A PARADIGM OF GLOBAL FINANCIAL REGULATION
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David Zaring
The Wharton School
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I. INTRODUCTION

Before the financial crisis, financial regulation was a task-specific matter pursued by aggregations of domestic regulators, with very little political oversight and a degree of siloing which limited the amount of comprehensive international policymaking that could be done. Before that – before 1974 – international regulators almost never cooperated, with central bankers being the principal exception – and even their cooperation was limited, and limited to monetary policy.[1] After 1974, and prompted by international crises that started, much to the surprise of domestic overseers, by the failures of two modestly sized German and American banks, financial regulation grew progressively more coordinated across borders, but only along narrow lines. Domestic regulators of banks began to talk more to their foreign counterparts, as did regulators of capital markets, and eventually, regulators of insurance companies.

But banking, insurance, and securities regulators spent little time talking to one another. Perhaps as a result of this task-specific siloing, the outcomes of the international interactions, loosely formalized in networks of regulators who met regularly and tried to develop metrics of cooperation and common approaches to oversight, varied depending on the industry being overseen. International financial regulation of banks proceeded at a relatively quick pace, the international regulation of capital markets at a more moderate pace, and the international regulation of insurers at a very slow pace indeed. After the financial crisis, there has been an effort, somewhat reminiscent of the 2010 American Dodd-Frank Wall Street Reform Act's insistence on coordinated supervision, to coordinate the efforts of the previously siloed networks of regulators, and to monitor them with more politically accountable actors such as the G-20.

To be sure, before the financial crisis there was plenty of activity in the international financial network space. Apart from banking, securities, and insurance, payment systems were also given a financial network. Finance and law enforcement officials collaborated on a Financial Action Task Force (FATF), designed to address money laundering, and, after 9/11, terrorism finance. And other financial regulatory networks developed as well. But siloing remained the standard trope of these task- and issue-specific regulators. Each network proceeded at its own pace and usually with only a limited amount of interaction with its counterparts, which contributed to the variance in the constraints they managed to impose on the global financial system. A particularly undeveloped example of this sort of pre-crisis coordination might be found in insurance. Insurance regulatory harmonization performed under the auspices of the IAIS has proceeded even more slowly; it essentially ceased after promulgation of the core principles designed to ensure a rough band of regulatory coordination among the members of the network and a memorandum on enforcement cooperation.

[1] *See* LIAQUAT AHAMED, THE LORDS OF FINANCE (2009).

Despite the varying speeds of network rule harmonization, the rules over the world's financial institutions, the markets in which these institutions operate, whatever the state of their regulatory compatibility, have continued to integrate. Financial intermediaries operate across borders all the time, and the global nature of the financial crisis attested to the problems of local supervision of what has quite clearly become a global enterprise. Chris Brummer has described the ensuing dynamic as nothing less than a global market for financial law. Brummer's account emphasizes the ability of relatively mobile capital to essentially choose its preferred regulator as well as its preferred capital market or financial institution. In some cases this market has created a market leader, leading to ad hoc harmonization of financial regulatory standards, without the harmonization of the supervisors applying the standards.

Thus the disaggregated nature of the pre-crisis regulatory story persisted even in cases of aggregation. It has been one that relied on market leaders or individual networks to solve the globalization problems that confronted task-specific regulators on an ad hoc basis. The process was technocratically, rather than politically, driven and, as a matter of international law, there was no effort toward codification through a treaty, and no doubt that whatever came out of the networks was soft law that derived its legitimacy from the domestic process of enforcement and implementation by the member regulators.

These facets of the origin have changed in the wake of the financial crisis. In the aftermath of the financial crisis, these various and divergent efforts have been coordinated much more carefully. The siloed and task-specific approach has been transformed into a still disaggregated, and still networked, but more interlinked regulatory system.

For banks, and for financial regulation more generally, there are three critical players in it. First, the G-20, as Sungjoon Cho and Claire Kelly have noted, has begun to provide a degree of political oversight to the process.[2] Second, the Financial Stability Board (FSB) has been created by the G-20; it is a "network of networks" that coordinates and encourages the work of the networks under it, takes a global approach to financial sector regulation, and is meant to also serve as an early warning system for financial instability. Third, the reinvigorated, remodeled, and expanded task-specific networks – exemplified by the Basel Committee – have been charged with promulgating the most significant and onerous reforms of the financial system in the wake of the crisis. The Basel Committee is the leading version of the formerly siloed regulatory networks; its relationship with its new overseers, and its redoubled efforts, demonstrates how those other networks, including IOSCO, IAIS, and the other financial regulatory networks have been given new kinds of marching orders.

The interlocking parts of regulatory governance amount to a form of administration. It is an agencification of a previously informal and diverse regulatory process, now replete with a degree of political oversight, a bureaucratic middle, and a bottom that has adopted many of the trappings of administrative law to get the work done. All of this has become integrated in the wake of the financial crisis.

These organizations – the G-20, the FSB, and the networks like Basel – all play different roles in the post-crisis global regulatory architecture, but they are each sources of policy that domestic regulators are meant to apply to their own financial institutions. They offer only some of the procedural safeguards that are the epitome of the constraints on domestic policymaking; indeed, it is fair to say that each institution was created with almost no attention to the regulatory process at all. As these fora have evolved to embrace more regulatory responsibilities in the wake of the financial crisis, some procedural safeguards have followed, if only as a voluntarily, and in some

[2] Cho & Kelly (2011).

cases warily embraced, phenomenon.

A second common theme, running from leader (the G-20), to supervisor (the FSB), to policymaker (the Basel Committee), is exclusivity. The organizations are peopled with representatives of the wealthiest countries, with some allowance made for representatives from the developing world, but not too many of them. In addition to the "BRIC" (Brazil, Russia, India, and China) countries, South Africa, Saudi Arabia, Indonesia, Turkey, Argentina, and Mexico round out the list of countries that send members to the organization that belong anywhere below the world's upper class.

The G-20. The G-20's role in the new financial regulatory architecture is realized through regular meetings of heads of state and financial ministers of the twenty invited members, including the world's most important economies, along with some large additional ones, at the conclusion of which communiqués are issued and ways forward are mooted. The G-20 has grown out of the smaller, and still extant western head of state meetings begun in the 1970s, the G-6, and G-7. These organizations had a reputation as talking shops, and indeed, were founded in part as get-to-know-you affairs for the important anti-communist world leaders.

In the midst of the financial crisis, however, it was the G-20 that provided much of the leadership for the global response, such as it was. At head-of-state summits in Pittsburgh and London in 2009, the G-20 agreed that it would make a priority of the international regulatory coordinative process.

In those meetings, the G-20 mandated the creation of the FSB, a network of networks designed to coordinate international financial regulation. It also set an agenda for the Board and the underlying networks regarding reform of the financial regulatory system. The G-20 directed financial regulators to increase the capital requirements for banks, to create a more centralized process for the trading of derivatives, to explore ways to "resolve" (that is, quickly fail and recapitalize) insolvent banks, and to look into the ways that executive compensation at these institutions incentivized risk.

Because of these directives, the G-20 appears to have taken on an important role in setting the agenda for post-crisis financial regulation, although, as its summits are purely political and somewhat secretive events, some of its role can only be gleaned through surmise. Nonetheless, what the institution does say is instructive. The G-20 has followed up on the progress made on the agenda it has set by commenting on progress reports from financial regulators at subsequent meetings. Indeed, financial regulatory reforms, in addition to macroeconomic surveillance, global warming, and ire about off-shore tax havens have comprised the bulk of the G-20's stated agenda.

The result is that financial regulation has a political overseer, and, as the top of the increasingly elaborated post crisis pyramid of international regulation, it is a unique example of political oversight in international governance. Created without any bow to legal legitimacy, the G-20 is perhaps best described as a modern day Concert of Europe – a congress of the important. It includes, as the old Concert of Europe did, not only democratic leaders, but also representatives from important, more totalitarian powers, such as Russia, Saudi Arabia, and China. Other international legal organizations, born by treaties and subject to intensive organization, are nothing like it. Their political inputs are not cabined or authorized by an authoritative international agreement, and although it adds an element of democratic (or, at least, head of state/political) legitimacy to financial regulation, its exclusivity calls that legitimacy into question in other ways.

This characterization comes from some assumptions, to be sure, given that the G-20 does not make its internal deliberations known. All we have, when trying to take the measure of this new

political overseer, are the regular communiqués issued by the G-20 after those meetings, and they make for some pretty dry, possibly obscurantist reading. Affidavits declaring that the politicians are still on the case and interested in the integration projects would be, if taken too seriously, a somewhat naïve exercise in the commitment to disclosure of high level economic diplomats. And it is not possible to know whether the communiqués reflect real agreement within the political meetings, or some more palliative exercises in modest hopefulness.

Nonetheless, running through the communiqués and the regular meetings is a theme that the G-20 is still interested in what the regulatory networks are doing about financial systemic stability, and that it expects regular updates on progress made to help ensure systemic stability. Reports that from the regulatory networks have ranged from capital adequacy to derivatives clearinghouse creation to the hot-button issue of executive compensation at financial intermediaries. Moreover, if the expansion of the group from seven to twenty has made agreement and consensus more challenging, it has also made the prospect of G-level policy-setting more globally legitimate.

It is fair to say that in the wake of the financial crisis, new political direction is being provided by the G-20, constituting a new sort of supervision over what used to be a technocratic, exclusively bureaucratic exercise.

The FSB. The second innovation that has come out of the financial crisis is a new network of networks, the Financial Stability Board, which the G-20 created by transforming a relatively quiet old institution, the Financial Stability Forum, into a vigorous "network of networks," that has become the G-20's coordinator and conduit.[3] The FSB is comprised of all of the principal financial regulatory networks, principally the Basel Committee, IOSCO, and IAIS. The G-20 also added two important treaty-based international organizations to the FSB's membership – the World Bank and IMF. These institutions were not added to augment the legitimacy or legality of the FSB, however; they have been added to make it a more threatening enforcer of international financial regulatory norms, and a more far-seeing lookout for future financial crises. As an intermediate policer of financial regulatory networks, and as an international institution designated to take the gestalt perspective on global finance, it is fair to say that there is nothing quite like the FSB. It, more than any other post-crisis financial initiative, exemplifies the desire of states and their regulators to create a new, not-entirely-legal international system with checks, balances, and a coherent organizational chart.

And so its contribution to post-crisis international financial regulation is above all the provision of bureaucratic order, the likes of which are mimicked by domestic regulatory agencies, to a formerly disaggregated international process. The contribution, and the institutionalization that it represents, may be exemplified by the goals to which the FSB is pledged, and by the way it is organized.

The FSB's objectives are threefold, and involve some of its own policymaking, a great deal of monitoring of networks and member agencies, and a nascent financial market surveillance function. The Board has declared that it will first "promote financial stability by developing strong regulatory, supervisory, and other policies." This is its *strong regulation* goal, if you like. The Board, however, is also dedicated to "fostering a level playing field through coherent policy implementation across sectors and jurisdictions." This is its *harmonization* goal. Competitive equality among regulators, of course, has nothing to do with the actual quality of the regulation,

[3] As Chris Brummer has explained, the FSB has evolved into one of the fulcrums of post-crisis financial oversight and "given a mandate to monitor global financial stability and promote medium-term reform." Chris Brummer, *Post-American Securities Regulation*, 98 CAL. L. REV. 327, 359-60 (2010).

and so the goals of strong regulation and harmonized regulation are entirely capable of diverging. Finally, the FSB has been charged with monitoring the stability of the global financial system for signs of weakness – to be, in effect, an *early warning system* for the G-20.

As it is, although the FSB has weighed in on a very wide ranging sort of initiatives in the last three years, ranging from efforts to scrutinize about the compensation of financial executives,[4] to policies designed to fail (or "resolve") insolvent banks quickly and with a minimum of disruption, it is probably most accurate to say that the organization is playing more of an oversight role than a policymaking role, pursuing strong regulation through its networks, rather than through itself. Its capacity to operate as the early warning system for the world's financial regulators, attuned to the potential of a future crisis, is, as yet, a work in progress.

The FSB is a not carefully specified institution, and because it is new, it is worth spending some time considering its structure. It is, like Basel, comprised of regulators seconded from the agencies that participate in its member networks; its secretariat shares space with the Basel Committee at the Bank for International Settlements (BIS) headquarters. The Board's charter is only ten pages long, in the space of which it outlines its objectives, some organizational guidelines, and membership rules for the organization. The charter has little to say about Board process other than to announce a commitment to consultation, and to specify, as is the case with most classic international organizations (often to the detriment of their ability to act), that the Board will operate through consensus.[5]

The FSB has tried to pursue its monitoring function through cajoling and peer review, bolstered by the institutionalized financial sector reviews performed by the IMF. Once its members pass rules that the FSB, or the networks under it, have adopted, presumably for their prospect of promoting financial stability, the Board conducts regular reviews of both the membership, on a country-by-country basis, and on particular issues for all the FSB members at once. Peer review requires the members of the board to report on their implementation progress to the Board, and also benefits from the parallel and related IMF regulatory supervision review process, the Financial Sector Assessment Program (FSAP). Its mandate also provides for the ability to review "the policy development work of the international standard-setting bodies to ensure that their work is timely coordinated, focused on priorities and addressing gaps," and while it rides herd over the standard-setting bodies, it also is charged with "assess[ing] vulnerabilities affecting the global financial system" which requires it to review the work of its member states. But the Board has suggested that it may, on occasion, pursue those goals by promulgating its own rules.

As for organization, the Board's plenary body is "the decision-making body of the FSB" and requires consensus before action. The plenary allows in new members, appoints the Chair of the Board, makes amendments to the charter and "decides on any other matter governing the business and affairs of the FSB." Members attend plenary sessions, but to do so, they must show up with a gaudy cast of regulatory characters – nothing less than a central bank governor, head or deputy of the main supervisory agency, and deputy finance minister.

The plenaries occur twice a year; they serve, inter alia, as the place for the appointment of a chair and steering committee to govern the Board. At them, there may also be the establishment of working groups and ad hoc committees as needed. The Chair of the Board is appointed for a three-year term, renewable once and must have "recogni[z]ed expertise and standing in the

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[4] Financial Stability Board, *Principles For Sound Compensation Practices* (Apr. 2009), *available at* http://www.financialstabilityboard.org/publications/r_0904b.pdf.

[5] Specifically the charter provides that "In the development of the FSB's medium and long-term strategic plans, principles, standards and guidance, the FSB should consult widely amongst its Members and with other stakeholders, including private sector and non-member authorities. This process shall include . . . an outreach to countries not included in the Regional Consultative Groups." *Id.* at art. 3.

international financial policy arena."

Like other networks, the FSB explicitly eschews any legal power contained within it. Indeed, its charter provides that it is "not intended to create any legal rights or obligations."

II. THE TERMS OF INSTITUTIONALIZATION

While international financial regulation has changed institutionally, it has also, perhaps in part because its new institutions have embraced process and bureaucratic regularity, become increasingly amenable to legal description. In fact, it is possible to characterize the structure undergirding the new international regulation through six legal and organizational principles. Because these principles identify the direction to which the elaborate procedural armature of the financial regulator is directed, despite being nonbinding as a matter of public international law, they mount a challenge to the traditional international law paradigm – despite, in many ways, adopting principles recognizably within it.

A. National Treatment

National treatment is the term used to denote a non-discriminatory principle adopted by the European Union and the World Trade Organization (WTO). Article III of the General Agreement on Tariffs and Trade (GATT) articulates the best-known legal version of this principle. It requires the GATT's "contracting parties [to] recognize that . . . regulations and requirements affecting the internal sale . . . of products . . . should not be applied to imported or domestic products so as to afford protection to domestic production." The goal is to ensure that regulators do not discriminate in favor of domestic businesses at the cost of foreign ones.

International financial regulation, in addition to being driven by the often-alarming interconnectedness of financial intermediaries, is driven by an interest in subjecting those intermediaries to national treatment. The point of developing a single set of accounting principles for capital markets participants, for example, is designed to make idiosyncratic national treatments more global.

So too, has the effort to devise common capital adequacy standards for banks often been justified as an effort to create a "level playing field" for those institutions that wish to compete for foreign business. The general manager of the Bank for International Settlements had indicated that the organizations housed in his building – Basel and the FSB – are trying to implement reforms in an "internationally consistent and non-discriminatory" manner. IOSCO has claimed that its Principles for Financial Market Infrastructures will ensure, among other things, a "global regulatory level playing field."[6] The G20's leaders emphasized the importance of the level playing field in the statement at the conclusion of its 2009 meeting in Pittsburgh, and the Basel Committee has accordingly monitored the progress of implementation of its Basel III capital adequacy accord in part on regulatory consistency, to ensure, in its words, the "level playing field." Charles Goodhart has characterized the goals of the accord at twofold: to ensure that banks had higher levels of capital requirements, and that there be a "level playing field."[7] IAIS has devoted sections of its recent newsletters to "level playing field issues."

Indeed much of the impetus for international financial regulation was not only to forestall

[6] BANK FOR INT'L SETTLEMENTS & INT'L ORG. OF SECS. COMM'NS, IMPLEMENTATION MONITORING OF PFMIS – LEVEL 1 ASSESSMENT REPORT 1 n.2 (2013), *available at* http://www.bis.org/publ/cpss111.htm.

[7] Charles Goodhart, The Basel Committee on Banking Supervision: A History of the Early Years (Cambridge Univ. Press 2011).

crises, but also to solve problems of competitive inequality created by regulatory differences across jurisdictions. The interest in national treatment motivates most countries, given that most has a large incumbent interested in encouraging their domestic regulator make an arrangement to ensure foreign access, while offering a threat to the incumbent institutions of other countries that would like to operate overseas.

National treatment in this way very much serves to underscore the globalization of finance, and the efforts of financial regulation to catch up. It would be an unnecessary principle if banks from one country did not attempt to expand their operations to other countries; because all countries that participate in the financial regulatory architecture have banks that do so, national treatment is one of the basic ways that regulators can champion their industry's interests to one another. It is the most trade-oriented of the basic principles of financial regulation.

To be sure, financial regulation's national treatment principle is not a simple copy of the GATT model. In finance, the national treatment goals are to raise standards across jurisdictions, rather than to minimize barriers keeping foreign competition out, as they were with the GATT. Nonetheless, for both international trade and international finance, the case for non-discrimination characterizes the goal to design international regulatory approaches.

B. Most-Favored Nation

The most-favored nation (MFN) principle in the WTO is thought to prevent countries from discriminating among their trading partners, for geopolitical advantage or any other reason. If one WTO member is granted a special favor, such as a lower customs duty rate for one of their exports, all WTO members are entitled to gain the benefit of the same rate.

In this way, the most-favored nation principle in trade is designed to reduce the complexity of rule navigation among the various jurisdictions to which an exporter might be inclined to send its goods, as well as to drive the tariff reduction process through the various rounds through which the GATT and the WTO have progressed. MFN thus has made the lowering of trade barriers a global, rather than a bilateral or regional, effort.

International financial regulation has embraced a similar, if not identical, commitment to making sure that every nation has the same approach to foreign financial intermediaries. It evinces its MFN predilection most obviously with its taste for consensus. The Basel Committee, IOSCO, and IAIS all operate on a consensus basis, or something close to it. So does the G-20. The Financial Stability Board does too. And each of these institutions has tried to stop its members from negotiating side deals favoring particular foreign regulators, partly through their peer review process, and partly through tradition. Indeed, the Basel Committee owed its first capital adequacy accord to concern that two of its members – the banking regulators in the United States and Britain – were contemplating issuing their own capital adequacy accord, and potentially excluding foreign banks who did not meet those requirements from their markets.

Consensus characterizes the work of the FSB as well, and the G-20 has also spoken with one voice, most obviously with its so-called "Seoul Development Consensus," but also through the communiqués transmitted without dissents or glosses at the conclusion of summits. And the inclination for a global settlement may help to explain why mutual recognition efforts – in the United States, between its capital regulators and those of Australia and Canada – have not yet born much fruit.

The consensus requirement in international financial regulation is a way of ensuring that a deal open to one member of the international financial regulatory architecture is open to all, and at the

same time that the commitments made by members to improve their regulatory performance within their own jurisdiction are to be matched by each of their counterparties.

Most favored nation policies are meant to simplify the complexities of managing the regulatory requirements that exist in different countries by promoting uniformity around whatever the best deal an offer to an outside country is. They also serve a centralizing function, making the institution supporting the practice the place where the common approach is developed.

In some ways, the principle works slightly differently in financial regulation. It partly exists as a developmental goal; with each regulatory agency from all countries, no matter what size or sophistication, adopting the same core approaches to financial regulation, as revealed by the principles adopted by the networks and endorsed by the FSB. This developmental goal is meant to raise the practices of many regulators, rather than to create opportunities for those regulators to cut side deals with particular foreign counterparts.

C. Rulemaking

If the national treatment and most-favored nation principles as principles ones that undergird the substance of global financial regulation, the phenomenon also evinces a number of procedural principles that legal scholars would find recognizable.

Most importantly, the system of global financial regulation has chosen to regulate through rules. It has eschewed efforts to devise a dispute settlement system, which characterize the WTO, the European Union, and other prominent formally constituted international organizations. There is no tribunal overseeing the implementation of Basel III or the dictates of the FSB, and no hint that such a tribunal is in the offing.

This has made international financial regulation harder to study – legal scholars reflexively look for tribunals to articulate the substance of legal principles – but it does not mean that the system has abandoned legal precision. American academics familiar with that country's administrative law principles tend to present the choice between adjudication and rulemaking as one with procedural implications, but not one that either dooms an agency to obsolescence or guarantees its effectiveness. In America, it is instead something that is a matter of pure choice for the agency.

In this view, adjudication allows broader regulation through precedent via the common-law accumulation of prior standards, which can then be applied more broadly by the lawyers and regulators involved with the regulated industry. And some American agencies regulate by adjudication exclusively.

Others regulate through rulemaking, which is the regulatory version of legislation, in that it is forward-looking and applies, at least ordinarily, to a class of regulated institutions, rather than to a particular legal dispute. It therefore is a form of law devised *ex ante* a set of facts, rather than *ex post*. The result is a prospective form of lawmaking, one that features an opportunity to comment before promulgation as the most accessible form of public participation in the governance process (as opposed to the right to litigate after the fact), and one that applies more broadly to swaths of regulated industry rather than narrowly to particular parties to a particular dispute.

Virtually all of the international financial regulatory bodies operate through rulemaking, rather than adjudication. In addition to Basel III and FSB, IOSCO, IAIS and IASB all hew to rulemaking over adjudication. The Basel Committee's website, for example, features publications, press releases, working papers, and newsletters that are all aimed at either explaining or promoting its rulemaking efforts. The NLRB and BIA, on the other hand, prominently feature court documents

on their websites evidencing their bent toward adjudicative regulation.

Rulemaking affords regime builders flexibility and control over the regulatory process, but often lacks the sort of procedural formality that administrative lawyers expect of regulatory initiatives. But if rulemaking is the form of international financial regulation, more can be said about how that form is realized across regulatory networks. International rulemakers proceed in three ways: though "hard" rules, harmonization principles, and best practices style guidance. To be sure, the hard rules are generally not as hard as is domestic rulemaking, the harmonization principles are general approaches to regulation, and best practices, while capable of being quite specific, rely on their bestness and make no claim to adoption by the members of the network. But the differences are informative.

When international rulemakers promulgate hard rules, they adopt specific requirements that their members must implement, and, at least sometimes, tend to accompany those requirements with some of the procedural safeguards that we see in domestic rulemaking. The still developing but potentially far reaching effort to harmonize accounting standards – a slow process that has also been marked by comment periods and notice – is an example of a hard international rule.

While only some regulators attempt to promulgate detailed rules governing every aspect of an international regulatory scheme, soft, principles-based regulation is much more common. The process adopted for these forms of rulemaking is oriented towards international consent by public agencies, rather than external review by interested parties. The idea is that every regulator must agree on a set of standards and principles before an organization will adopt it.

Principles-based rulemaking offers regulators the flexibility of setting their own compliance schedules.

A final prominent form of international regulatory rulemaking is explicitly nonbinding and particularly popular. It takes the form of recommendations by the international version of blue ribbon panels, white papers issued by multilateral committees on effective regulatory techniques, and, perhaps most interesting, the endorsement of best practices by international regulatory bodies.

Best practices, a term popular in business management and one that has made its way into the public sector, is a method of regulation that works through horizontal modeling rather than hierarchical organization. In a classic international best practices scheme, international regulatory bodies select and publicize certain approach to either regulation or regulation compliance as "best," but do not mandate adoption of the practices. The idea is that the wisdom of the practices will become clear and become adopted.

Best practices-style rulemaking exemplifies what would seem to be particular problems in international rulemaking: the rules it produces are unenforceable and promulgated unaccompanied by any procedural safeguards.

As such, best practices are tailor-made for the rather small secretariats and nonbinding nature of international regulation. They are aimed at coordination by regulators, or advice to regulated industry, and again, keeping up with them would be a difficult task for any administrative lawyer.

For example, IOSCO has issued a flurry of white papers designed to provide them. In October 2003, for example, the Technical Committee issued reports on "Collective Investment Schemes As Shareholders: Responsibilities And Disclosure," and "Investment Management Risk Assessment: Marketing and Selling Practices," and a survey of member practices on "Fees and Commissions Within the CIS and Asset Management Sector."

Best practices are well-suited for a decentralized world, and their flexibility is less likely to

result in the difficulties, procedural barriers, and attendant "ossification" of domestic administrative rulemaking. But offering regulators an attractive combination of casualness and detail is not without cost.

As with all cases of nontransparent international rulemaking, the sources of the standards adopted are unclear. Because this mandate is extracted from a process that is hardly representative, and at best only graciously consultative, it suffers from the characteristic problems of international rulemaking suffered by principles regulation – a lack of transparency.

D. Subsidiarity

If international financial regulation is done through rules without the benefit of a tribunal to enforce them, then the question of rule application becomes somewhat fraught. Many observers think that tribunals are the epitome of effective vindication of international legal rights, and some of the push to transform the GATT into the WTO was driven by the desire to ensure that a court could enforce the standards of trade.

The emerging regime of international financial regulation relies solely on its members to enforce its edicts in their own jurisdictions in their own manner. The decision to place the responsibility for enforcement and implementation at the domestic level, rather than the international one, suggests that international financial regulation is peculiarly attached to a principle familiar to European Union observers: the principle of subsidiarity, with its attendant preference for action by smaller units of government where possible.

Subsidiarity may be an essential feature of the soft law institutions of international financial regulation. Because they cannot hope to mandate global standards – an occupational hazard of entities unwilling to go through the formal process of institutionalization through a treaty and accordingly ever willing to claim that they are not lawmakers – they can only agree on them, and rely on their members to do the hard work of enforcement and implementation. That dependence on local implementation is, in some ways, an unambitious aspect of the emerging financial regulatory regime. But, given the attention paid to the regime by heads of state and domestic regulators, it does not appear to be a principle that negates the importance of the international policymaking efforts.

To be sure, however, subsidiarity could mean that international financial regulation would amount to nothing more than a purely optional exercise for the domestic regulators who join the international institutions that propound it. After all, it is entirely up to the members of the Basel Committee and FSB as to whether and how they enforce the rules devised through the international process. There is also no court that can be resorted to if other regulators think that a member agency is failing to meet its promised obligations.

But subsidiarity has not meant that international financial regulation is a matter of local option and international talking shops. It has instead enjoyed a seemingly high degree of compliance, and, in a testament to the substantiveness of the international regulatory enterprise, a great deal of attention from lawyers engaged in managing the regulatory burdens on international banks.

E. Peer Review

International financial regulation has sought to solve the compliance problem created by its strict observance of subsidiarity in implementation through a process of peer review. The Financial Stability Board in particular has engaged in reviews of its membership on both a country-

by-country basis and for particular issues for all FSB members at once. Peer review as practiced by the financial regulatory networks involves some invited visitation, the perusal of reports prepared by countries that have joined the organization, and some free riding on the FSAP analyses conducted by the International Monetary Fund.

It is through peer review – and the subsequent shaming of a member institution out of compliance – that international financial regulation seeks to have binding bite on its constituents. Peer review is, of course, no panacea. Rather, it is an imperfect form of discipline, as any professor who has been subjected to it can attest. It would also be inaccurate to say that international financial regulation has always successfully ensured that its rules are implemented, as the Basel Committee can attest given the late-to-never implementation of the Second Basel capital adequacy accord by the United States.

But peer review is an innovation that even domestic regulators have found promising, and, after all, it has a cherished place in academia, and is an increasingly utilized management tool. International financial regulation's embrace of it as an enforcement mechanism in lieu of a lawsuit before an international tribunal is therefore not unprecedented, and may even be appropriate in an international order increasingly lacking a hegemon who can police compliance by countries through a variety of other sanctions.

In 2010, the G-20 announced its plan for financial reform that includes four guiding principles, one of which is a commitment to peer review. The leaders of the G-20 have declared that they will "aim[] to improve assessment of risk by relying on the IMF and World Bank Financial Sector Assessment Program (FSAP) and FSB peer reviews." The FSB, in turn, had performed peer reviews in nine countries as of September 2013. According to the press release announcing the completion of the FSB's completion of South Africa's peer review, "FSB member jurisdictions have committed to undergo an FSAP assessment every five years and, to complement that cycle, an FSB peer review two to three years following an FSAP."

The IAIS, for its part, has recently begun its Self-Assessment and Peer Review on Insurance Core Principles 4, 5, 7, and 8. IAIS members are "strongly encouraged" to participate in the survey, which past members have found "helpful to improve understanding and observance of the [Insurance Core Principles]" and have used the information "to enhance their supervisory practices and legislative frameworks." Other examples are not difficult to find. It has also promulgated a Multilateral Memorandum of Understanding (MMoU), which is a "global framework for cooperation and information exchange between insurance supervisors." The MMoU goes a long way toward ensuring national treatment of insurance supervisors, both by dictating "minimum standards to which signatories must adhere," and by "subject[ing] [all applicants] to review and approval by an independent team of IAIS members."

Horizontal enforcement, and its difficulties, have long been a characteristic challenge for international governance mechanisms. But peer review has not been a particularly institutionalized method to approach the problem. Assigning a third party to monitor compliance, or relying on secretariats to do so, has been more characteristic of international organizations in the past. In financial regulation, the agencies themselves are meant to do the job, which in some ways recasts the role of participant in international governance. Responsible for implementing the rules of the network both at home and in their peers, peer review gives the agencies that sit at the base of regulatory cooperation an international role – and perhaps also an international mindset with which to play that role.

F. Networks

The vehicle for the international financial regulation has overwhelmingly been, indeed, uniformly been, the network. Networks, as Ann Marie Slaughter has put it, exhibit "patterns of regular and progressive movement among like government units working across the borders that divide countries from one another and that demarcate the domestic from the international sphere." Networks are unique innovations in international financial regulation and they have been the mechanisms chosen by the regulators to conduct their business.

Post-crisis financial regulation is essentially *only* done through networks. There is no other institutional approach, even though the alternatives to networks are easy to find in other areas of international law. For financial regulation, the precision and possibly enhanced compliance pull of a treaty or a tribunal has been no match for the flexibility of the confederations of regulators acting on agendas provided by political leaders meeting in concert.

As networks, despite their different origins, achievements, and ages, the Basel Committee, IOSCO, and IAIS share common characteristics. Their members are not states, but agencies. The members explicitly view themselves as representatives of their bureaucratic employer, rather than their national government.

Networks are created informally. The idiosyncrasy of their founding documents is striking. IAIS's founding document is its certificate of incorporation as a nonprofit organization in the state of Illinois. IOSCO was birthed via a private bill in the Quebec Assembly. The Basel Committee, unlike IOSCO and IAIS, does not even have a legal existence on the national level. Its existence was first marked by a press release issued through the BIS, and the Concordat that defines its approach to banking supervision lays down no requirements or framework for the organization itself.

Finally, networks have flexible internal organization. Both IAIS and IOSCO have promulgated bylaws, but those laws are permissive and open-ended, rather than restrictive and definitive-the former organization's are eight pages long, the latter's are longer, but not much longer. AIS's bylaws permit its Executive Committee to take "all decisions necessary to achieve the objectives of the organization," while its modestly sized secretariat, headed by the Secretary, "executes all other functions that are assigned" to it.

The enabling tenor of the bylaws of both organizations, comparable to bylaws a business might pass for itself, suggests that the organizations should be viewed as conduits for ongoing and flexible relationships. And indeed, networks are, in some senses, forums for jawboning and outlets through which regulators can contact other entities, both within and outside of the membership. By contrast, other international organizations have much more formal rules of order. The UN General Assembly, for example, has promulgated an elaborate procedural code governing its deliberations and the practice of its bureaucracy. The unencumbering bylaws of the networks make their goals and means flexible and less dependent on the status envisioned for the organizations at their founding.

Networks are also characterized by decentralized organization and action. They have small bureaucracies, limiting the amount of centralization each organization can hope to attain. For example, IAIS's secretariat was originally delegated to a member organization, which in turn tasked a single employee to keep the records of the organization and answers requests made to it. The secretariats of the organizations have grown since then, but they hardly resemble the setups at formal international organizations like the WTO, let along the UN or EU. Network secretariats in the financial regulatory environment do not enjoy headcounts that exceed the double digits.

Finally, the legal authority in any network announcement is, if you believe the network, nonexistent. They make no claim to be promulgating laws or expounding on treaties. Regulators

have claimed that nothing they do in the organizations is legally binding, again and again. "We can't bind the United States," observed one SEC regulator who has participated in IOSCO, which means that there are no formal legal consequences that attach to the SEC's participation in the organization. The general counsel of the Basel Committee has made a similar about his organization's lawmaking powers; such declamations are, if anything, de rigeur at the institutions. None of this means that the pronouncements of networks will never be legally binding in any way; although their promulgations lack formal international legal authority when implemented at the domestic level, they gain at least local legal legitimacy.

A final characteristic of networks is that they spend a lot of time networking. Basel, IOSCO, and IAIS assiduously maintain connections with one another and have created an interlocking web of financial regulators, one formalized with the growing importance of that network of networks, the Financial Stability Board. IOSCO and IAIS have also cultivated ties with regional securities and insurance regulators. Additionally, IOSCO works closely with private groups of self-regulatory organizations.

III. THE SIX PRINCIPLES IN CONTEXT

Some of these six principles are comparable to the legal pillars supporting prominent organizations like the EU and WTO, both of which espouse MFN and national treatment. The EU is also a prominent proponent and practitioner of subsidiarity. Others, like the use of rulemaking, are comparable to domestic regulation. Peer review and the network model are relatively distinctive, however, to international financial regulation.

Despite the recognizably legal nature of the paradigmatic principles of international financial regulation, the networks certainly do not mimic classic international legal organizations in every way. For example, one of the hoary old tropes of public international law, sovereign equality, is not a fixture of international financial regulation. While treaties like the UN Charter provide that "[t]he Organization is based on the principle of the sovereign equality of all its Members,"[8] and the reporters to the Restatement (Third) of Foreign Relations Law cite, with approval, a declaration that "solemnly proclaims" the importance of the principle of sovereign equality of states, international financial regulation operates differently.[9]

Membership in the networks is not open to all sovereigns or agencies, most notably the Basel Committee of Banking Supervision and FSB, which limit themselves to regulators from twenty large markets. The big countries – European nations, the United States, and Japan – play outsized roles in these organizations, despite the consensus rules that are commonly required for action by the selective membership. In this way, the financial regulatory networks have followed the lead of more formal international financial institutions, such as the World Bank and the IMF, which favor larger contributors to the organization over smaller ones and divide their top jobs on regional loyalty bases that have little to do with sovereign equality. Moreover, when the financial networks have made bows to consensus-based action, the consensus has sometimes been deemed by

[8] U.N. Charter ch. I, art. 2, para. 1. This, of course, is an oversimplification. The existence of the Security Council illustrates the incompleteness of this guarantee.

[9] Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess. Supp. No. 28, U.N. Doc. A/8028, at 121, (1970), *reprinted in* 65 AM. J. INT'L L. 243 (1971); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 712 (1987). Meanwhile, hornbooks like the Max Planck Institute's Encyclopedia of International Law also celebrate the concept of sovereign equality. According to Julianne Kokott, "Sovereign equality is a fundamental axiomatic premise of the international legal order. It is the source of other most important principles such as the ban on the use of force and the prohibition of intervention." Julianne Kokott, *States, Sovereign Equality*, MAX PLANCK INSTITUTE'S ENCYCLOPEDIA OF INTERNATIONAL LAW (Rüdiger Wolfrum & Frauke Lachenmann, eds., art. updated Apr. 2011), *available at* http://tinyurl.com/d7pfqwz.

observers to be quite forced.

If global financial regulation does not resemble hard public international law in every way, it is certainly not a rejection or dismissal of the importance of legal rules either. Prior enthusiasts for international financial regulation and the structures like it sometimes have propounded a somewhat mystical process of unorganized, disaggregated coordination. David Mitrany and Charles Sabel, for example, posit that the mere act of interaction can take on some sort of momentum that results in coordinated outcomes, even though the coordination itself is hard to institutionalize, define, or predict. Mitrany described this as a process of enmeshment, where some transnational coordination might lead to more.[10] Sabel, along with Michael Dorf, characterized it, in the domestic sphere, as democratic experimentalism, whereby disaggregated groups would try a number of different approaches to regulatory problems, and the best of those approaches would be used as benchmarks offered up to everybody and then replaced by a new effort to exceed the benchmarks.[11] In their view, the design of the institution of cooperation does not matter much. What matters is the fact of cooperation, which can construct virtuous circles leading to more and more of it, courtesy of some hard-to-grasp intangibles.

I find these insights to be plausible, but in my view, there is more to be said about the capabilities and organization of global financial regulation, which is increasingly less shrouded in mystery and more explicable as a principled legal order founded on instruments of soft cooperation. Networks can solve problems and build momentum in Sabellian ways, but that momentum has taken – at least in financial regulation – a form with recognizably legal characteristics.

International financial regulation is a complex, changing phenomenon, and as it is evolving apace, broad conclusions about what it means are difficult to draw. Nonetheless, there are some implications of the way that the institutions that comprise international financial regulation have evolved that has some implications of traditional views of public international law; in this concluding chapter, those differences are discussed.

IV. LEGITIMATION THOUGH DOMESTIC INSTITUTIONS

Understanding the way that IFR achieves its legitimacy – through a series of domestic processes, rather than through an international one gleaned from state practice and treaty commitment – offers a perspective on public international law that can draw attention away from the old problematic categorization of sources, and towards the way that real obligation of international commitments is felt by states.

The defining "lawness" of international law is supposed to come through its recognition as

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[10] *See* DAVID MITRANY, A WORKING PEACE SYSTEM (1966). To Mitrany, functional cooperation was a matter of creating specialized agencies on the international level that pursued similar goals to those pursued by the New Deal agencies. In his view, "[t]he growth of specific administrative agencies and laws is the foundation of modern government." *Id.* at 113. The most promising international organizations were therefore those that pursued specific and technical goals. "Internationally . . . while a body of law grew slowly and insecurely through rules and convention, many common activities were developed effectively by means of functional organs." See David Zaring, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*, 33 TEX. INT'L L.J. 281, 292-97 (1998), and Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998) for a discussion..

[11] Dorf & Sabel, *supra* note 10, at 287–88 ("The model requires linked systems of local and inter-local or federal pooling of information, each applying in its sphere the principles of benchmarking, simultaneous engineering, and error correction, so that actors scrutinize their initial understandings of problems and feasible solutions. These principles enable the actors to learn from one another's successes and failures while reducing the vulnerability created by the decentralized search for solutions."); *see also* ALBERT HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 77 (1970). As the following analysis will underscore, utilizers of Hirschman's trichotomy tend to ignore loyalty, which even Hirschman himself failed to find as fruitful as the tradeoff between exit and voice. See Lyman Johnson, *After Enron: Remembering Loyalty Discourse in Corporate Law*, 28 DEL. J. CORP. L. 27, 73 (2003), for a discussion of Hirschman with particular attention to the hazy concept of loyalty.

such by states. This rather magical nature of this elevation to legal obligation has often mystified observers, and made the communicants of the old time international law religion firm believers in transubstantiation – the change of discretionary acts to evidence of legal compliance, and therefore of the existence of law itself.[12]

Particularly in the case of custom – where states comply with their legal obligations not because of some explicit treaty/contractual commitment, but rather because of a more diffuse sense that they, through their actions, recognize the commitment to be a legally binding one – the moment at which inclination turns into legal obligation is awfully difficult to discern.

Consider the Supreme Court's view in *The Paquete Habana.*[13] As the court famously observed: "Like all of the laws of nations, it rests upon the common consent of civilized communities . . . it is recognition of the historical fact that by common consent of mankind these rules have been acquiesced in as of general obligation."[14]

The language is famous but quite difficult to pin down. The search is for state-level "common consent," although it is not always easy to know how that consent, evidenced by the conduct of the amalgam of actors known as the state, would be expressed. Understanding that consent exists because of a sense – again, by the state itself – of "general obligation" is just as tricky to pin down.

It is accordingly unsurprising that the evidence resorted to in *The Paquette Habana* to discern opinio juris by the states looks quite selectively done. To discern evidence of custom, the Court examined orders issued by English King Henry IV in the early 15th century during a war with France, a treaty made between the Holy Roman Empire and France in the 16th century, treaties between the United States and Prussia and Mexico, a British case concerning a Dutch fishing vessels, Japanese state practice in relation to Chinese vessels.[15]

It all is quite interpretive and, as with any kind of precedent selection, suspicions of selection bias and aggressive interpretation have reared their heads.

For these reasons, customary international law, with its uncomfortably pliable methods of discerning state practice, has become the sort of international law most likely to be assaulted by critics of the enterprise.[16] While few international lawyers doubt that custom is something on which nations rely in some cases – if the United States was not able to rely on customary international law as a mechanism to give it some consistent approach to treaty interpretation consistent with that set forth in the Vienna Convention on the Law of Treaties, then it would have a difficult time concluding treaties of any sort – custom is international law at its most mysterious.

But even treaties, though more straightforward to limn, turn on difficult contract-like questions as to whether there has been a meeting of the minds between the states – as if states had minds.[17] It is just as difficult to attribute a purpose to a state, though treaties are regularly interpreted to give effect to those purposes.[18] Indeed, Article 31 of the Vienna Convention of the Law of Treaties, the canonical statement of how international lawyers are supposed to approach the task of treaty

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[12] *Cf.* Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 740 (1988) ("The excommunicate priest who elevates the host before the altar in a fraudulent Eucharist is left holding only bread and wine because his invalid orders cannot effect the miracle of transubstantiation.").

[13] 175 U.S. 677 (1900).

[14] *Id*. at 711.

[15] *Id*.

[16] *See* Jack L. Goldsmith & Eric A. Posner, *Further Thoughts on Customary International Law*, 23 MICH. J. INT'L L. 191, 200 (2001); Jack L. Goldsmith & Eric A. Posner, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 VA. J. INT'L L. 639 (2000); Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999).

[17] *See* Curtis J. Mahoney, *Treaties As Contracts: Textualism, Contract Theory, and the Interpretation of Treaties*, 116 YALE L.J. 824, 857 (2007).

[18] For a critique of the effort to try to discern the object and purpose of the treaty by looking to state practice, see George Letsas, *Strasbourg's Interpretive Ethic: Lessons for the International Lawyer*, 21 EUR. J. INT'L L. 509, 512 (2010).

interpretation, provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[19]

And the less said about another important source of international law – jus cogens – the better.[20] These preemptory norms are essentially supercharged customary norms from which derogation is not permitted; they are also principles of international law accepted by the international community, and as such subject to all of the interpretive difficulties of custom, albeit with even fiercer debates as to which norms, precisely, have arisen to the exalted status of preemptory. The Restatement (Third) of Foreign Relations Law mentions prohibitions on genocide, slavery, and torture, but hard-headed lawyers might wonder how often at least two of those norms are honored in the breach.[21] The International Law Committee admitted in 1963 that "there is not as yet any generally accepted criterion by which to identify a general rule of international law as having the character of jus cogens."[22]

In each of these cases, much of the interpretive difficulty involves trying to think about what a state is thinking. Of course, states don't think; the people serving them think, negotiate treaties, take actions that they believe to be legally required, and so on. As Peter Malanczuk observes, "[t]here is clearly something artificial about trying to analyze the psychology of collective entities such as states."[23] International law doctrine is based on a recognition of the modern sovereign state as the only subject of international law. That system has, of course, changed with the advent of human rights and investor protections of individual claims, which make substate actors worthy of the attention of public international law. But still the state remains central in international legal efforts.[24]

Observers of international financial regulation do not spend their time wondering what France "believes" or what the United States "wants" from a capital adequacy arrangement. In IFR, legitimation does not happen mysteriously on the international level, where the difference between legal and not legal is often reflected by descending into the subconscious of a state and the reasons for its compliance with or disregard of a particular principle of international relations. IFR is never legal once agreed to in Basel, Switzerland, or by a resolution of the International Organization of Securities Commissioners. As Daniel Lefort, the General Counsel of the Bank for International Settlements has observed, IFR

> formulates broad supervisory standards and guidelines and recommends statements of best practices in the expectation that individual authorities will take steps to implement them through detailed arrangements – statutory or otherwise – which are best suited to their own national systems.[25]

In other words, it obtains its legitimation through domestic institutions – through the agencies that, once they agree on an international standard, go home and implement the standard.

If anything, IFR has taken the domestic legalization component of what it does to an extreme. While international financial policymakers tend to disclaim what they do as legally binding as loudly as Lefort does across the spectrum of market regulation, the domestic component has been

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[19] Vienna Convention on the Law of Treaties art. 31-1, May 23, 1969 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

[20] Jus cogens is the Latin term for non-derogable principles of international law.

[21] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702, cmt n.

[22] Second Report on the Law of Treaties, [1963] 2 Y.B. Int'l L. Comm'n 16, U.N. Doc. A/CN.4/107. For a discussion, and an effort to move towards more specificity in jus cogens, see Evan J. Criddle & Evan Fox-Decent, A Fiduciary Theory of Jus Cogens, 34 Yale J. Int'l L. 331, 337 (2009).

[23] PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 44 (7th ed. 1997).

[24] *Id.*

[25] *See* Lefort, *supra* note **Error! Bookmark not defined.**, at ¶ 172.

elevated in the very way that IFR is celebrated.

It relies, for example, upon peer review to ensure compliance with its mandates – a policy that itself suggests the importance of the domestic role – the peers that are being reviewed.[26]

Peer review as practiced by the financial regulatory networks involves some invited visitation, the perusal of reports prepared by countries that have joined the organization, and some free-riding on the Financial Sector Assessment Program (FSAP) analyses conducted by the International Monetary Fund.[27] But the way it works – domestic regulators reviewing other domestic regulators to see whether they are meeting their international commitments – underscores that even the international interactions of financial regulators are premised on their taking domestic acts.

The importance of domestic institutions is also illustrated by the attachment in IFR to the principle of subsidiarity, with its attendant preference for action by smaller units of government where possible.[28] Subsidiarity is an essential feature of the soft law institutions of IFR.[29] Because the financial regulators who participate in IFR cannot hope to mandate global standards – an occupational hazard of entities unwilling to go through the formal process of institutionalization through a treaty and accordingly ever willing to claim that they are not lawmakers – they can only agree on them, and rely on their members to do the hard work of enforcement and implementation.

The reliance on municipal law is clear, but it does not make IFR a global governance outlier. A great deal of formal, public international law turns on legitimation through domestic institutions.

A. Implication #1: Dualism

In this sense, the experience of international financial regulation helps to underscore how much of international law really is rather dualist and not monist. The dualism/monism distinction is one of the traditional battlegrounds of international law; the question is whether international law is the governing domestic law of a country party to it, or whether international law only binds domestic actors like courts when duly enacted through domestic legislation or some other domestically cognizable legal act.[30] A dualist view "assumes that international law and municipal

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[26] For a discussion of peer review, see J.B. Ruhl & James Salzman, *In Defense of Regulatory Peer Review*, 84 WASH. U. L. REV. 1, 18 n.82.

[27] For evaluations of peer review in other contexts, see, e.g., Lars Noah, Peer Review and Regulatory Reform, 30 Envtl. L. Rep. 10,606, 10,606 (2000) ("[E]ssentially everyone applauds the idea of using independent peer review in the regulatory process."). *See also* Final Information Quality Bulletin for Peer Review, 70 Fed. Reg. 2664, 2666 (Jan. 14, 2005) ("A wide variety of authorities have argued that peer review practices at federal agencies need to be strengthened."); Louis J. Virelli III, Scientific Peer Review and Administrative Legitimacy, 61 Admin. L. Rev. 723, 780 (2009) (arguing that "the wisdom of relying on some measure of administrative peer review in policymaking has been largely uncontroversial"). For a discussion of the FSAP, Richard Gordon has a comprehensive overview:

> The purpose of the FSAP was to identify strengths and vulnerabilities of a country's financial sector, in part by assessing its compliance with key international financial standards, such as the Basel Core Principles and related standards on insurance and securities regulations. The IMF and World Bank agreed that they should divide assessment work between them based on their areas of competence, with some being exclusively IMF, others exclusively World Bank, and others being of joint responsibility. Basel Core Principle assessments were to be the responsibility of the IMF.

Richard K. Gordon, *On the Use and Abuse of Standards for Law: Global Governance and Offshore Financial Centers*, 88 N.C. L. REV. 501, 553 (2010).

[28] For an early treatment of EU subsidiary, see Kees Van Kersbergen & Bertjan Verbeek, *The Politics of Subsidiarity in the European Union*, 32 J. COMMON MARKET STUD. 2, 215 (1994) *available at* http://onlinelibrary.wiley.com/doi/10.1111/j.1468-5965.1994.tb00494.x/abstract.

[29] For a discussion of subsidiarity's implications in a regulatory context, see Eleanor M. Fox, *International Antitrust and the Doha Dome*, 43 VA. J. INT'L L. 911, 912 (2003) (arguing that horizontal networks can work with the WTO to create a system of internationally harmonized antitrust in a way that honors subsidiarity).

[30] *See* Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 864-66 (1987); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991); J.G. Starke, *Monism and Dualism in the Theory of International Law*, 17 BRIT. Y.B. INT'L L. 66 (1936).

law are two separate legal systems which exist independently of each other."[31] Monists understand international law and domestic law as components of a single legal institution, with international law occupying a position of supremacy under the local variance.[32] But in IFR, although international agreements provide the contents for domestic regulation, thinking of the role as supreme misses the point. The international arena is where policy is formulated. But it is the domestic arena where it is implemented and made into binding legal instrument.

It would accordingly be inaccurate to say that the systems are monist or even that they perform similar kinds of functions. Rather, the international and the local do different things in IFR, and it is the local where legal obligation is maintained. The radically dualist nature of IFR calls into question some of the monists' inclinations, that international law is supposed to trump domestic law.

In the *Free Zones* case, thought to be a stalwart of the monist vision, the Permanent Court of International Justice held that "it is certain that France cannot rely on her own legislation to limit the scope of her international obligations."[33] IFR works the opposite way. France depends on her own legislation to give any force whatsoever to the scope of her international obligations.

Similarly the rule found in Article 27 of the Vienna Convention of the Law of Treaties providing that "a party may not invoke the provisions of its internal law as justifications for its failure to perform a treaty" is subject to a similar revision when the question is one of financial regulation.[34]

The powerful dualist tendency underscored by financial regulation reaches into areas long claimed by monists, Treaties do not bind states until ratified by the relevant domestic actor.[35] This broad language however, has famously been interpreted by American courts as not making American treaty commitments actionable before the judiciary if, in ratifying the treaty, there has been a clear statement suggesting that the treaty is "self-executing."[36] Congress has found this doctrine to be to its liking as well, and so it has sometimes ratified a United States treaty only through implementing legislation – in recent years, the Senate has frequently stipulated that the President *could not* consider a treaty ratified until Congress has passed implementing legislation.[37]

B. Implication #2: Subsidiarity

There is quite a bit of subsidiarity in international law, too. Conservative legal commentators have offered succor to international policies adopted by states and localities.[38] And in the *Medellin* case, the Supreme Court found that local preferences on domestic criminal law could even trump that of the International Court of Justice, which the federal government chose, mildly, to heed, but

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[31] PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 63 (7th ed. 1997).

[32] For a discussion of dualists and monists, see Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628, 631 (2007).

[33] Free zones of Upper Savoy and District of Gex (Fr. V. Switz.), 1932 P.C.I.J. (Series A/B) No. 46, at 167 (June 7).

[34] Vienna Convention on the Law of Treaties art. 27, Jan. 27, 1980, 1155 U.N.T.S. 331. Per discussion, see MALANCZUK *supra* note 31, at 64.

[35] Edward T. Swaine, *Unsigning*, 55 STAN. L. REV. 2061, 2066 (2003) ("The history of the law of treaties, greatly simplified, supports a shift in gravity from signature to ratification."). The United States requires Senate ratification before any treaty can become part of domestic law and it is not alone. Some states, including the United Kingdom, require an act of Parliament before a treaty can become domestic law. VALERIE EPPS & LORIE GRAHAM, EXAMPLES AND EXPLANATION: INTERNATIONAL LAW § 3.13.1 (3rd ed. 2009). Moreover, the Constitution provides that "this constitution, and the laws of the United States which shall be made and pursuant thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land." U.S. CONST. art. 6, cl. 2.

[36] *See* Medellin v. Texas, 552 U.S. 491, 491 (2008).

[37] Epps & Graham, *supra* note 35, at § 3.13.1.

[38] *See, e.g.*, Julian G. Ku, *Gubernatorial Foreign Policy*, 115 YALE L.J. 2380, 2383 (2006); Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341 (1999); *see also* United States v. Belmont, 301 U.S. 324, 331 (1937) ("Plainly, the external powers of the United States are to be exercised without regard to state laws or policies.").

which lawyers in the state of Texas entirely ignored.[39]

The European Union, as we have noted, is obsessed with subsidiarity, as the delegation of European law to enforcement and implementation by national courts and agencies is a hallmark of the international economic arrangement.[40] Recognizing that the legitimation through domestic institutions is so important helps to explain the question of whether treaties are self-executing or not is so important to form relation scholars on such an obsession of American legal theorists.

C. Implication #3: Extraterritoriality

Conversely, the ability of states of apply their rules extraterritorially is of interest because of the domestic nature of the actors in this system. Extraterritoriality is a particular obsession of United States regulators, and their critics.[41] Justice Holmes in 1908 reminded his readers of "the general and almost universal rule . . . that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."[42] But the Supreme Court moved from a position of absolute territorialism then to radical extraterritorialism in 1945. In that year, the Second Circuit, sitting for the Supreme Court, promulgated the famous – or infamous, depending on your point of view – "effects test" holding that US legislation or regulation would apply in any case in which foreign conduct was intended to and did in point of fact affect American commerce.[43] Although associated with American regulatory arrogance, the extraterritoriality of law was established internationally. The Permanent Court of International Justice had declared in the *Lotus Case*, "the territoriality of criminal law . . . is not an absolute principle of international law and by no means coincides with territorial sovereignty."[44]

It is the work of antitrust regulators, and the plaintiffs' securities class action bar that animates the question, of such interest to international laws. And what to do about extraterritoriality is a particular interest to American lawyers, who have occasionally embraced it, and, more recently, approached it with caution.[45] Extraterritoriality offers, in short, its own kind of international rulemaking done by domestic institutions.

D. Implication #4: *Jus Cogens*

The pattern applies even to matters of international law that some would argue have risen to the level of *jus cogens*,[46] or something quite close to it.

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[39] For a news story on the Texas perspective in the Medellin case, see Mark Whittington, *Ted Cruz Touts Role in Medellin Supreme Court Case*, YAHOO! NEWS (Mar. 21, 2012, 6:31 PM), http://news.yahoo.com/ted-cruz-touts-role-medellin-supreme-court-case-223100277.html.

[40] Consolidated Version of the Treaty Establishing the European Community art. 5, Dec. 29, 2006, 2006 O.J. (C 321) 46 [hereinafter EC Treaty] available at http://eur- http://frontex.europa.eu/assets/Legal_basis/12002E_EN.pdf. For a discussion, see Ernest A. Young, *Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism*, 77 N.Y.U. L. REV. 1612, 1678 (2002); *see also* Daniel Halberstam, *Of Power and Responsibility: The Political Morality of Federal Systems*, 90 VA. L. REV. 731, 825 (2004); Edward Swaine, *Subsidiarity and Self-Interest: Federalism at the European Court of Justice*, 41 HARV. INT'L L.J. 1, 5 (2000).

[41] See Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1, 12-13 (2002); Anne-Marie Slaughter & David T. Zaring, *Extraterritoriality in a Globalized World, available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=39380 (last visited Jan. 15, 2014). For a critique of the current practice, see Austen L. Parrish, *Evading Legislative Jurisdiction*, 87 NOTRE DAME L. REV. 1673, 1707 (2012); *see also, e.g.*, KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW (Oxford Univ. Press 2009); Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After* Boumediene, 109 COLUM. L. REV. 973 (2009); Chimene I. Keitner, *Rights Beyond Borders*, 36 YALE J. INT'L L. 55, 114 (2011).

[42] Am. Banana Co. v. United Fruit Corp., 213 U.S. 347, 370 (1909). Holmes was paraphrasing the holding in *The Apollon*, which provided that "the laws of no nations can be justly extended beyond its own territory." 22 U.S. 362, 270 (1824).

[43] United States v. Aloca, 148 F.2d 416, 443-44 (2d Cir. 1945).

[44] The S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

[45] While the United Sates is thought to be the foremost proponent of the extraterritorial application of its own economic laws, its Supreme Court has evinced some skepticism about the practice. *See* Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2877-78 (2010) (requiring a clear statement from Congress before applying American laws with private rights of action extraterritorially); David Zaring, *Finding Legal Principle in Global Financial Regulation*, 52 VA. J. INT'L L. 683, 689 (2012) (noting the controversy of extending U.S. financial regulation beyond its borders).

[46] Vienna Convention on the Law of Treaties, May 23, 1969, U.N.Doc. A/CONF.39/27, *reprinted in* 8 I.L.M. 698-99 (1969) (art. 53 defines

Consider human rights. The parties to the International Covenant on Economic, Social, and Cultural Rights, which includes rights to self-determination, to be treated "without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status," and to a panoply of other social rights, has been signed and ratified by the vast majority of the countries in the world.[47]

The states that have ratified the ICESCR Convention, however, have committed only to monitoring through a body known as a committee on economic and cultural social rights established by a so-called Economic and Social Council.[48] The monitoring mechanism does not provide for state against state, or individual against state, complaints, and the council does not offer dispute resolution services. Instead, the council provides opportunities for states to show that they have taken steps in their domestic set-ups to implement the commitments they have undertaken, as part of the convention.[49]

Similarly, a state that ratifies the International Covenant on Civil and Political Rights, which includes rights against discrimination, freedom from torture and slavery, and the liberty and security of the person, is monitored by the UN's Human Rights Committee, rather than subjected to judicial review. As the HRC has stated, "When there are inconsistencies between domestic law and the Covenant Article 2 requires that the domestic law practiced be changed to meet the standards imposed by the covenant substantive guarantees."[50] But the Committee is comprised of nothing more than "independent experts," and their chief task is dialogue.[51] The Committee monitors implementation by receiving reports and, in light of the reports and the research of its members, measures the states have taken to implement the government's rights and commenting on those reports.[52] The Committee then sends written comments to each state regarding their

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"peremptory norm of general international law (jus cogens)" as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character"); *see also* Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 HASTINGS L.J. 805, 822 (1990) ("there is much scholarly support for the view that most international human rights norms constitute at least binding rules of customary law if not, indeed, noderogable rules or jus cogens."). Though beyond that, it is hard to know what, exactly, just cogens include. As Jules Lobel observed, "[s]ome dispute exists over what norms are fundamental. The International Law Commission, in adopting the notion of jus cogens in the Vienna Convention on the Law of Treaties, did not elaborate on its content, in part because even the drafting commission could not agree on what norms constituted jus cogens." Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1148 (1985).

[47] International Covenant on Economic, Social, and Cultural Rights art. 2, G.A. Res. 2200A, U.N. Doc. A/RES/2200A (Dec. 16, 1966). The United States has only signed, but not yet ratified, the convention.

[48] Shortcomings of the council and challenges to its effectiveness have been apparent since its creation. For a general discussion of the obstacles confronted by the council, see Phillip Alston, *Out of the Abyss: The Challenges Confronting the new U.N. Committee on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 332 (1987). As Barbara Stark has observed, "[a]s part of ICESCR compliance, ratifying nations prepare self-monitoring reports that document their efforts, successes, and failures to 'progressively achieve' the goals set out in ICESCR. These 'country reports' are reviewed by the Committee on Economic, Social and Cultural Rights (the 'Committee')." Barbara Stark, *Economic Rights in the United States and International Human Rights Law: Toward an "Entirely New Strategy*", 44 HASTINGS L.J. 79, 89 (1992).

[49] For a description of the council's current enforcement mechanism and suggestions for improvement, see Audrey R. Chapman, *A "Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights*, 18 HUM. RTS. Q. 23 (1996); Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should There Be An International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?*, 98 AM. J. INT'L L. 462 (2004).

[50] Human Rights Committee, General Comment No. 31, ¶13, U.N. Doc.. CCPR/C/21/Rev. 1/Add 13 (May 26, 2004).

[51] The membership of the committee is listed on the committee's website. *Human Rights Committee – Membership*, OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, http://www.ohchr.org/EN/HRBodies/CCPR/Pages/Membership.aspx (last visited Jan. 15, 2014). Its current American member, for example, is an international law professor at Harvard Law School. See Gerald L. Neuman (United States of America), OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, http://www2.ohchr.org/english/bodies/hrc/membersCVs/neuman.htm (last visited Jan. 15, 2014) (presenting the credentials of Professor Neuman).

[52] As the HRC puts it on its website,

> All States parties are obliged to submit regular reports to the Committee on how the rights are being implemented. States must report initially one year after acceding to the Covenant and then whenever the Committee requests (usually every four years). The Committee examines each report and addresses its concerns and recommendations to the State party in the form of "concluding observations".

UN Human Rights Committee, Monitoring Civil and Political Rights, OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, http://www2.ohchr.org/english/bodies/hrc/ (last visited Jan. 15, 2014).

implementation of the ICCPR.

The point is a straightforward one. Many of the mechanisms for the protection of fundamental human rights value domestic implementation, and make it (as scrutinized by monitors and jawboners) the mechanism used to do the actual work of realizing international commitments – a process that students of IFR would find familiar – while leaving international oversight to a rather flexible sort of peer review and monitoring.

This is not to suggest that international law in its classical variant is the same thing as IFR, but rather that the IFR, in appearing somewhat similar to way international law really works, underscores the importance of domestic institutions and making international commitments real commitments on which domestic actors can less rely.

E. Conclusion

International financial regulation's reliance on domestic institutions is reflective of the relatively disaggregated way that the state has been changing, and our perspective on such change.[53] Rather than one billiard ball of state level interests, states contain multitudes, and looking inside the state is one of the innovations made by international law scholars interested in IFR.[54] And in doing so, they are drawing on insights made by distinguished observers of an earlier era. Others have focused on the growing importance of transnational law, which recognized that actors beyond the state could affect international standard. Phillip Jessup defined "transnational law" in 1956 as "all law which regulates actions or events that transcend national frontiers" and including "[b]oth public and private international law . . . [plus] other rules which do not wholly fit into such standard categories."[55]

Applying to international law the legal process approaches developed in domestic law in the 1950s produced articles and casebooks that went beyond the state to consider, for example, constituents within states that pursued trade conflicts and decisions to abrogate sovereign contracts.[56] By the 1970s, the legal focus shifted more to the private side of international legal relationships, with a particular emphasis on the role of multinational corporations. Steiner and Vagts' *Transnational Legal Problems* casebook essentially invented the field of international business transactions and has echoes in the below-the-state level coordination that characterizes network analysis from the legal perspective.[57] Since then Slaughter's network view has taken hold and has scholars appearing a little in, but mostly out, of international financial regulation.[58]

V. COORDINATION

A. The Fundamentally Legal Nature Of Coordination

One of the points of legal systems is to permit parties to coordinate their interests – contracts, for example, are premised on such interest confluence – but it is often viewed derisively by some

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[53] For example, "[w]hen articulating domestic policies, mayors, governors, and members of state and city legislatures often look beyond their own borders for guidance and sometimes choose to affiliate their localities with transnational initiatives." Judith Resnik, *Foreign As Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31, 34 (2007).

[54] *See* Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 STAN. J. INT'L L. 283, 285 (2004); Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 1, 191 (2003).

[55] PHILIP C. JESSUP, TRANSNATIONAL LAW 2 (Yale Univ. Press 1956).

[56] 3 ABRAM CHAYES, THOMAS EHRLICH & ANDREAS F. LOWENFELD, THE INTERNATIONAL LEGAL PROCESS: MATERIALS FOR AN INTRODUCTORY COURSE, 249–306, 805–77 (1967).

[57] HENRY J. STEINER & DETLEV VAGTS, TRANSNATIONAL LEGAL PROBLEMS (2nd ed. 1976).

[58] ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (Princeton Univ. Press, 2004); *see also* Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1 (2002); David Zaring, *Network and Treaty Performance During the Financial Crisis*, 103 AM. SOC'Y INT'L L. PROC. 63, 65 (2009); David Zaring, I*nformal Procedure, Hard and Soft, in International Administration*, 5 CHI. J. INT'L L. 547 (2005).

critics in international law.[59] Why call it law if the parties to the project would have done it anyway? The experience of IFR reminds us of the way that coordination games create winners and losers, just as do tort cases and company deals. In this sense it is just as interesting as the kind of law that proscribes conduct such as fraud, monopolization, or the unwarranted use of force, even if there are some who criticize both it and international law for being principally concerned with obligations that increase the size of pies, rather than merely dividing them.

International law often comes in for a great deal of criticism based on its coordinative role. Posner and Goldsmith have raised some questions about its customary variant in particular.[60] They argue that, "international law does not pull states toward compliance contrary to their interests. International law emerges from states pursuing their interests to achieve mutually beneficial outcomes, and it is sustained [only] to the degree to which it continues to serve those interests."[61] Posner and Vermeule have also questioned its importance when international problems grow very severe, as they do in times of war or crisis.[62]

International law is really not much of anything in this view – it merely celebrates the sort of mutually beneficial cooperation that rational actors would embrace regardless of its legality, and, presumably, if there was no such thing as international law.

The Goldsmith and Posner view builds on a rich tradition of political science skepticism about the merits of international law. A primary school in international relations – the rational choice realists – have always suspected that international law is nothing more than a meaningless exercise in labeling by hopeful academics and other hangers-on, a position articulated by Hans Morganthau in the post-war period,[63] and many others since.[64] Realism, along with its legal sympathizers, treats states as self-interested unitary actors of varying strengths locked in an anarchic struggle to survive, and unconstrained by legal principle when it conflicts with self-interest.[65]

But from the perspective of IFR, the anarchic struggle is not so obvious – not, at least, after four decades of effort to create international institutions capable of regulating world finance. In light of this experience, to students of international finance, branding coordination enterprises as somehow unrelated to the project of international law – or international relations – seems bizarre.[66] IFR, after all, is regulation, interpreted by lawyers, and devised by bureaucrats, via an increasingly legalized process. It looks a lot like law.

But at the same time, it emphasizes coordination. The rules must be agreed upon, rather than

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[59] *See* Andrew T. Guzman, *The Design of International Agreements*, 16 EUR. J. INT'L L. 579, 585 (2005)).

[60] Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999)).

[61] Jack Goldsmith & Eric A. Posner, *The New International Law Scholarship*, 34 GA. J. INT'L & COMP. L. 463, 467 (2006). This view about international law come from a social scientific view of state interest focused on the rational actor. As Goldsmith and Posner have argued, "international law emerges from and is sustained by nations acting rationally to maximize their interests (i.e., their preferences over international relations outcomes), given their perception of the interests of other states, and the distribution of state power." Rather than hewing to international legal obligations because they are law, "self-interest and the logic of the strategic situation do a much better job of explaining the behaviors associated with international law." Jack L. Goldsmith & Eric A. Posner, *International Agreements: A Rational Choice Approach*, 44 VA. J. INT'L L. 113, 134 (2003).

[62] ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC (Oxford Univ. Press 2011).

[63] *See, e.g.*, HANS J. MORGANTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE 3-15 (1960). Morgenthau's work built on earlier skepticism by E. H. Carr. EDWARD HALLETT CARR, THE 20-YEAR CRISIS, 1919 THROUGH 1939: AN INTRODUCTION TO THE STUDY OF INTERNATIONAL RELATIONS (1940).

[64] *See* KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS 88 (1979) (stating that "[i]nternational systems are decentralized and anarchic"); *see also* ADAMSON HOEBEL, THE LAW OF PRIMITIVE MAN (1967).

[65] Many realists argue that international institutions have no effect on the important aspects of international life-- namely, the competition between states. *See* John J. Mearsheimer, T*he False Promise of International Institutions*, 19 INT'L SECURITY 5, 7 (1994); John J. Mearsheimer, *A Realist Reply*, 20 INT'L SECURITY, 75, 82 (1995)).

[66] And not just from an IFR perspective, it is perhaps worth noting. *See* Robert B. Ahdieh, *Foreign Affairs, International Law, and the New Federalism: Lessons from Coordination*, 73 MO. L. REV. 1185, 1204 (2008)); Mariano-Florentino Cuellar, *Reflections on Sovereignty and Collective Security*, 40 STAN. J. INT'L L. 211, 242 (2004)); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1857 (2002)).

imposed. IFR operates through consensus, and its coercion mechanisms are modest and horizontal (as I discussed earlier, IFR relies upon peer review to police compliance by regulators with their international commitments).

But coordination has long made for law that anyone would recognize as "real." And coordination has to occur at *some* equilibrium; that equilibrium may favor one interested party over others. The process of IFR is replete with winners and losers, and with compliance as well. It would be truly be observing the world with blinders if one ignored all cases where legal or regulatory instruments were deployed in the service of coordination and cooperation. Indeed, one wonders if a large part of international law may be conceived of as law made in the service of enlarging pies – and whether it still might be worth considering as important and legal even for it.

B. Conclusion

But regardless of the legal implications, looking at international law through an IFR lens prompts the observer to consider just how much international law – often shorthanded as a mechanism for states to contract with one another – is comprised of coordination. International law has been quite a successful mechanism for resolving some of the cross-border externalities created by a globalizing world, with its problems of environmental degradation, economic contamination and trade and investment. Here international law, and indeed often international soft law, which takes on many international legal characteristics, coordinates outcomes among states that simply must be resolved through a variety of institutional arrangements. In environmental law, it has often been a treaty. The same goes for international trade, while for IFR, networks and soft legal institutions have been the recourse.

In each of these cases, it is impossible to imagine the existence of an international police force, or indeed that many countries would care enough about the issues presented to mobilize their own soldiers, and it is in these areas where international law has created a welter of regimes that affect what we do. While almost none of these regimes have the power to impose losses on participants, it is nonetheless the case that coordination creates losers as well as winners, as IFR exemplifies.

VI. CONTESTATION

Can a legal system claim to be a system if its rules cannot be reduced to writing? International lawyers have traditionally appeared to worry that the answer is no. The search for rules reducible to writing is one of the features of classic international legal scholarship.[67] Particularly puissant scholars might be garlanded with appointment to the International Law Commission, where they would be charged with writing international law, at least in draft form, for the states to consider adopting.[68] And Article 38(2) of the Statute of the International Court of Justice famously gives scholarly writings the same status – a secondary sources of international law – as judicial opinions.[69]

A. Ever Evolving International Governance

The traditional vision of the scholarly role is one that posits international law as reducible to

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[67] *See* Jill McC. Watson, *Briefer Notice*, 95 AM. J. INT'L L. 747 (2001) (reviewing ARTHUR WATTS, THE INTERNATIONAL LAW COMMISSION:1949-1998 (OXFORD UNIV. PRESS 1999)); George K. Walker, *Sources of International Law and the Restatement (Third), Foreign Relations Law of the United States*, 37 NAVAL L. REV. 1, 3 (1988).

[68] Michael Owen, *The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority*, 96 AM. J. INT'L L. 857, 859 (2002).

[69] Statute of the International Court of Justice art. 38(2).

rules, if one thinks it through carefully enough – a vision that may stem from the work of the natural law aficionados that founded the discipline. In the 17th century, Hugo Grotius argued that the fundamental tenets of international law could be derived from principles of justice that had a validity transcending time and context and that could be discovered through reason.[70] Grotius argued that natural law, and thus the international law which depends upon it, "would have a degree of validity even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to Him."[71]

The search for the rules of international law has accordingly been an abiding passion for legal theorists. But it also threatens to set overly precise standards for a discipline that, on account of its horizontal structure, is likely to arrive at those sorts of standards very slowly, and only after much disagreement, tentative agreement, and revisitation of the issue. As Peter Malanczuk has observed of international law: "The horizontal system of law operates in a different manner from a centralized one and is based on principles of reciprocity and consensus rather than on command, obedience, and enforcement."[72]

This is not a surprise to observers of IFR. The horizontal nature of international financial regulation means that it resembles an argument more than it does a list of rules, and reflection on the way it works suggests that the desire to fix international law principles on ratified paper should, perhaps, be tempered. After all, neither IFR nor public international law offers a monopoly on violence (which makes them different from a conventionally Weberian definition of a legal system).[73] And like IFR, public international law features ambitious claims about what the law requires, and plenty of pushback against those ambitious claims by skeptics of legal evolution – regardless of what legal scholars and the ILC identify as evolving

International financial regulators frequently appear to agree about very little. They meet and argue about the sorts of rules they would like to impose across the world's financial markets. The debates can be heated. Agreement is difficult. And when there is resolution on issues – when, say, a capital adequacy rule meets with consensus by the world's banking regulators – the issue must be revisited when the facts require, as they often do. For example, the capital adequacy accord promulgated by the Basel Committee on Banking Supervision – the signature achievement of IFR – has gone through three complete revampings, and intermediate clarifications and reconceptualizations almost too numerous to mention. Students of IFR do not think that the accord is unimportant even though it is constantly revisited – indeed, IFR is structured to make that sort of revisitation constant.

In international financial supervision, we have seen at the beginning limited work - efforts by regulators to stay in touch with one another, and to divide responsibilities over multijurisdictional financial enterprises. That was then paired with efforts to cooperate across borders – but only to assist financial regulators in carrying out their domestic responsibilities.[74] Later still came deeper and more far-reaching efforts to do things in the same way and with the same approach. The

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[70] HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES: PROLEGOMENA, in 2 THE CLASSICS OF INTERNATIONAL LAW ¶11 (Francis W. Kelsey trans., James Brown Scott ed., 1925). For a discussion, see William P. George, *Grotius, Theology, and International Law: Overcoming Textbook Bias*, 14 J.L. & RELIGION 605, 606-07 (2000).

[71] GROTIUS, *supra* note 70, at ¶11.

[72] PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW (7th ed. 1997).

[73] The concept comes from Max Weber, under which the government "upholds the claim to the monopoly of the legitimate use of physical force in the enforcement of its order." 1 MAX WEBER, ECONOMY AND SOCIETY 54 (Guenther Roth & Claus Wittich eds., 1978) (1956). For a discussion, see Benedict Sheehy, Jackson N. Maogoto, *The Private Military Company-Unraveling the Theoretical, Legal & Regulatory Mosaic*, 15 ILSA J. INT'L & COMP. L. 147, 164 (2008) ("It is the State's monopoly of violence that underpins the international legal system and justifies the emphasis on State sovereignty").

[74] An example would be IOSCO's Multilateral Memorandum of Understanding. IOSCO, MMOU, *supra* note **Error! Bookmark not defined.**.

evolving sort of cooperation was first done through core principals of financial institutional supervision (These "Principles" are quite short, broadly defined guidelines that every regulator is meant to apply to its own organization and to the regulated industry within its purview; they come in numbers of 21, 28, or occasionally as many as 40, are one of the first acts of every financial regulatory network).

In some cases, the supervision has become even more elaborately cooperative – and has resulted in the creation of complex rule systems that leave little room for domestic discretion.

Of course, progress in IFR, like its domestic counterpart and like many other international problems is periodic and sporadic, unprompted by crisis. Throughout this period, finance has constantly innovated, creating brand new markets – derivatives trading has only become a big business in the last twenty years – and getting, if anything, even more global.[75] Regulators have struggled to keep pace, and doing so has required them to constantly move the targets and goalposts of their missions.

Other international lawyers might benefit from thinking about their own bailiwicks through a paradigm of revisitation, rather than one that looks for a Restatement-like fixity of rules. International law fosters a debate about bedrock commitments more often than it might appear. It might be useful to think of public international law, like IFR, as one that resolves questions over obligation through contestation rather than through mandate.

Doing so insulates public international law from a persistent criticism – that it is often breached, without consequence to the breacher. This critique is surely true – even if states observe most of their treaty obligations most of the time,[76] in any particular time and, indeed, in particularly important times, powerful states may break their legal obligations in the interests of their national security or other national interests. Well-known American examples of this phenomenon include the airstrikes in Libya, one pursuant to an aggressive interpretation of a United Nations Security Council, and the response to the International Court of Justice's decision in the *Nicaragua Harbors* case.[77]

While some argue that occasional noncompliance by the powerful means that international law is not very relevant to the interactions of states, others recognize that all those lawyers deployed and time spent on legal instruments must amount to something. Thinking of international law in this way – as a way of debating value without expecting uniform compliance with these values – explains some of the potential of international law a bit more persuasively, and it also illuminates some of the tensions behind something that occasionally looks like a pitfall of international legal scholarship, where thoughtful academics are announcing the discovery of new favored rights, for example, rights to be free of war,[78] to be free of want,[79] or to access healthcare.[80] Better to think of this work as an effort to start a debate, rather than deriving a proof.

The point is not meant to be an overly constructivist one – constructivists argue that legal meaning is created through communities of like-minded thought, rather than from any logical

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[75] As former CFTC chair Brooksley Born observed, "[d]uring the past decade, the world derivatives markets have grown exponentially in size and importance." Brooksley Born, *International Regulatory Responses to Derivatives Crises: The Role of the U.S. Commodity Futures Trading Commission*, 21 NW. J. INT'L L. & BUS. 607, 608 (2001).

[76] As Louis Henkin has memorably observed, "[m]ost nations observe most international law most of the time." LOUIS HENKIN, HOW NATIONS BEHAVE 47 (2nd ed. 1979).

[77] *See* Katrina J. Church, *The Briar Patch of Reality: A Legal Analysis of the Mining of Nicaragua's Harbors*, 18 N.Y.U. J. INT'L L. & POL. 169 (1985-1986)).

[78] *See, e.g.* David A. Soley, *Hunt v. Galtieri: A Hypothetical Scenario for Holding International Aggressors Civilly Liable in American Courts*, 33 EMORY L.J. 211, 224 (1984).

[79] *See* Aravind R. Ganesh, *The Right to Food and Buyer Power*, 11 GERMAN L.J. 1190 (2010).

[80] *See* Puneet K. Sandhu, *A Legal Right to Health Care: What Can the United States Learn from Foreign Models of Health Rights Jurisprudence?*, 95 CAL. L. REV. 1151, 1159 (2007).

necessity; it is a sociological, arguably "soft" form of obligation that turns more on thought process than on external requirement. But this Book is not a constructivist enterprise; it recognizes that legal obligation is not always relative, and not always supported by nothing more than a bit of we-feeling among elites when it crosses borders. But recognizing the negotiated nature of a governance regime is not meant to deny that there is legal obligation present in the international system.

B. Contestation in Finance and Crime

One useful way of looking at what various parts of international law are supposed to do is to think about the fundamental question those components are meant to answer. For IFR, the institution builders and rule makers are asking, "What does a safe and sound global financial system require?" Answering that question has been a negotiated process. It is not one which reaches a terminal result but one that evolves over time – which is why the international financial system is replete with the re-evaluation of standards.

The Financial Stability Board, for example, uses peer review to check on the commitment of its members and counterparties to the coordinated outcomes meant to be created through financial regulatory cooperation.[81] Peer review exemplifies the negotiated nature of IFR because, like all other sorts of peer review, it inquires into, rather than demands allegiance to, the values of the system.[82]

In this way, there has never been a time where the question "what does a safe and sound global financial system require?" has been clearly and unanimously answered. And of course, throughout all of these evolutions in the style and degree of international governance made, regulators have pursued their own interests and the interests of the industries they oversee – indeed, many political scientists, such as David Singer and Abraham Newman, have identified this sort of state influence as being a critical component explaining the content of the rules of IFR.[83]

In sum, instead of iron rules, fixed and permanent, representing platonic ideals of sound international governance that might be fixed in print by legal scholars, financial regulation is a messy debate. But in this way it really may not be different than other kinds of more formal international laws.

One could look at perhaps the most active area of public international law over the last 20 years – international criminal law – and analyze it quite similarly. It too, has an animating question - what activities by states and individuals should be regarded as international crimes? – the answer to which is a subject of debate, even after the Rome Statute criminalized terms like "atrocities," and "aggression," and even attempted to define them.[84] But even after the treaty's conclusion,

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[81] The Board is, in conjunction with the IMF, dedicating a substantial portion of its resources to "peer review," designed to see that its member countries are making progress towards implementing the programs it has pursued internationally. These peer reviews feature self-reporting by the regulators to other members of the FSB, and are paired with, and modeled off of, the IMF's own Financial Sector Assessment Program. Jeffery Atik, *Basel II: A Post-Crisis Post-Mortem*, 19 TRANSNAT'L L. & CONTEMP. PROBS. 731, 758 (2011) (describing the IMF program). The IMF describes the purpose of the program as "a comprehensive and in-depth analysis of a country's financial sector . . . . [i]n jurisdictions with financial sectors deemed by the Fund to be systemically important, financial stability assessments . . . and are supposed to take place every five years." *Supporting Documents Country FSAPs*, INT'L MONETARY FUND (Nov. 14, 2013), http://www.imf.org/external/NP/fsap/fsap.aspx.

[82] For a discussion of peer review, see J. B. Ruhl & James Salzman, *In Defense of Regulatory Peer Review*, 38 ENVTL. L. REP. NEWS & ANALYSIS 10,553, 10,554 (2008). For criticism of the peer review process, at least as applied to the world of international trade law, see J. H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS (3d ed. 2009).

[83] *See* DAVID ANDREW SINGER, REGULATING CAPITAL: SETTING STANDARDS FOR THE INTERNATIONAL FINANCIAL SYSTEM (2007); David Bach & Abraham Newman, *Transgovernmental Cooperation and Domestic Policy Convergence: Power, Information, and the Global Quest Against Insider Trading* 36 (Am. Political Sci. Ass'n Annual Mtg., 2009) *available at* http://ssrn.com/abstract=1450395.

[84] For one account of the effort to define the term "atrocity," see William A. Schabas, *Retroactive Application of the Genocide Convention*, 4 U. ST. THOMAS J.L. & PUB. POL'Y 36, 41 (2010).

there is a great deal of negotiation about what should be beyond the pale and what should be regretfully tolerated, as hardly unprecedented state and leader conduct.

Consider the crime of aggression. First mentioned in the London Charter governing the Nuremburg trials, aggression was included a laundry list of "crimes against peace," and ever since, it has been difficult to discern where the outer bounds of such a crime lie.[85] The United Nations General Assembly adopted a resolution on the definition of aggression, one that included both a general definition and a list of examples of aggression crimes, in 1974.[86] The general definition provided that:

> Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations[87]

The specifics include blockades, airstrikes, and more capacious and arguable provisions such as "allowing [] territory … to be used by [another] State for perpetrating an act of aggression against a third," or "substantial involvement" in the "sending" of "armed bands."[88] The resolution has unsurprisingly been criticized ever since as "both too narrow and too broad."[89]

International criminal lawyers hoped that the meaning of the international crime would be settled by the international process that defined international criminal law and created a tribunal to interpret and enforce it. But, while the Rome Statute listed the crime of aggression as a cause of action over which the ICC would have jurisdiction, it was not until 2010 that the meaning of the term "aggression" was defined.[90] Then, at a Rome Statute review conference held in Uganda, the parties to the statute, after years of debate and negotiation, settled – after a fashion – on a definition.[91] Article 8 bis defines the crime of aggression as, among other things, "the planning, preparation and initiation or execution, by a person in a position effectively to exercise control over or to direct a political or military activity of a state, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the charter of the United Nations."[92] The article also includes a laundry list of activities that do qualify, ranging from invasion to infiltration.

In this way, although international criminal law is both at the heart and at the cutting edge of public international law, the parallels between its form of governance and that of international financial regulation are striking even as the provenance of their legality differentiates them. Aggression remains one of the least defined and most debated aspects of international criminal law, and while this Chapter is not the place to try to sort out what, precisely, aggression is or should be, its indeterminateness is one of its features, and is one of the reasons why the development of international criminal law provokes support (because of the idea that it can potentially evolve), and opposition (for the same reason). And if that is the case, it underscores the parallels between the negotiated and debated nature of informal international regulation like IFR and the much more formal public international law represented by the Rome Statute and its court.

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[85] Charter of the International Military Tribunal – Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis ("London Agreement"), art. 6(a), Aug. 8, 1945, *available at* http://www.unhcr.org/refworld/docid/3ae6b39614.html (last visited Jan. 16, 2014). The charter governing the Tokyo trials of Japanese leaders contained a very similar laundry list.

[86] G.A. Res. 3314 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 19, U.N. Doc. A/Res/3314 (XXIX) (Dec. 14, 1974).

[87] *Id.* art. 1.

[88] *Id.* art 3.

[89] VALERIE EPPS & LORIE GRAHAM, EXAMPLES AND EXPLANATIONS: INTERNATIONAL LAW § 11.2.4 (2011).

[90] David Scheffer, *Atrocity Crimes Framing the Responsibility to Protect*, 40 CASE W. RES. J. INT'L L. 111, 113 (2008).

[91] For a discussion, see Claus Kress, *The Kampala Compromise on the Crime of Aggression*, 8 J. INT'L CRIM. JUST. 1179, 1183 (2010).

[92] Int'l Criminal Court, Assembly of States Parties, Resumed Seventh Session Feb. 9-13, 2009, Annex I, Report of the Special Working Group on the Crime of Aggression, at 11, art. 8 *bis*, ¶ 1, ICC-ASP/7/SWGCA/2 (Feb. 20, 2009).

Just as with financial regulation, state interest goes into this negotiation and despite the creation of dispute resolution processes and tribunals, much of what international criminal law is also turns on its own stylized process of peer review, whereby multiple states act in judgment of the delicts committed by their peer states in the dock. The similarities go on from there – just as IFR is developed through financial crises, the mechanisms of criminal law have been prompted by atrocities.

The International Criminal Tribunal For Yugoslavia handled a different set of war crimes cases than did the International Criminal Tribunal for Rwanda, with the ICTY focusing more on leaders, and the ICTR on mid-level participants in the hostilities.[93]

Nor need the nature of the debates in IFR or in international criminal law look like an unrealistically pious search for truth. In both cases, of course, state interest play important roles in determining content and participation. The United States has stayed out of the ICC because it worries about the consequences for its soldiers posted abroad.[94] American regulators, along with their British counterparts, first pursued a capital adequacy agreement in IFR because the American and British banking industries were worried that they would be unable to compete with large Japanese banks. No one would suggest that, simply because IFR and international law work through contestation and disagreement that self-interest is abandoned. Indeed, self-interest explains why the dialogue is constant and the disagreements often sharp.

Moreover, the contestation is underscored by the consensus orientation of both IFR and international law more generally. The constant undercurrent of debate and revisitation is encouraged by the need to convince everyone, most of the time is a feature of both IFR and international law. For IFR, the taste appears to be driven by the desire for harmonization, the need to motivate domestic agencies to want such harmonization, and the inclination to ensure a buy-in. International law's preference for consensus is presumably rooted in its (not always explicable) commitment to the idea of sovereign equality of nations, the idea that Vanuatu and China are functionally similar in the eyes of the law. In both cases, the taste for consensus is driven by the horizontal nature of global governance.

Rather than being something set in stone, IFR is a debate about values and interests in the service of finding an answer to a question about safe and sound finance. But an argument over an answer is not so different than the way that more formal variants of international law often work. The insight is not meant to be fundamental rethinking of what international law is all about. Instead, it aims merely to remind legal scholars that despite the predilection in doctrinal analysis, and particularly in the doctrinal analysis of insecure international lawyers, precision and reduction to writing have often been favored but really international governance happens through imprecision and constant revisiting of writing. International lawyers would do well to remember this and international financial regulation has taken it to an art form.

VII. CONCLUSION

Because of the importance of coordination, contestation, and domestic institutions, international law looks very like international financial regulation. The comparison underscores the horizontal nature of international legal obligation, and emphasizes the way that soft law, in the

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[93] Morten Bergsmo, Catherine Cissé, & Christopher Staker, *The Prosecutors of the International Tribunals: The Cases of the Nuremberg and Tokyo Tribunals, the ICTY and ICTR, and the ICC Compared*, *in* THE PROSECUTOR OF A PERMANENT INTERNATIONAL CRIMINAL COURT 121 (1999).

[94] Or so, at least, has been the conclusion of Congress, which passed the Servicemember's Protection Act for this reason. *See* Lilian V. Faulhaber, *American Servicemembers' Protection Act of 2002*, 40 HARV. J. ON LEGIS. 537 (2003).

international system, has more similarities to hard law than one might expect, given that the concepts were conceived as opposites.[95] These insights are the kind still ignored by leading textbooks of international law. But they have not always been. The New Haven School argued that international law was more than doctrine, and should better be understood as a process of authoritative decisionmaking. Myres McDougal and Harold Lasswell, the founders of the school, wrote that "our chief interest is in the legal process, by which we mean the making of authoritative and controlling decisions."[96] And their disciples agreed. "[I]nternational law is most realistically observed, not as a mere rigid set of rules but as the whole process of authoritative decision in which patterns of authority and patterns of control are appropriately conjoined," argued Eisuke Suzuki.[97] No less an authority than World Court judge Rosalyn Higgins agreed that "international law is a process, a system of authoritative decision-making, . . . a process for resolving problems."[98]

It is an attractive approach to international law – rather than seeking doctrine where the doctrine is necessarily contested (and always has been, when it comes to international law), the New Haven school sensibly inquired who would be the organs making decision seen as legally required. It is through attention to the process of how policy preferences get transformed into legal obligation that the surprising similarities between IFR and international law become clearer. And by the same token, it is the process of transforming international policy to domestic regulation that illustrates the critical role of sub-state actors in making international law, in either its hard or soft variants, any sort of law at all. The process of coordination around a mutually beneficial standard is also a turn to process, rather than content. The continual debate and revision of principles, too, is a function of process, rather than any particular piece of substantive regulation.

The New Haven School has largely been forgotten because of its inability to pick from far too many methods of investigating the international system. Its explicitly utopian streak did it little good. But process need not be interrogated with a value system favoring world peace at its forefront. However, it must not be forgotten in international law, even though international legal procedure is fuzzy, varied, and often, quite ad hoc. But it is similarities in process that animates each of the three lessons IFR has for public international law considered in this Chapter. Those

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[95] For other works, along this line, see Gidon Gottlieb, *The Nature of International Law: Toward a Second Concept of Law*, in 4 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 331 (Cyril E. Black & Richard A. Falk eds., 1972); OLIVER J. LISSITZYN, THE INTERNATIONAL COURT OF JUSTICE 5-6 (1951); *cf.* Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L.J. 2277, 2280 (1991) ("the distinction between horizontal and vertical interpretations of international law is already implicit in the case law. In this sense, the horizontal/vertical distinction is old wine in new bottles."); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 545 (2001) (noting that "in most areas of the law, states have obligations without either the possibility or probability that they might be called before an international court").

[96] MYRES MCDOUGAL ET AL., STUDIES IN WORLD PUBLIC ORDER (1987); MYRES S. MCDOUGAL & W. MICHAEL REISMAN, INTERNATIONAL LAW IN POLICY-ORIENTED PERSPECTIVE, IN THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY, DOCTRINE AND THEORY 103 (Robert Macdonald ed., 1983); G. L. Dorsey, *The McDougal Laswell Proposal to Build a World Public Order*, 82 AM. J. INT'L L. 41 (1998); Myres S. McDougal, *International Law, Power and Policy: A Contemporary Conception*, 82 RECUEIL DES COURS 137, 157 (1953); *see also* David Kennedy, *My Talk at the ASIL: What is New Thinking in International Law?*, 94 AM. SOC'Y OF INT'L L. 104 (2000).

[97] Eisuke Suzuki, *The New Haven School of International Law: An Invitation to a Policy-Oriented Jurisprudence*, 1 YALE J. WORLD PUB. ORD. 1, 30 (1974); *see also* John Norton Moore, *Prolegomenon to the Jurisprudence of Myres McDougal and Harold Lasswell*, 54 VA. L. REV. 662, 667 (1968) ("[T]he most useful conception of law is a broad one encompassing the entire process by which judges, legislators, litigants and many others pursue particular values through the whole panoply of authoritative community decision-making.").

[98] ROSALYN HIGGINS, PROBLEMS AND PROCESS 267 (1994); *see also* Harold Hongju Koh, *Is There A "New" New Haven School of International Law?*, 32 YALE J. INT'L L. 559, 573 (2007)

> (The New Haven school does not describe the world's different community decision processes through a dichotomy of national and international law, in terms of the relative supremacy of one system of rules or other interrelations of rules. Instead, it describes them in terms of the interpenetration of multiple processes of authoritative decision of varying territorial compass.)

similarities are real, enlightening, and are, far too often, ignored. It is time to consider them anew, and, at the same time, put new efforts into research into the new international legal process, both hard and soft.