders: Responsibilities And Disclosure”¹⁷⁰ and “Investment Management Risk Assessment: Marketing And

¹⁶⁶ See *The SEC Speaks in 2001*, 1235 PLI/Corp 977, 988–89 (2001). The SEC issued a “concept release” in the Federal Register seeking comment on the organization’s development of common accounting standards, in tandem with a semipublic organization of accountants. See SEC, Concept Release, 65 Fed Reg 8896 (2000), available online at <<http://www.sec.gov/rules/concept/34-42430.htm>> (visited Nov 1, 2004).

¹⁶⁷ See IOSCO, *Objectives and Principles of Securities Regulation* 4 (Sept 1998), available online at <<http://www.iosco.org/pubdocs/pdf/IOSCOPD82-English.pdf>> (visited Nov 1, 2004).

¹⁶⁸ Id at 35.

¹⁶⁹ Id at Annexure 3.

¹⁷⁰ See <<http://www.iosco.org/pubdocs/pdf/IOSCOPD158.pdf>> (visited Nov 1, 2004).

Selling Practices,”¹⁷¹ and a survey of member practices on “Fees And Commissions Within The CIS And Asset Management Sector.”¹⁷² In this way, it has evaluated access to markets, capital requirements, clearing and settlement rules, accounting standards, and more traditional securities and futures rules among its members and has debated which standards are the most amenable to common standard setting within its committees.

This advice, however, does not rise to the level of requirement on any of IOSCO’s members. A combination of recommendation plus very broad principles characterizes the regulatory product of the organization. IOSCO has created broad areas of agreement, but, other than perhaps in the area of disclosure standards for nonfinancial statement information,¹⁷³ not the sort of specific standards represented by Basle’s Capital Accord.

Its most promising potential initiative probably lies in the way it partnered with another IFRO, the International Accounting Standards Board, in an effort to develop accounting standards that could be used in all securities markets, an initiative I discuss in (slightly—fear not!) more detail below.¹⁷⁴ As of this writing, however, although a number of jurisdictions (notably European ones) have agreed to harmonize around the International Accounting Standards (“IAS”) developed by the International Accounting Standards Board (“IASB”) in consultation with IOSCO, the United States has thus far expressed skepticism about the prospects of harmonization.¹⁷⁵ Accordingly, the dream of a worldwide set of accounting standards endorsed by IOSCO and enforced by its members—one comparable to the worldwide capital adequacy standard adopted by the Basle Committee—is far from becoming a reality.

Thus, its “most significant accomplishment,” in the words of former CFTC chair Brooksley Born, has been its promulgation of its binding but broad set of Core Principles.¹⁷⁶

2. Analysis

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

¹⁷¹ See <<http://www.iosco.org/pubdocs/pdf/IOSCOPD156.pdf>> (visited Nov 1, 2004).

¹⁷² See <<http://www.iosco.org/pubdocs/pdf/IOSCOPD157.pdf>> (visited Nov 1, 2004).

¹⁷³ See text accompanying notes 97–99.

¹⁷⁴ See text accompanying notes 189–93.

¹⁷⁵ For a brief discussion related to IOSCO from the perspective of an SEC official, see Kung, 33 L & Poly Intl Bus at 474–77 (cited in note 98).

¹⁷⁶ Brooksley Born, *International Regulatory Responses to Derivatives Crises: The Role of The U.S. Commodity Futures Trading Commission*, 21 Nw J Intl L & Bus 607, 613 (2001).

There are, of course, a number of ways to look at the Core Principles and their ilk. As with the promulgations of the Basle Committee, they do not meet the Schepel test for adequate internal administrative law.¹⁷⁷ It could instead be viewed as an instrument of foreign policy—a set of best practices sent from a class of haves, represented in IOSCO’s Technical Committee, to a class of have-nots, including the rest of the organization’s membership.¹⁷⁸

Or, less cynically, call this administrative development the functional equivalent of an advice column from those who have made their mistakes to those who are about to do so. Tony Porter has noted that “the difficulty for the emerging markets of formulating and promoting a position in matters that are highly technical, in fora that are dominated by the developed markets, and in an issue area where their own institutions are in a process of rapid change.”¹⁷⁹ These markets and their regulators may benefit from the expertise of IOSCO’s Technical Committee.

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

An effective system of banking supervision will have clear responsibilities and objectives for each agency involved in the supervision of banks. Each such agency should possess operational independence and adequate resources. A suitable legal framework for banking supervision is also necessary, including provisions relating to authorization of banking establishments and their ongoing supervision; powers to address compliance with laws as well as safety and soundness concerns; and legal protection for supervisors. Arrangements for sharing information between supervisors and protecting the confidentiality of such information should be in place.¹⁸⁰

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

Over the past few years, the Committee has moved more aggressively to promote sound supervisory standards worldwide. In collaboration with many non-G-10 supervisory authorities, the Committee in 1997 developed a set of “*Core Principles for Effective Banking Supervision*”, which provides a

¹⁷⁷ See text accompanying notes 158–58; Schepel, *The Constitution of Private Governance* (cited in note 158).

¹⁷⁸ Jorge Guira, for example, believes that, for developing countries such as Brazil, “there is little question that, despite the sensitivity of this area in domestic political environments who do not like such ‘soft law’ imposed on them, such institutional development [of, inter alia, IOSCO’s standards] serves a highly positive social purpose.” Jorge M. Guira, *Preventing and Containing International Financial Crisis: The Case of Brazil*, 7 *L & Bus Rev Am* 481, 487 (Fall 2001).

¹⁷⁹ Tony Porter, *The Transnational Agenda for Financial Regulation*, in Leslie Elliott Armijo, ed, *Financial Globalization and Democracy in Emerging Markets* 100 (St. Martin’s 1999).

¹⁸⁰ See Basel Committee, *Core Principles for Effective Banking Supervision* 5, available online at <<http://www.bis.org/publ/bcbs30.pdf>> (visited Nov 1, 2004).

blueprint for an effective supervisory system. To facilitate implementation and assessment of implementation by outsiders, the Committee in October 1999 developed a "Core Principles Methodology."¹⁸¹

Moreover, the committee "stands ready to give advice to supervisory authorities in all countries."¹⁸² BIS supervisors (again, the Basle Committee does not have its own secretariat) attend a biannual International Conference of Banking Supervisors, sponsored by the Basle Committee partly for this purpose.¹⁸³ In 2002, the conference, held in South Africa, featured sessions on two subjects: the implementation of the Basle Accord and "creat[ing] a stable financial environment" in emerging market economies.¹⁸⁴ Other, more formal international organizations have adopted Basle principles.¹⁸⁵

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

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

For developing countries, then, the organizations' increasingly formally issued hard rules are perhaps less relevant than their quickly promulgated soft ones. To them, the Basle Committee and IOSCO are venues through which they obtain information about best regulatory practices and the common standards that, it is hoped, will persuade investors from wealthy countries to consider diversifying into emerging markets. And finally, membership in, or interaction

¹⁸¹ See BIS, *The Basle Committee on Banking Supervision*, <<http://www.bis.org/bcbs/aboutbcbs.htm>> (visited Nov 1, 2004) (cited in note 23).

¹⁸² Id.

¹⁸³ Id.

¹⁸⁴ See BIS, Press Release, *Twelfth International Conference of Banking Supervisors* (Sept 19, 2002), available online at <<http://www.bis.org/press/p020919b.htm>> (visited Nov 1, 2004).

¹⁸⁵ For example, as Sol Picciotto has observed, "the members of the Basle Committee have used their influence to urge the formation of a half-dozen other specialized, regional groupings with which it can coordinate supervision efforts, such as the Offshore Group of Bank Supervisors." Picciotto, 17 Nw J Intl L & Bus at 1041 (cited in note 120).

with, the organizations may convey to the regulators the same sort of badge of respectability as participation in more formal international organizations, such as the UN.¹⁸⁶

This sort of proselytization has met with success, even beyond the community of bank supervisors, and thus is not without some substantive bite—if not because of what IOSCO requires, then because of what other entities who listen to IOSCO require. As the General Accounting Office has concluded, the “IMF, the World Bank, and other international financial institutions that provide direct assistance use the Basle principles in assisting countries to strengthen their supervisory arrangements in connection with their work aimed at promoting financial stabilization and supporting improved supervisory qualifications.”¹⁸⁷

C. MODELING: EVER DEVELOPING REGULATORY COOPERATION

1. The Second Wave of IFROs

Although the Basle Committee and IOSCO are the two most established IFROs, they are by no means unique.¹⁸⁸ Recently, there has been a proliferation of IFROs modeled on both organizations. In many cases, these two founding IFROs are members of the entities created in their image. A brief tour through the second generation of IFROs is instructive in both illustrating the design and purpose of the organizations and the extent of the phenomenon of regulatory cooperation that they represent.

¹⁸⁶ See Raustiala, 43 Va J Intl L at 60–61 (cited in note 2).

¹⁸⁷ GAO, *International Finance: Actions Taken to Reform Financial Sectors in Asian Emerging Markets* 32, available online at <<http://www.gao.gov/archive/1999/gg99157.pdf>> (visited Nov 1, 2004). See also, for example, International Monetary Fund, The World Bank, *Experience with the Assessments of the IOSCO Objectives and Principles of Securities Regulation under the Financial Sector Assessment Program 3* (1999), available online at <<http://www.imf.org/external/np/mae/IOSCO/2002/eng/041802.pdf>> (visited Nov 1, 2004) (stating that the Objectives and Principles “form an essential part of the standards and codes work undertaken in the Financial Sector Assessment Program. . . . The Principles set a standard against which a country’s practice of regulation and supervision of securities markets is assessed.”); The World Bank Group, *Evaluating Legal Institutions*, available online at <<http://www1.worldbank.org/publicsector/legal/evaluatinglegal.htm>> (visited Nov 1, 2004) (stating that “[t]he IOSCO Objectives and Principles, with a defined rating system, are widely used by the International Monetary Fund (IMF), the World Bank and others in assessing the health of the securities markets of countries.”).

¹⁸⁸ Herbert Morais has observed that most IFROs are concerned with the “preparation and dissemination of standards . . . directed towards self-regulation of the professionals.” Herbert V. Morais, *The Quest for International Standards: Global Governance vs. Sovereignty*, 50 U Kan L Rev 779, 786 (2001–02).

IASB. IOSCO's closest and perhaps most currently vibrant partnership may lie in its relationship with the semiprivate IASB, which consists of some government and some private accountants from a few select countries.¹⁸⁹

The Board has attempted to solve the difficult question of whether the rather different accounting standards employed throughout the world can be harmonized (and, as Beth Simmons has noted, American accounting standards are particular outliers, both because they are more strict than those in place on the European continent, and because they are extremely important, as they must be used by companies seeking entrance to America's capital markets).¹⁹⁰ As one former SEC commissioner has stated, "one cannot overlook the potential expansion of investment opportunities if all issuers could use one set of accounting standards that would be accepted world-wide for securities offerings."¹⁹¹ As the Board has explained, it "and IOSCO [have] work[ed] on a programme of 'core standards' which could be used by publicly-listed enterprises when offering securities in foreign jurisdictions."¹⁹²

The IASB is organized, however, in the usual style of IFROs: it began as an informally constituted committee; it was then reconstituted as "a not-for-profit corporation incorporated in the State of Delaware" in March of 2001. The corporation was later transformed into the parent entity of the IASB, an "independent accounting standard setter based in London."¹⁹³ It also has moved increasingly to publicize its deliberations, in an effort, some commentators believe, to win acceptance of its International Accounting Standards by both IOSCO's Technical Committee and its member agencies.¹⁹⁴

¹⁸⁹ The complicated details of the IASB's structure can be found in its constitution. See IASB, *LASC Foundation Constitution* (July 2002), available online at <http://www.iasb.org/uploaded_files/documents/8_11_iascf-constitution.pdf> (visited Nov 1, 2004).

¹⁹⁰ Simmons, 55 *Intl Org* at 595 (cited in note 102). See also Edward F. Greene, *Hegemony or Deference: U.S. Disclosure Requirements in the International Capital Markets*, 50 *Bus Law* 413, 418 (1995) (describing loss of market share of US exchanges to foreign exchangers, subject to less rigorous accounting requirements).

¹⁹¹ See Hunt, 51 *Admin L Rev* at 1114 (cited in note 69).

¹⁹² See IASB, *Frequently Asked Questions*, available online at <http://www.iasb.org/about/faq.asp?showPageContent=no&xml=18_17_24_17122003.htm> (visited Nov 1, 2004). See also Kung, 33 *L. & Poly in Intl Bus* at 474-77 (cited in note 98).

¹⁹³ See IASB, *General Information*, available online at <<http://www.iasb.org/about/general.asp>> (visited Nov 1, 2004). The IASB, however, differs from other IFROs by including private members and by its rather detailed constitution. See IASB, *LASC Foundation Constitution* (cited in note 189).

¹⁹⁴ The restructuring "include[s] changes in the IASC's objectives and strategy, due process, standards implementation and enforcement, and funding mechanisms." Maureen Peyton King, Note, *The SEC's (Changing?) Stance on LAS*, 27 *Brooklyn J Intl L* 315, 332 (2001). As King has noted, these changes respond to criticism of the way the organization was organized. See id. at 329 n 85; Carrie Bloomer, ed, *The LASC - U.S. Comparison Project: A Report on the Similarities and*

LAIS. Established in 1994 as a nonprofit corporation in Illinois, the International Association of Insurance Supervisors (“IAIS”) represents insurance supervisory authorities in approximately 100 jurisdictions.¹⁹⁵ It is organized similarly to IOSCO, and, as with the Basle Committee, the BIS serves as its secretariat.¹⁹⁶ Like both of these organizations, IAIS has issued global insurance principles. It has also conducted research on supervision problems, provided training and support on issues related to insurance supervision, and organized meetings for insurance supervisors, including an “Annual Conference where supervisors, industry representatives and other professionals discuss developments in the insurance sector and topics affecting insurance regulation.”¹⁹⁷ Like IOSCO, IAIS permitted more than sixty observers “representing industry associations, professional associations, insurance and reinsurance companies, consultants and international financial institutions,” to participate in its meetings and deliberations.¹⁹⁸

FSF. The Group of Seven (“G-7”) recently created a Financial Stability Forum (“FSF”), “to ensure that national and international authorities and relevant international supervisory bodies and expert groupings can more effectively foster and coordinate their respective responsibilities to promote international financial stability, improve the functioning of the markets and reduce systemic risk.”¹⁹⁹ The Forum meets biannually and currently consists of twenty-six national regulatory agencies and, inter alia, the Basle Committee and

Differences between IASC Standards and U.S. GAAP 15 (Fin Acct Stands 2d ed 1999). The SEC has expressed some skepticism about the way the old IASC developed its standards:

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

SEC, *Report on Promoting Global Preeminence of American Securities Markets*, available online at <<http://www.sec.gov/news/studies/acctgsp.htm>> (visited Nov 1, 2004).

¹⁹⁵ See Zaring, 33 *Tex Intl L J* at 297–304 (cited in note 6).

¹⁹⁶ See IAIS, *Organization Chart*, available online at <http://www.iaisweb.org/132_173_ENU_HTML.asp> (visited Nov 1, 2004). The IAIS secretariat was moved to the BIS in 1996. See BIS, *New Secretariat of the LAIS Comes to Basle* (Oct 26, 1996), available online at <<http://www.bis.org/press/p961023.htm>> (visited Nov 1, 2004).

¹⁹⁷ See IAIS, *About LAIS*, available online at <http://www.iaisweb.org/132_ENU_HTML.asp> (visited Nov 1, 2004).

¹⁹⁸ See *id.*

¹⁹⁹ FSF, Press Release, *Communiqué of G-7 Finance Ministers and Central Bank Governors* (Feb 20, 1999), available online at <http://www.fsforum.org/attachments/g7pressrelease_on_establishment_ofFSF.pdf> (visited Nov 1, 2004).

IOSCO.²⁰⁰ It is run by the General Manager of the Bank for International Settlements, who “was appointed Chairman of the FSF in a personal capacity.”²⁰¹

Joint Forum. In fact, IFROs themselves are coming together to create IFROs—second order collaborations between regulators channeled through the first order organizations that occupy particular issue areas. IOSCO, the Basle Committee, and IAIS have formed a Joint Forum on Financial Conglomerates (“Joint Forum”) to deal with the regulatory issues raised by multinationals that offer banking, investment banking, securities brokering, and insurance services to clients. In November 2001, that forum issued its own set of Core Principles.²⁰² As with the founding IFROs, the Joint Forum informally invited commentary on its draft proposals with “press communiqué” stating:

The Basle Committee, IOSCO and IAIS stress the working paper nature of the documents and invite comments which will be taken into account in the evolution of these papers and in the implementation of supervisory guidance. The input from both the industry and the supervisory community in each sector will also influence the continuing work of the Joint Forum in addressing supervisory issues that arise from the continuing emergence of financial conglomerates and the blurring of distinctions between the activities of firms in each financial sector.²⁰³

The principles of the Joint Forum, although broad, do matter for developing markets. As the Forum acknowledged, the IMF and the World Bank suggested that principles be developed, in part to “help assessors improve their understanding of the principles and thereby make the implementation and assessment process more effective.”²⁰⁴ That important financial institutions such as the IMF and the World Bank suggested this is no surprise: these institutions made up the most biting aspect of the proselytization functions of IFROs that I earlier illustrated with reference to IOSCO’s own core principles.²⁰⁵

FATF. The Financial Action Task Force on Money Laundering, created by the G-7 in Paris in 1989, has issued a set of “40 Recommendations” to combat

²⁰⁰ See IAIS, *Who We Are*, available online at <http://www.fsforum.org/about/who_we_are.html> (visited Nov 1, 2004).

²⁰¹ FSF, Press Release (cited in note 199).

²⁰² See generally BIS, *Capital Adequacy Principles* (Feb 1999), available online at <<http://www.bis.org/publ/joint02.pdf>> (visited Nov 1, 2004).

²⁰³ See IOSCO, Press Release, *Joint Forum on Financial Conglomerates* (Dec 1998), available online at <<http://www.iosco.org/news/pdf/IOSCONEWS49.pdf>> (visited Nov 1, 2004).

²⁰⁴ Basel Committee, Joint Forum, *Core Principles: Cross-Sectoral Comparison* ¶ 12, available online at <<http://www.bis.org/publ/joint03.pdf>> (visited Nov 1, 2004).

²⁰⁵ See text accompanying note 187.

money laundering.²⁰⁶ The organization “comprises 29 governments and two regional organizations representing the major financial centers of the Americas, Europe, and Asia.”²⁰⁷ It is composed of “Members of the ministries of Finance, Justice, the Interior, and External Affairs, financial regulatory authorities and law enforcement agencies.”²⁰⁸

2. IOSCO and the Basle Committee Together

The Basle Committee and IOSCO do not just pursue their own regulatory agendas: They work together to create common standards of supervision.²⁰⁹ As the SEC has noted, “through its membership in . . . IOSCO . . . , the Commission has been cooperating with the Basle Committee . . . with respect to the use of proprietary . . . models to determine bank capital requirements for market risk.”²¹⁰ IOSCO and the Basle Committee also coordinated efforts to prepare the financial markets for the Y2K bug.²¹¹

To be sure, interorganizational collaboration hasn’t always been perfectly harmonious. In 1991, the Basle Committee entered discussions with IOSCO to jointly develop a framework for regulation of both credit risk (roughly, the making of loans)—with which the 1988 Accord had been principally concerned—and market risk (such as the buying and selling of securities in financial markets).²¹² Richard Breeden, then the head of the SEC and chairman of the Basle-IOSCO committee, ultimately scuttled the possibility of a joint framework, which he believed would result in drastically reduced capital requirements for US securities firms.²¹³ But on other occasions, joint collaboration appears to have made a real impact on member jurisdictions. For example, the Government Accounting Office (“GAO”) has concluded that “[i]n Germany, reporting for derivatives has been further improved by banks,

²⁰⁶ The recommendations are available online at <http://www1.oecd.org/fatf/40Recs_en.htm> (visited Nov 1, 2004). See generally Beth Simmons, *International Efforts against Money Laundering*, in Dinah Shelton, ed., *Commitment and Compliance* 244–63 (Oxford 2003).

²⁰⁷ FATF, *Annual Report 2001–02* at 2, available online at <http://www1.oecd.org/fatf/pdf/AR2002_en.pdf> (visited Nov 1, 2004). The international organization members are the Gulf Coordination Council and the European Union. See FATF, *Members and Observers*, available online at <http://www1.oecd.org/fatf/Members_en.htm> (visited Nov 1, 2004).

²⁰⁸ FATF, *Annual Report 2001–02* (cited in note 207).

²⁰⁹ See, for example, Picciotto, 17 Nw J Intl L & Bus at 1042 (“Efforts have been made to establish a liaison between IOSCO and the Basel Committee.”) (cited in note 120).

²¹⁰ See 63 Fed Reg at 59384 (cited in note 53).

²¹¹ Former SEC Commissioner Isaac Hunt has described the coordination of these efforts, as well as the efforts of IOSCO more specifically. See Hunt, 51 Admin L Rev at 1108–10 (cited in note 69).

²¹² See riskglossary.com, *Basle Committee on Banking Supervision*, available online at <http://www.riskglossary.com/articles/basle_committee.htm> (visited Nov 1, 2004).

²¹³ See id.

especially through disclosure of value-at-risk estimates that were introduced in Basle Committee on Banking Supervision and IOSCO Technical Committee papers.”²¹⁴

3. Conclusions

What are we to make of this proliferation of international organizations? Joseph Norton believes that “[o]ver the past two decades, the international financial community has been in the process of devising a ‘consensus’ on standards and codes of conduct and a related loose international institutional framework to achieve financial stability and to develop robust financial systems on a global basis.”²¹⁵ If it has done so, it has used an ever increasing number of ever more institutionalized IFROs to achieve these goals. But with the second wave of IFROs, it is too soon to tell whether the wealthy countries will be able to agree on a common approach to preventing money laundering or capital adequacy standards for insurance companies, and so on.

The proliferation of international financial regulatory cooperation is a recent development—and one gathering increasing momentum—but it is not an unpredictable one.²¹⁶ Political theorists have long posited that technical cooperation by self-interested regulators could expand into an internationalization of regulation. Neofunctionalists, such as Ernst Haas and, before him, David Mitrany, posited that international cooperation is likely to develop along task-specific lines when prodded by domestic actors who expect to benefit from it.²¹⁷

²¹⁴ See GAO, *Financial Derivatives* at 115 (cited in note 54) (also discussing the effects of Basle on Australian, Japanese, Singaporean, Swiss, and British bank regulators).

²¹⁵ Joseph J. Norton, *The Modern Genre of Infrastructural Law Reform: The Legal and Practical Realities—The Case of Banking Reform in Thailand*, 55 SMU L Rev 235, 238 (2002). See also generally Joseph J. Norton, “A New International Financial Architecture?”—*Reflections on the Possible Law-Based Dimension*, 33 Intl Law 891 (1999).

²¹⁶ I, for one, have explored the implications of a momentum in this field before. See Zaring, 33 Tex Intl L J at 323–25 (cited in note 6).

²¹⁷ Mitrany’s classic exposition of functionalism, *A Working Peace System*, first appeared in 1943, and was heavily influence by the New Deal, which he interpreted to represent a fundamental shift in political power from the states to the federal government that had occurred quietly because of the way the New Deal created specific new powers in task-defined federal agencies such as the SEC and the Tennessee Valley Authority. See David Mitrany, *A Working Peace System* 21–22 (Oxford 1943) (“No attempt was made to relate [New Deal reforms] to a general theory or system of government. . . . Yet the new functions and the new organs, taken together, have revolutionized the American political system. The federal government has become a national government.”). Ernst Haas refined the theory (he called it “neofunctionalism”) and applied it to European integration: he believed that technical experts, if linked to effective interest groups, could further integration on a regional level. Ernst Haas, *The Uniting of Europe: Political, Social, and Economic Forces, 1950–1957* at 19 (Stanford 1958). His study of Europe substantiated “the pluralistic thesis that a larger political community can be developed if the crucial expectations, ideologies, and behaviour

The crucial insight of neofunctionalism, for our purposes, is its recognition that regulatory cooperation in particular issue areas can, under the right circumstances, enmesh states and societies in international cooperation.²¹⁸ Thus IFROs grow or beget more IFROs and expand turf as the members of these organizations see their interests more globally. There are a number of implications to this process of enmeshment. One is that the growth of regulatory cooperation will likely be accompanied by a mobilization of, and interaction with, interested private groups affected by the organizations.

The IASB's relationship with IOSCO is a good example of this, as is the organization's vast affiliate membership of broker organizations and private stock exchanges.²¹⁹ Another such implication is that the enmeshing of domestic regulators in international regulatory frameworks will turn the interests of the regulators abroad. We can see this in the SEC's annual reports of its work with IOSCO.²²⁰ The Federal Reserve has also published a great deal of material about its work with the Basle Committee. And the final implication—a rather strong claim—is that after these entities are drawn further into the international regulatory framework of IFROs, a return to solely domestic regulation will become increasingly unlikely.²²¹

To be sure, neofunctionalism is a controversial theory among political scientists—it is, for one thing, very difficult to quantify how much harmonization the theory demands, and even in drawing together entities such as the European Union, its predictive power has been hotly contested.²²² But whatever its drawbacks in other contexts, IFROs exhibit much of the informal coagulation predicted by Haas and Mitrany. Part of the neofunctionalist story of

patterns of certain key groups can be successfully refocused [sic] on a new set of central symbols and institutions," provided the community was developed from democratic states with sophisticated economies enmeshed in international trade and finance. See *id.* at xiv–xvi.

²¹⁸ Paul Taylor identified this sort of expansion in his introduction to one of David Mitrany's final publications. See Paul Taylor, *Introduction*, in David Mitrany, *The Functional Theory of Politics* x (St. Martin's 1975).

²¹⁹ See text accompanying note 67.

²²⁰ See, for example, SEC, Division of Corporation Finance, *Current Issues And Rulemaking Projects*, available online at <<http://www.sec.gov/pdf/cfcr112k.pdf>> (visited Nov 1, 2004).

²²¹ See Zaring, 33 *Tex Intl L J* at 324–25 (cited in note 6).

²²² See, for example, Andrew Moravcsik, *Europe's Integration at Century's End*, in Andrew Moravcsik, ed, *Centralization or Fragmentation? Europe Facing the Challenges of Deepening, Diversity, and Democracy* 1, 51 (CFR 1998). On the other hand, academics like Alec Stone Sweet believe that the theory has substantial explanatory power. See Sweet, Sandholtz, and Fligstein, eds, *The Institutionalization of Europe* at 1 (cited in note 41) (“[T]he European Union [now] governs in an expanding number of policy domains, producing rules that are authoritative for both states and persons. Increasingly dense networks of transnational actors . . . operate in political spaces that are best described as supranational in character.”).

a momentum to informal regulatory collaboration turns on what are now termed network effects.

To economists, network effects exist for those products for which the utility of the product to the consumer increases as other consumers obtain the product. E-mail is an example. The ability to get and receive e-mail is worth more to you the more other people have e-mail addresses on the network to which you have access.²²³ Kal Raustiala has applied an understanding of these network effects to regulatory cooperation. He has noted that regulators across jurisdictions may settle on a common regulatory standard: one that permits them to exchange information easily and broaden the reach of their regulatory efforts. In these circumstances,

network theory predicts that tipping occurs, leading to an equilibrium in which one (or more . . .) regulatory standard dominates. Network effects thus aid policy standardization. . . . [T]his is not to say that convergence is “caused” by network effects, but rather that network effects boost the existing incentives to standardize.²²⁴

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

IV. CONCLUSION: THE PROMISE OF THE NEW PROCESS

I do not want to overly complicate the prescriptive takeaway for a phenomenon that, as we have seen, is plenty descriptively complex. But in evaluating whether a phenomenon is good or bad, one must have some idea of what it actually does, and much of what I have tried to do in this article is designed to describe and theorize how regulatory cooperation actually works.²²⁵ In this section, I consider some normative implications of the phenomenon and site what I have found in the literature of international cooperation.

²²³ For a general discussion, see Zaring, 51 UCLA L Rev at 1039 (cited in note 6); Mark A. Lemley and David McGowan, *Legal Implications of Network Economic Effects*, 86 Cal L Rev 479, 489–90, 492–93 (1998); Raustiala, 43 Va J Int L at 63 (cited in note 2).

²²⁴ See Raustiala, 43 Va J Ind L at 65 (cited in note 2).

²²⁵ Malcolm Feeley and Edward Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* 11 (Cambridge 1998).

A. THE IMPLICATIONS FOR SCHOLARSHIP

Legal scholars disagree whether the paradigmatic limitation of legal personality to states ought to be opened up in a world where subjects of states—including agencies, nongovernmental organizations, and even individuals—play an active role. I argue, at least in areas of technical regulatory cooperation, that this debate is not fruitful, and that substate actors are both important and distinct from state action.

I proceed, per an assumption of international relations liberals, on the premise that international society is disaggregated.²²⁶ That is, the interests and perspectives of the agencies engaged in international regulatory cooperation can usefully be understood separately from the interests of the states that comprise them.²²⁷ However, this does not mean that the rationalist parsimony of state-centered paradigms of international relations should be abandoned. Those paradigms have much to say about what happens in regulatory cooperation—if they are refocused on the regulators.

Recognizing that substate actors such as regulators play an important role in the development of international rules is sometimes thought to be a controversial proposition, but few international lawyers, at least in this area, would seriously dispute it. Consider, for example, the critics of regulatory cooperation.²²⁸ Their concerns about democratic dispossession and regulators running amok, for example, make little sense if agency actions are inseparable from the interests of the states to which they belong, especially if those states are democracies (the calculus is different if the “democracy deficit” is being used as a shorthand for a First World-Third World power imbalance). These criticisms depend on a conception of international lawmaking that goes beyond a paradigm of a state as a unitary actor.

²²⁶ See Slaughter, 24 Mich J Intl L at 1041 (cited in note 134); Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 Am J Intl L 205, 230 (1993). See also generally Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 Intl Org 513 (1997); Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two Level Games*, 42 Intl Org 427 (1988) (an early and influential model of the ways domestic concerns could affect the international relations of the state). As William Burke-White has put it, “[a]ccording to positive liberal international relations theory, individuals—the basic actors in international society—organize to promote their own interests; States represent some subset of those domestic interests; and international outcomes depend on the configuration of national interests.” William Burke-White, *Community of Courts: Toward a System of International Criminal Law Enforcement*, 24 Mich J Intl L 1, 29 n 138 (2002).

²²⁷ See generally Slaughter, 24 Mich J Intl L at 1041 (cited in note 134).

²²⁸ For a broad survey of these perspectives, see Susan Marks, *Democracy and International Governance*, in Jean-Marc Coicaud and Veijo Heiskanen, eds, *The Legitimacy of International Organizations* 47, 66 (United Nations 2001).

In sum, I think the liberal perspective on disaggregated states has occupied the field of writing on international regulatory cooperation.

However, the sort of collaboration wrought by agencies often mimics the kind of collaboration that realists expect from state-state cooperation, albeit on a different scale. International financial regulators have designed regimes that seek legitimacy for their actions with ever more process safeguards. This can be understood as an agreement to constrain the action that the agencies take in a way to get interested parties to buy into the process of regulatory harmonization—a classic observation about how state regimes work.²²⁹

Similarly, the proselytization in which IFROs engage can be seen as a realist, rational effort to create baseline regulatory standards across the globe, perhaps to reduce regulatory arbitrage.²³⁰

Finally, scholars should be cautious about attributing revolutionary reinventions of government to processes of regulatory cooperation. Although this cooperation might begin in lieu of treaties, pledges, or other sorts of international agreements, it, at least so far, has rapidly adopted the trappings of domestic administrative process. So, even though international regulatory cooperation is an explosive regulatory phenomenon, it may, in the end, not create a new way of doing administrative law, but rather a familiar one—albeit one offered by new international institutions and with broad international reach.

Legal scholars have also recently developed a great deal of attention to the importance of “soft law” in international relations.²³¹ I argue that the regulatory cooperation studied here transcends the concept. IFROs represent a classic version of nonrequired cooperation, but calling it soft law is pointless. Financial regulatory cooperation enjoys widespread adherence, in the way that widely adopted models of regulation enjoy adherence in any regulatory context. Even if it is nonbinding, how does that matter if it is obeyed?

²²⁹ Stephen Krasner, who set much of the framework for regime theory, has increasingly turned to examining regimes as precommitment strategies by states. See Stephen D. Krasner, *Global Communications and National Power: Life on the Pareto Frontier*, 43 *World Polit* 336, 338–40 (1991) (defining regimes as solving particular kinds of coordination games by states); Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in Stephen D. Krasner, ed., *International Regimes 2* (Cornell 1983) (defining regimes as involving “sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given area of international relations”).

²³⁰ As Claire Kelly notes, “start from the realist premise and claim that regimes operate to mitigate the harmful effects of a state of anarchy by promoting cooperation.” Claire R. Kelly, *Realist Theory and Real Constraints*, 44 *Va J Intl L* 545, 554 (2004). See also generally Claire R. Kelly, *The Value Vacuum: Self-Enforcing Regimes and the Dilution of the Normative Feedback Loop*, 22 *Mich J Intl L* 673 (2001).

²³¹ See Simmons, *International Efforts against Money Laundering* (cited in note 206).

Kal Raustiala has recently argued that the concept of soft law makes little sense in a world where states proceed by either contract-type agreement or more flexible pledges.²³² Andrew Guzman also believes that the concept obscures more than it helps.²³³

I agree—to a point. Financial regulatory cooperation would seem to be the epitome of soft law, but it is much harder than it looks. The Basle Accord, for one, has enjoyed widespread compliance despite being putatively nonbinding.²³⁴ IOSCO's pronouncements are more flexible, and pledge-like, but are also designed to create a harmonized regime.

In this sense, regulatory cooperation, both hard and soft, amounts to administration by agreement in a way just as substantial as agreement by treaty. Drawing careful distinctions between hard and soft law makes little sense where nonbinding rules can have such binding effect.

Finally, my findings vindicate the international networks literature.²³⁵ There is still more work to be done here, but, as I discuss below, there are reasons to be cautiously positive about the qualities of network governance in international regulatory cooperation. We must remember, however, that regulatory cooperation is a phenomenon dominated by First Worlders.

B. PRESCRIPTIVE IMPLICATIONS

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

It therefore is both a fact on the ground and a choice presented for national lawmakers. These lawmakers must decide whether they wish to try to develop international coordination through more centralized means, such as treaties or existing international organizations, or whether they wish to leave the cooperative process to the informal outlets increasingly offered by regulatory cooperation.²³⁶

²³² Kal Raustiala, Draft Working Paper, *Form and Substance in International Agreements* 16–19 (on file with the author).

²³³ Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 Cal L Rev 1823, 1880 (2002) (“soft law remains largely outside the theoretical framework of international legal scholars”).

²³⁴ See text accompanying note 50.

²³⁵ See generally Slaughter, *A New World Order* (cited in note 1).

²³⁶ The choice is similar to a domestic one that I have discussed elsewhere: whether to proceed through centralized rules, or whether to permit a regulatory equilibrium to develop through more

In my view, the decision turns upon the value that legislators place on coordination. Where the fact of coordination is particularly important, but the substance of the coordination is not, regulatory cooperation is a useful, low-cost choice. It avoids the difficulties of the treaty process. Regulatory cooperation moves quickly and flexibly; national lawmakers often do not. Moreover, regulatory cooperation, at least in the financial sector, addresses technical and complex issues about which generalist national lawmakers are usually inexpert.

Regulatory collaboration is therefore appropriate in technical areas of “low politics,” where national interests in unique approaches to regulation are hard to discern.²³⁷ In these areas, there is every indication that globalized administrative process is by no means a bad thing.

But in areas where mere coordination is not a predominant value, lawmakers may be wary of leaving matters to the regulators. Because while there is evidence that regulatory cooperation may achieve a regulatory equilibrium, we do not know whether ad hoc harmonization will center around the right one.

Thus, lawmakers evaluating the prospect of regulatory harmonization must decide how much the substance of the possible agreement matters to them. If it is important, they may wish to act instead of leaving matters to the vagaries of the informal administrative process. But otherwise, they need not fear that process. In the remainder of this section, I focus on two reasons why. I show how the new global administrative process contributes a solution to two evergreen questions that have long exercised international lawyers. The questions are:

Are these bureaucrats on the loose?²³⁸

Can this phenomenon be used to constrain a hegemonic power?²³⁹

disaggregated mechanisms, such as, for instance, district courts. See Zaring, 51 UCLA at 1017, 1077–78 (cited in note 6).

²³⁷ Here, at least, I agree with Guzman. See Guzman, 90 Cal L Rev at 1885 (cited in note 233) (“[T]hose areas in which international law matters . . . include . . . the entire range of international economic issues, from trade to the international regulation of competition law to environmental regulation.”).

²³⁸ Slaughter, 24 Mich J Intl L at 1052 (cited in note 134).

²³⁹ As Robert Keohane and Ruth Grant have observed, “[a] common response to these new patterns of global governance is to call for greater accountability.” Ruth W. Grant and Robert O. Keohane, Seminar on Global Governance and Administrative Law, NYU Law School, *Accountability and Abuses of Power in World Politics* 1, available online at <<http://www.law.nyu.edu/kingsbury/spring04/globalization/keohane.Grant%20paper.doc>> (visited Nov 1, 2004) (“The most complex issues arise with respect to very powerful states with constitutional democratic governments, such as the United States. Such governments are accountable to their citizens and to an array of domestic interests and institutions, but as we have noted, this does not assure accountability to outsiders. Large and powerful states do not depend on subventions from others or on markets, and there is no strong international legal structure governing their actions.”).

I offer two hopeful answers to both questions.

1. The Democratic Deficit Problem

Many commentators have evinced concern about whether international regulatory agreement is subject to control by elected officials and to real participation by the people and entities affected by the work of these institutions.²⁴⁰ This is the democratic deficit inherent in international regulatory agreement. Some have called for a variety of procedural fixes to ensure the accountability of phenomena like IFROs, ranging from enhanced Internet access of the proposals of these organizations to formal treaties ratifying the existence and work of the regulators.²⁴¹ Others have downplayed the problem of popular control of regulators, positing that such control is only one value among many, including the development of effective policy and the control of multinational and many-tentacled corporations.²⁴² These scholars contrast the work of regulators favorably with that of domestic agencies and legislatures.²⁴³

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

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

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

²⁴⁰ See, for example, Macey, 52 Emory L J at 1353–54 (cited in note 13) (for a conservative perspective); Lori M. Wallach, *Accountable Governance in the Era of Globalization: The WTO, NAFTA, and International Harmonization of Standards*, 50 U Kan L Rev 823, 824 (2001–02) (Director of Public Citizen’s Global Trade Watch arguing that harmonization through the WTO and NAFTA—admittedly more formal means of formalization than the ones considered here—“directly and deeply affect an array of domestic policies, [but] were developed in processes that excluded many interested parties”). See also Kinney, 54 Admin L Rev at 430 (cited in note 113) (“The greatest concern with . . . transgovernmental networks involved with international regulation is their limited accountability,” especially compared to “democratically elected governments.”).

²⁴¹ Kinney has called for a confluence of international policymakers and scholars working under a formally constituted organization—like the UN’s International Law Commission—to address the problem. 54 Admin L Rev at 431–32 (cited in note 113).

²⁴² See, for example, Slaughter, 24 Mich J Intl L at 1041 (cited in note 134).

²⁴³ See id.

No doubt, this salve is an imperfect one, because the comment periods, etc., are done by the grace of IFROs. But the fact remains that as these organizations have evolved and tackled far-reaching regulatory problems, they have done so more openly, and with increasing procedural regularity. There is little reason to believe this momentum will change.

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

Legislative, Not Judicial, Control. Moreover, perhaps hearteningly, the institution that most oversees IFRO rulemakings in the United States is a particularly democratic branch of government. Federal Reserve officials regularly testify on the progress of Basle Accord revisions before Congress.²⁴⁴ A number of individual congressmen have recently sent the American banking regulators a letter expressing their concerns about the development of Basle II.²⁴⁵

Congress has also expressed interest in constraining the activities of the organizations through disclosure and reporting. In 1996, Congress passed the National Securities Markets Improvement Act of 1996. Section 509 of that Act required the Commission to report to the Congress “on progress in the development of international accounting standards and the outlook for successful completion of a set of international standards that would be acceptable to the Commission for offerings and listings by foreign corporations in United States markets.”²⁴⁶

Moreover, many congressmen have begun to express concern about the lack of accountability implicit in the actions of IFROs. One bipartisan set of legislators has introduced legislation that would require banking regulators to come to consensus on positions to be taken at the Basle Committee, and, if no consensus could be reached, to defer to the position of the Secretary of the Treasury.²⁴⁷

²⁴⁴ See The Federal Reserve Board, *Basle II Capital Accord*, available online at <<http://www.federalreserve.gov/generalinfo/basel2/speeches.htm>> (visited Nov 1, 2004).

²⁴⁵ See, for example, House Committee on Financial Services, Letter to Allan Greenspan, Chairman, Federal Reserve Board; John D. Hawke, Comptroller, OCC; Donald E. Powell, Chairman, FDIC; and James E. Gilleran, Director, Office of Thrift Supervision (Nov 3, 2003), available online at <http://www.federalreserve.gov/SECRS/2003/November/20031106/R-1154/R-1154_73_1.pdf> (visited Nov 1, 2004).

²⁴⁶ For the October 1997 report, see SEC, *Report on Promoting Global Preeminence of American Securities Markets* (cited in note 89).

²⁴⁷ See HR 2043, 108th Cong, 1st Sess (May 9, 2003) (“If the members of the Committee that are participants on the Basel Committee on Banking Supervision are unable to agree on a uniform

That bill would also require the agencies to report to Congress before agreeing to any regulation before the Basle Committee: “No . . . banking agency . . . may agree to any proposed recommendation of the Basel Committee on Banking Supervision before the agency submits a report on the proposed recommendation to the Congress.”²⁴⁸

As the chairman of the House Financial Services Committee has said, because “[c]hanges to the Basel Accord will have a dramatic impact on financial institutions around the globe,” the legislation is designed to “create a mechanism by which Congress can be sure that any changes to the Basel Accord will have a positive effect on both competition and our economy.”²⁴⁹

This developing approach to cure the undemocratic aspects of the generation of regulations in the sphere of international harmonization is rather different than the classic ways these agencies are constrained in domestic law: by courts.²⁵⁰ Neither American nor European courts have yet played an important role in constraining international financial regulation.²⁵¹

position on an issue, the position of the Secretary of the Treasury shall be determinative for purposes of paragraph (1) with respect to such issue.”).

²⁴⁸ See *id.*

²⁴⁹ House Committee on Financial Services, Press Release, *Basel Bill Would Unify US Position, Promote Competitiveness* (May 9, 2003), available online at <<http://www.financialservices.house.gov/news.asp>> (visited Nov 1, 2004). In the future, thinking about IFRO pronouncements on a scale of hardness and softness might help determine where to strike the balance between permitting these organizations to develop organically or to check their growth with strict limits on American agency participation. The persuasion and jawboning involved with the development of broad principles and the exchange of ideas about best practices seems harmless, particularly to Americans. But it might be wise to require agencies participating in IFROs to file an annual report with Congress indicating the potential regulatory initiatives. For those initiatives designed to result in hard standards, Congress could require advanced notices of proposed rulemaking or issue its blessing with an authorizing statute directing the agency to develop hard standards with foreign regulators, if possible. For the Fed’s view of such a statute (as well as for a good explanation of what Basel II is designed to do), see The New Capital Basle Accord (Basle II), Hearings on HR 2403 before the Subcommittee on Financial Institutions and Consumer Credit of the Committee on Financial Services, 108th Cong, 1st Sess (2003) (statement by Roger W. Ferguson, Jr., Vice Chairman, Federal Reserve Board), available online at <<http://www.federalreserve.gov/boarddocs/testimony/2003/20030619/default.htm>> (visited Nov 1, 2004).

²⁵⁰ I have found no evidence yet of typical judicial review of provisions created by IOSCO and the Basle Committee. One Tax Court case has, however, attributed the origins of a rule to the Basle Committee. See *Bank One Corp.*, 120 TC at 222–23 (cited in note 56). See also Martin Shapiro, *Institutionalizing Administrative Space*, in Alec Stone Sweet, Wayne Sandholtz, and Neil Fligstein, eds, *The Institutionalization of Europe* 94 (Oxford 2001).

²⁵¹ Although Martin Shapiro believes that the EU, “which exhibits so much Angst about the democratic deficit . . . is likely to move in the direction of judicial . . . [democratization] of the administrative process” by adopting some form of the dialogic method of notice, comment, and lawsuit over the record permitted in American courts. *Id.* at 112.

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

In fact, it is not clear what the courts could do. For example, although American regulators expect litigation over the Basle II accord,²⁵² American courts are unlikely to feel comfortable involving themselves in the accord, even though it will be presented to them as something of a *fait accompli*.

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

In this way, the “democratic deficit” threatened by financial regulatory cooperation is really only a judicial deficit. With plenty of agency process on hand, and with the active supervision of Congress, it is by no means clear that First Worlders should worry about the phenomenon.²⁵³

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

2. Constraint of Hegemonic Power

Other observers of the international scene worry about the role of international law in a world where one power is so much stronger than all of the others.²⁵⁴ What are we to do, it is asked, in a world where the SEC plays an outsized role in the harmonization of accounting standards and the like? But the

²⁵² Interview with a Staff Attorney, Federal Reserve Board (Jan 9, 2004).

²⁵³ We also see the OECD doing this, at least in some cases. See James Salzman, Working Paper, L & Contemp Probs (forthcoming) (noting that recent revisions to the OECD’s Guidelines for Multinational Enterprises were first tested among a variety of members “like a focus group” and then “fed into a process that resembled notice-and-comment rulemaking”).

²⁵⁴ For a recent collection of the varying perspectives that advance these concerns, see Michael Byers and Georg Nolte, eds, *United States Hegemony and the Foundations of International Law* (Cambridge 2003).

way that IFROs work—and I do not seek to be new here—calls a strong conception of hegemonic power into question.²⁵⁵

Consider the very concept of a hegemonic interest that can be attributed to the United States. Does it include the interests of turf-protecting regulators (to the extent that regulators actually pursue this goal²⁵⁶), the goals of sophisticated financial institutions who wish to act without constraint, or the perspective of American financial consumers?

Each of these oxen has been gored by the efforts of IOSCO and the Basle Committee. The American bureaucrats who attend IOSCO meetings often complain about the demands membership in the organizations create.²⁵⁷ American banking regulators have disagreed with one another about the merits of the impending revisions to Basle's capital accord,²⁵⁸ while some American banks are preparing to (ineffectually) dispute Basle II in domestic courts.²⁵⁹ As for the consumer perspective (if that perspective is represented by Congress), Congress has expressed its worry about—and exercised its supervision of—both

²⁵⁵ For a defense of the importance of conceiving of unitary states as principle actors in international relations—an importance that this paper disputes—see Moravcsik, *Europe's Integration at Century's End* at 51 (cited in note 222).

²⁵⁶ I am, as are many observers, very skeptical of simplistic claims that agencies attempt to maximize turf. See Daryl J. Levinson, *Empire-Building Government in Constitutional Law* 118 Harv L Rev (forthcoming 2005) (questioning “the theoretical basis for believing that government predictably seeks to build empires of either the imperialistic or avaricious variety”); Edward L. Rubin, *Public Choice, Phenomenology, and the Meaning of the Modern State: Keep the Bathwater, but Throw Out that Baby*, 87 Cornell L Rev 309, 320 (2002) (“Within the political sphere . . . , material self-interest models have been energetically proposed and convincingly refuted in such disparate areas as voting behavior, social movement participation, legislative action, and judicial decisionmaking.”) However, federal banking agencies with overlapping jurisdictions (the OCC regulates federal banks, the FDIC insures banks and has some supervisory power over state banks—as does the Fed, which also exercises exclusive supervisory powers over bank holding companies), do often disagree over policies that they each would implement, along with OTS. For a brief overview, see generally, Carter H. Golembe, *Banking Agency Turf War: It's Not like Wendy's and McDonald's*, 17 Bank Poly Rep 1 (May 1998).

²⁵⁷ Interview with a Staff Attorney, CFTC (Jan 2004).

²⁵⁸ The OCC and the Basle Committee, for example, have disagreed about the complexity of the new accord. See Hawke, Address at the American Academy in Berlin at 17 (cited in note 44) (noting the unspecific nature of the first accord). The FDIC has also expressed concerns about the substantive implications of the accord, while grudgingly supporting it. Hearings on the New Basle Capital Accord (Basle II) and HR 2043 before the Subcommittee on Financial Institutions and Consumer Credit of the Committee on Financial Services, 108th Cong, 1st Sess (2003), (statement of Donald E. Powell, Chairman, FDIC), available online at <<http://www.fdic.gov/news/news/speeches/chairman/sp19june03.html>> (visited Nov 1, 2004). For an overview of the structural reasons for conflict between banking regulators, see Golembe, 17 Bank Poly Rep at 1 (cited in note 256).

²⁵⁹ Interview with a Staff Attorney, Federal Reserve Board (Jan 9, 2004).

the capital accord and the accounting standards harmonization efforts of IOSCO.²⁶⁰

In sum, although the organizations do not offer developing countries the same sort of rights as developed ones (and it is, of course, not clear that they should), it is by no means clear that they represent “unilateralism”—whatever such a term would mean when applied to the diverse American economy.²⁶¹

There is no particular American interest represented in disaggregated financial regulatory cooperation. There is instead the increasing involvement of domestic regulators in the work of international cooperation—cooperation that the regulators feel obligated to vindicate with domestic policymaking.²⁶² The evidence instead suggests that the obligations created by these organizations can result in requirements that “are thought of, spoken of, and function as” binding, regardless of whether they are American, European, or other regulators.²⁶³

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

²⁶⁰ See text accompanying notes 246–52.

²⁶¹ See, for example, Joseph S. Nye, Jr., *The Information Revolution And The Paradox of American Power*, 97 *Am Socy Intl L Proc* 67, 72 (2003) (“The United States is the only country with both intercontinental nuclear weapons and large state-of-the-art air, naval, and ground forces capable of global deployment. But . . . economic power is multipolar . . . On this economic board, the United States is not a hegemon; it must often bargain as an equal with Europe. The bottom chessboard is the realm of transnational relations that crosses borders outside government control.”); Grant and Keohane, *Accountability and Abuses of Power in World Politics* at 39 (cited in note 239) (“The diversity of views in world politics means that ideological hegemony is rarely attained.”).

²⁶² John Peterson has observed that in the EU, WTO, and IMF, “supranational policy-making . . . is highly technical. In these and other IOs, experts who share specialized knowledge and casual understandings tend to identify and ‘bond’ with each other, and often seek to depoliticize the policy process.” John Peterson, Working Paper, *Policy Networks*, ch 1 at 2, available online at <http://www.ihs.ac.at/publications/pol/pw_90.pdf> (visited Nov 8, 2004).

²⁶³ H.L.A. Hart, *The Concept of Law* 226 (Clarendon 1961). Thomas Franck argued that the perceived legitimacy of a rule would exert a “compliance pull” on those charged with implementing the rule. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 *Am J Intl L* 46, 51 (1992). Franck was interested in the legality of these rules qua states. His compliance pull mechanism could conceivably matter even more for regulators, especially now that they act in an era that particularly values best practices. Although, then, Franck has been prescient, I do not attempt to apply his work here in the work of prelegal regulatory cooperation.

C. A BROADER VIEW

This question and others raised by the prospect of financial regulatory cooperation suggest that the phenomenon, likely to be copied in adjacent issue areas, and even emulated in areas of environmental law,²⁶⁴ criminal law,²⁶⁵ and elsewhere, is not something to fear—at least not in the way it is usually feared. The principal problem of regulatory cooperation is not the prospect of a democratic deficit, which its voluntary procedural safeguards and legislative, rather than judicial, supervision do much to ameliorate.

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

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

²⁶⁴ Although many international environmental agreements are done through traditional legal mechanisms such as treaties, agreement on biotechnology includes an overlay of informal regulatory cooperation. See Raustiala, 43 Va J Int L at 43–49 (cited in note 2) (describing, *inter alia*, the development of the International Network for Environmental Compliance and Enforcement); note 8. See also generally Matthias Herdegen: *Biotechnology and Regulatory Risk Assessment*, in George A. Bermann, Matthias Herdegen, and Peter L. Lindseth, eds, *Transatlantic Regulatory Cooperation—Legal Problems and Political Prospects* (Oxford 2001).

²⁶⁵ See text accompanying notes 206–08 (describing a regulatory forum designed to address money laundering).



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