Informal Procedure, Hard and Soft, in International Administration
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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 lain 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

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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 Rule 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).
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.

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...
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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 just 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
cooporation, focusing on horizontal connections between trial courts that can create uniform
national standards. See generally David Zaring, National Rulemaking through Trial
\(^7\) 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 Piilola, 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
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

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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.

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.  

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. 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).” Nor are domestic analogies, which turn on the important


14 See text accompanying notes 216–22.

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

For example, the Basle Committee and IOSCO were founded by regulators themselves, who comprise the entirety of the membership.\textsuperscript{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."\textsuperscript{18}

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

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

\textsuperscript{17} 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.

\textsuperscript{18} 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).

\textsuperscript{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.
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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. However, in practice, the agencies that enjoy their own subjectivity in the international arena certainly act consistently with rationalist paradigms of regime theory.

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

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.

Both the Basle Committee and the IOSCO, in addition to serving as models for other organizations, set the groundwork for other agreements between regulations, 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, memorandum 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).

See Zaring, 33 Tex Ind L J at 281 (cited in note 6).
A. THE BASLE COMMITTEE ON BANKING SUPERVISION

Prompted by three large international bank failures in 1974, the central bank governors of the Group of Ten Countries (G-10), Luxembourg, and Switzerland agreed to establish the Basle Committee on Banking Supervision. 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. 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. 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. It has traditionally maintained a low profile. 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).


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).

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. 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. However, its meetings, which occur four times per year in Basle, remain closed to the public (although the committee has adopted the practice of issuing ex post brief press releases describing the approximate agenda of these gatherings). It has also announced the opening of comment periods on consultative documents, also by press release, accompanied by a rough schedule for further action.

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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.”).


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 Basle 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.

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.” 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.”

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. The Economist has characterized it as nothing more than an “international club for banking regulators.” 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 Reserve—in Basle. (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.”)

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.”).


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


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).

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

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.” Instead, it “reports to the central bank Governors of the Group of Ten countries and seeks the Governors' endorsement for its major initiatives.”

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.

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.” BIS supervisor Andrew Crockett similarly concludes


45 See note 179–80.


47 Id.


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 regulators^51 have generally treated the Committee’s theoretically voluntary proposals as the basis for rapid domestic regulatory action. 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

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^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.”


institutions' "value at risk," subject to regulatory modeling criteria. 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 . . .

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. 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.

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."

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

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).
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uniform rules of the Accord have been bad for competition.\(^5^9\) 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.\(^6^0\)

**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.\(^6^1\) 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.”\(^3^6^2\)

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\(^{5^9}\) 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”).

\(^{6^0}\) 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").

\(^{5^2}\) Emory L J at 1353-54 (cited in note 13).


IOSCO is a much less selective organization than the Basle Committee—it claims 174 members, overseeing almost all of the world’s capital markets. 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.”

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. It has since created and funded a small permanent secretariat, which in 2001 moved from Montreal to Madrid. 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 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.” 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.”

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. The Secretariat consists of ten employees. The organization is financed by membership dues of $6,750 per member per year. 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).” By contrast, the World Trade Organization’s 2004 budget was 162 million Swiss francs (approximately $107 million), the United Nation’s annual budget is approximately $1.3 billion, and the SEC’s annual budget for fiscal 2004 has been proposed at $841.5 million.

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.
71 IOSCO’s website lists ten people on its list of contacts. See <http://www.iosco.org/about/> (visited Nov 9, 2004).
73 Id at 30, 34.
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.” 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.

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. 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). 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. It is the source of IOSCO promulgations that have required the SEC and Commodity Futures Trading Commission (“CFTC”) to engage domestic rulemaking.

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

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77 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.).
79 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.
80 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, Issco: Its Mission and Achievement, 17 Nw J Ind L & Bus 15, 18 (1995).
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.”

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.”

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. It holds comment periods, but is not subject to open-meeting laws, 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.

However, like the Basle Committee, IOSCO also aspires to achieve its goals of regulatory harmonization through consensus. 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.” 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.” Thus, when IOSCO passes a

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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).
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." IOSCO's general principles argue that "[t]here is often no single correct approach to a regulatory issue."

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."

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]." It has also referred foreign investors considering investments in American stocks to IOSCO for information about the process and has praised the organization for "mov[ing] regulators around the globe to work more closely together."
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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
enhance the vitality of capital markets.' 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 agency—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. 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,” and it has cited guidelines issued by IOSCO as “appropriate” ones for automated clearing systems, screen-based trading systems, and electronic trading systems. One CFTC employee has told me that the agency does most of its cooperative regulatory work with foreign regulators through IOSCO.

103 See text accompanying notes 104–09.
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].” The CFTC accordingly did “not make any independent investigation or assessment of the Norwegian regulatory program.”

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.

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 because in

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110 Id.
111 Interview with a Staff Attorney, Federal Reserve Board (Jan 9, 2004).
international law all treaties apply only to states. 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). 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” and that “statehood . . . is generally a minimum qualification for membership in international organizations.” But bureaucrats from the SEC, the CFTC, and the Federal Reserve attend IFRO meetings as representatives of their agencies rather than their nation. 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. IFROs barely possess these attributes. 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).

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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. The IOSCO Secretariat in Madrid administers an annual budget dwarfed by that of the UN and one percent the size of the WTO's.

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, while in the Basle Committee, the Federal Reserve Bank and the Bank of England have been thought driving forces. 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.

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

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.
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.

Protestors. 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

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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 observed—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). 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. 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. In fact, some observers have concluded that the implementation of the 1988 Basle Accord forced Japanese banks to raise so much cash that the

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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).


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
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.
(Macmillan 1990).
137 See Porter, States, Markets, and Regimes at 70 (cited in note 28).
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
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

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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 Int'l L J 1, 19–20 (1997) (noting and discussing Basle's 1993 Market Risk Proposal, 1993 Netting Proposal, 1993 Interest Rate Risk Proposal, 1994 Netting Amendment, 1995 Netting Amendment, 1995 Market Risk Proposal, and 1996 Market Risk Amendment).

theory, encourage "market discipline."\textsuperscript{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."\textsuperscript{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.\textsuperscript{147}

Substantively, there is no doubt that the draft accord is important.\textsuperscript{148} It has been the subject of a lead editorial in \textit{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.\textsuperscript{149} The proposed regulations run hundreds of pages—many times the size of the first accord, as one American regulator has complained.\textsuperscript{150} Moreover, they look much more similar to eye-glazing domestic regulations than to international treaties.\textsuperscript{151} American regulators have worried that applying the most

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


\textsuperscript{148} One Federal Reserve Board employee described it to me as a "really big deal." Interview with a Staff Attorney, Federal Reserve Bank.

\textsuperscript{149} See Louis Beckerling, \textit{New Basle Capital Accord Seen Taking Heavy Toll on Small Lenders}, S China Morn Post 5 (Dec 18, 2002); Karen Krebsbach, \textit{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).

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

\textsuperscript{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.”

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, and 200 on a consultative paper about the accord in 2003. 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. 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.” The OCC and FDIC have made the congressional testimony of their officials on the Basel II process available on their websites as well.

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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, Basel 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).


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

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159 Id.

160 See text accompanying notes 250–54.
Informal Procedure, Hard and Soft, in International Administration

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. The usual problems of democratic deficits apply, as does, notably, the lack of a supranational check that serves the equivalent of domestic judicial review.

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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," [i]t the 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.

¹⁶⁴ Id at 1064.
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


\(^{168}\) Id at 35.

\(^{169}\) Id at Annexure 3.

Selling Practices,"\textsuperscript{171} and a survey of member practices on "Fees And Commissions Within The CIS And Asset Management Sector."\textsuperscript{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,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\begin{itemize}
  \item \textsuperscript{171} See <http://www.iosco.org/pubdocs/pdf/IOSCOPD156.pdf> (visited Nov 1, 2004).
  \item \textsuperscript{173} See text accompanying notes 97–99.
  \item \textsuperscript{174} See text accompanying notes 189–93.
  \item \textsuperscript{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).
\end{itemize}
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


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).


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 "creating 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


\(^{182}\) Id.

\(^{183}\) Id.


\(^{185}\) 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 NWJ 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.  

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.”

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. 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.

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


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).
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, IASC Foundation Constitution (July 2002), available online at <http://www.iasb.org/uploaded_files/documents/8_11_iascf-constitution.pdf> (visited Nov 1, 2004).


\(^{191}\) See Hunt, 51 Admin L Rev at 1114 (cited in note 69).


\(^{193}\) 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, IASC 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 IAS, 27 Brooklyn J Indl 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 IASC - 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. It is organized similarly to IOSCO, and, as with the Basle Committee, the BIS serves as its secretariat. 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." 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.

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." 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.


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


See id.

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

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. 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.

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.” 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.

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
money laundering.\textsuperscript{206} The organization "comprises 29. governments and two regional organizations representing the major financial centers of the Americas, Europe, and Asia."\textsuperscript{207} It is composed of "Members of the ministries of Finance, Justice, the Interior, and External Affairs, financial regulatory authorities and law enforcement agencies."\textsuperscript{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.\textsuperscript{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."\textsuperscript{210} IOSCO and the Basle Committee also coordinated efforts to prepare the financial markets for the Y2K bug.\textsuperscript{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).\textsuperscript{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.\textsuperscript{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,”


\textsuperscript{208} FATF, \textit{Annual Report 2001–02} (cited in note 207).

\textsuperscript{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).

\textsuperscript{210} See 63 Fed Reg at 59384 (cited in note 53).

\textsuperscript{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).


\textsuperscript{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.\footnote{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.”\footnote{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.\footnote{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.\footnote{217}

\footnote{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).


\footnote{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).

\footnote{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. 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. 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. 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.

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. 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 Ind 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. 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. . . . This is not to say that convergence is “caused” by network effects, but rather that network effects boost the existing incentives to standardize.

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. 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 Intl L at 63 (cited in note 2).
224 See Raustiala, 43 Va J Intl L at 65 (cited in note 2).
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. 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. 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. 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.


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.\(^2\)

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.\(^2\)

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.\(^2\) 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”).


\(^{231}\) 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. Andrew Guzman also believes that the concept obscures more than it helps.

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. 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. 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.


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. 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? Can this phenomenon be used to constrain a hegemonic power?
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. 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. 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. These scholars contrast the work of regulators favorably with that of domestic agencies and legislatures.

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.

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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. A number of individual congressmen have recently sent the American banking regulators a letter expressing their concerns about the development of Basle II.

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.”

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.


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).


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

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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, 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.

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. 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.\footnote{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, \textit{Europe’s Integration at Century’s End} at 51 (cited in note 222).}

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 goal\footnote{I am, as are many observers, very skeptical of simplistic claims that agencies attempt to maximize turf. See Daryl J. Levinson, \textit{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, \textit{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, \textit{Banking Agency Turf War: It’s Not like Wendy’s and McDonald’s}, 17 Bank Poly Rep 1 (May 1998).}, 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.\footnote{Interview with a Staff Attorney, CFTC (Jan 2004).} American banking regulators have disagreed with one another about the merits of the impending revisions to Basle’s capital accord,\footnote{The OCC and the Basle Committee, for example, have disagreed about the complexity of the new accord. See Hawke, \textit{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).} while some American banks are preparing to (ineffectually) dispute Basle II in domestic courts.\footnote{Interview with a Staff Attorney, Federal Reserve Board (Jan 9, 2004).} As for the consumer perspective (if that perspective is represented by Congress), Congress has expressed its worry about—and exercised its supervision of—both
the capital accord and the accounting standards harmonization efforts of IOSCO.\footnote{See text accompanying notes 246–52.}

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.\footnote{See, for example, Joseph S. Nye, Jr., The Information Revolution And The Paradox of American Power, 97 Am Socy Int'l L Proc 67, 72 (2003) ("The United States is the only country with both intercontinental nuclear weapons and large state-of-the-art air, naval, and ground forces capable of global deployment. But ... economic power is multipolar ... . On this economic board, the United States is not a 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.").}

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.\footnote{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).} 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.\footnote{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 Int'l L 46, 51 (1992). Franck was interested in the legality of these rules qua states. His compliance pull mechanism could conceivably matter even more for regulators, especially now that they act in an era that particularly values best practices. Although, then, Franck has been prescient, I do not attempt to apply his work here in the work of prelegal regulatory cooperation.}

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

This question and others raised by the prospect of financial regulatory cooperation suggest that the phenomenon, likely to be copied in adjacent issue areas, and even emulated in areas of environmental law, criminal law, 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 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).