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Transnational Regulatory Networks and Their Limits

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I. INTRODUCTION

Since the end of World War II, ambitious institutions and regimes have emerged to regulate international economic life. The General Agreement on Tariffs and Trade (GATT) provided multilateral legal guidelines for governing trade restraints; the World Trade Organization (WTO), as the new incarnation of the GATT's original institutions, has extended its jurisdiction to encompass intellectual property and services.¹ The International Monetary Fund (IMF) initially wielded extensive authority over the international monetary system and, though its mission has been in flux since the 1970s, retains a leading role in the international financial system.² Alongside these global regimes, numerous regional and bilateral treaties pursue greater trade liberalization and investment protection. Other treaty regimes control trade in specific goods such as nuclear materials, weapons, and cultural property.

Despite these developments, economic regulation in crucial areas such as competition, securities, and banking remains first and foremost a domestic phenomenon. The first major attempt to set up a global competition regime failed in 1947 with the Havana Charter, as have periodic attempts to resuscitate the idea.³ Transnational securities transactions are subject to overlapping and sometimes contradictory national laws. Likewise, national regulators, not global authorities, supervise internationally active banks. In the absence of international treaties and institutions, national regulators have created informal networks to exchange ideas, coordinate their enforcement efforts, and negotiate common standards. Thus, the Basel Committee on Banking Supervision promotes cooperation in bank regulation and supervision; the International Organization of Securities Commissions (IOSCO) coordinates international securities regulation and enforcement; and the International Competition Network (ICN) fosters policy convergence among antitrust authorities.

In recent years, scholars of global governance have devoted substantial attention to the promise and perils of these transnational (or transgovernmental) regulatory networks (TRNs).⁴ In its most ambitious form, the theory of regulatory networks claims that TRNs illustrate a pivotal

1. See Multilateral Agreements on Trade in Goods, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 1867 U.N.T.S. 187, 33 I.L.M. 1125, 1154; General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Legal Instruments—Results of the Uruguay Round, 1869 U.N.T.S. 183, 33 I.L.M. 1125, 1167; Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 1869 U.N.T.S. 299, 33 I.L.M. 1125, 1197; General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

2. See generally ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 529-63 (2002) (discussing the role of the IMF in the global financial system).

3. See MICHAEL J. TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 593 (3d ed. 2005).

4. See ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004). Other influential contributions to the literature on TRNs include Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1 (2002), and David Zaring, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*, 33 TEX. INT'L L.J. 281 (1998).

contemporary phenomenon: the disaggregation of the state in the conduct of its international relations. In this view, individual government agencies and actors negotiate directly with their foreign counterparts and reach informal understandings relating to their areas of responsibility. Their expertise and insulation from domestic political pressures allows them to solve problems that traditional international organizations cannot adequately address. In the strongest normative account of TRNs to date, Anne-Marie Slaughter argues that TRNs can solve what she describes as the “globalization paradox.” On the one hand, TRNs effectively address global problems that individual governments cannot tackle alone. On the other hand, because TRNs are decentralized, dispersed, and involve participants that are domestically accountable, they do not pose the kinds of threats to democracy, freedom, or national sovereignty that make world government undesirable.⁵ While advocates of TRNs acknowledge some of their drawbacks—such as limited democratic accountability and imperfect global representation—they claim that these deficiencies can be alleviated through relatively modest reforms, such as broader membership and links with global civil society.⁶

This Article advocates for a more cautious approach to the TRN phenomenon. Based on a theoretical and empirical analysis of TRNs, it argues that they face several fundamental limitations that have not been fully taken into account by previous scholarship and, as a result, are unlikely to meet the high expectations raised by their advocates. These limitations cannot easily be alleviated because they arise from the very features—domestic accountability and informality—that make TRNs normatively attractive in the first place.

First, domestic constraints on the autonomy of regulators, while ensuring some degree of accountability, cast doubt on the purported insulation of the regulators from the domestic political pressures that make formal international agreements difficult to reach. Instead, this Article argues, national regulators are tied to domestic constituencies by incentives and accountability structures that are much stronger than their links to any “hypothetical global polity.”⁷ As a result, national regulators acting in TRNs are not free to pursue optimal global public policy for its own sake. Instead, one should expect that their positions will be shaped by the preferences of domestic constituencies.

Second, while some of the international regulatory issues faced by TRNs involve coordinating standards and procedures in ways that are beneficial to all states and create no incentives to defect, many do not lend themselves to uncontroversial technical solutions. Instead, international regulatory cooperation often raises significant conflicts over the distributive consequences of new standards, as the costs and benefits of alternative proposals fall on different states. Once adopted, TRN standards also frequently face enforcement problems, as states are tempted to defect from the cooperative solution under pressure from domestic constituencies.

Finally, TRNs are institutionally ill equipped to resolve these conflicts. In order to solve distributive conflicts, international negotiations must involve

5. See SLAUGHTER, *supra* note 4, at 8-10.

6. See *id.* ch. 6.

7. *Id.* at 29.

concessions and tradeoffs across issue-areas and, in some cases, threats and other manifestations of relative power. These tasks are not easily entrusted to regulatory agencies, and are at odds with the supposedly apolitical nature of the TRN process. In addition, the informal and nonbinding nature of the rules adopted by TRNs, and their incapacity to monitor or enforce them, limits their effectiveness in circumstances where states have incentives to defect.

This Article considers these limitations through detailed case studies of three TRNs—the Basel Committee, IOSCO, and the ICN—that are widely regarded as successful, making them *prima facie* cases favorable to Slaughter's theory. Importantly, it does not argue that these limitations are unique to TRNs, or that specific alternatives such as formal international institutions, regional or bilateral arrangements, "bottom-up" international lawmaking,⁸ or unilateral regulatory action by powerful states are always preferable. The limitations of these other mechanisms have been extensively studied and, in some cases, they parallel those of TRNs. What this Article argues, however, is that current evidence regarding the effectiveness of TRNs is insufficient to support strong normative claims regarding their transformational impact on global governance. In particular, it questions the idea that TRNs represent a "third way" through which effective global regulation can emerge without the drawbacks of formal institutions or government procedures. It also explores the possibility that TRNs might promote regulatory convergence through social processes of networking, persuasion, and acculturation, but concludes that the evidence available is insufficient to support this hypothesis. Hence, the intent of this piece is not to argue against TRNs *per se*, but to pave the way for a more realistic assessment of their strengths and weaknesses, and to more clearly illustrate their legitimate, if intrinsically limited, role in the constellation of mechanisms that make up the emerging global governance system.

Part II of this Article reviews the main characteristics of TRNs and the normative claims made by their advocates. Section III.A describes the multiple domestic legal and political constraints faced by national regulators when participating in TRNs. Section III.B then draws on international relations theory to characterize the international regulatory problems faced by TRNs and identify potential limitations on their effectiveness. In particular, it argues that TRNs are ill equipped to address distributive problems, where states share common objectives but would prefer different solutions; and enforcement problems, where individual states can gain by defecting from the cooperative solution after it is adopted. Section III.C concludes this Article's theoretical treatment by describing its main hypotheses and the two-step analytical framework that will guide the following case studies.

Part IV illustrates the limitations of TRNs through three case studies of major TRN initiatives. First, an analysis of the global capital standards adopted by the Basel Committee reveals the substantial role of domestic pressures and relative power relations in the initial negotiations, and the failure of the network to prevent substantial inconsistencies in national

8. See Janet Koven Levit, *A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 YALE J. INT'L L. 125 (2005).

implementation. The objective of creating a level playing field in international banking has not been achieved, a situation unlikely to be improved by the recent Basel II standards. Second, while regulators in developed countries have successfully coordinated securities law enforcement under the auspices of the IOSCO, this coordination was made possible by the prevalence of shared interests among them and is limited to procedural rules. In contrast, developed states resorted to coercive tactics to secure cooperation against fraud by offshore financial centers, whose interests favored laxer laws and less transparency. Other initiatives by IOSCO, such as its failed effort to establish global capital standards for securities firms, point to the limits of informal cooperation when domestic interests clash. Finally, while it is too early to assess the success of the ICN's initiatives to promote substantive convergence in antitrust, this new initiative takes place in an international regulatory environment still deeply shaped by the unilateral policymaking of the United States and the European Union.

Part V describes how the three case studies described above are consistent with the theoretical framework elaborated in Part III, and discusses the implications of these findings for the ongoing debate over TRNs. It examines hypotheses based on market forces and sociological theory that attempt to explain how rules adopted by TRNs may be effective despite conflicts with domestic preferences, but finds them insufficient to support normative claims about TRNs. However, it also reviews the international relations literature on "soft law" and finds that, with some qualifications, it provides a useful starting point for a rationalist account of TRNs. Finally, it sounds a cautionary note regarding current proposals for more formal administrative procedures to govern TRN rulemaking, and the implications of public choice theory for the effectiveness and desirability of TRNs. In conclusion, the Article finds that, while TRNs are a useful means of regulatory policy coordination in certain circumstances, the more ambitious normative claims regarding their impact on global governance are exaggerated. What is needed, it argues, is theoretical and empirical analysis of TRNs that is sensitive to the political aspects of international regulatory cooperation.

II. THE RISE OF REGULATORY NETWORKS

A. *What Are Regulatory Networks?*

The emergence of several major cooperative initiatives among national regulators began engaging the attention of international law scholars in the 1990s.⁹ The Basel Committee had successfully adopted an international accord on bank capital adequacy in 1988, and efforts were underway to strengthen the rulemaking activity of IOSCO and the International Association of Insurance Supervisors (IAIS).¹⁰ Networks of environmental

9. The theory of TRNs finds its intellectual roots in the "transgovernmental relations" approach pioneered by political scientists Robert Keohane and Joseph Nye in the 1970s. *See, e.g.*, ROBERT O. KEOHANE & JOSEPH S. NYE, POWER AND INTERDEPENDENCE: WORLD POLITICS IN TRANSITION (1977); Robert O. Keohane & Joseph S. Nye, *Transgovernmental Relations and International Organizations*, 27 WORLD POL. 39 (1974).

10. *See, e.g.*, Raustiala, *supra* note 4, at 31-35 (discussing IOSCO); Zaring, *supra* note 4

and antitrust regulators were also cited to illustrate an emerging global trend toward soft law and informal regulatory cooperation.¹¹ Early commentators expressed concern that these initiatives evidenced a shift toward disaggregated global governance by experts acting outside the constraints of domestic political structures and the normal foreign affairs process.¹²

Scholars such as Kal Raustiala and David Zaring eventually proposed more detailed accounts of TRNs that identify several important networks and their principal characteristics and purposes.¹³ According to their accounts, TRN members are not states but national regulatory agencies, and TRNs have no international legal personality or status beyond that conferred on their organization under the national law of their host country.¹⁴ TRNs tend to operate by consensus without formal voting procedures; their membership is selective; and despite recent efforts at greater transparency, many of their important meetings and negotiations are kept secret until the resulting document is released.¹⁵ Most importantly, the guidelines and other documents they promulgate have no international legal status, meaning that they do not create international legal obligations and do not require the same cumbersome domestic ratification procedures as treaties. Finally, the networks do not formally monitor the implementation of their decisions or provide dispute-resolution procedures.¹⁶

No doubt because of the variety of TRNs and their disparate structures, there is not one consistent definition of TRNs in the literature.¹⁷ Nevertheless, for purposes of this Article, the following tentative definition usefully describes the phenomenon: TRNs are informal multilateral forums that bring together representatives from national regulatory agencies or departments to facilitate multilateral cooperation on issues of mutual interest within the authority of the participants. This definition distinguishes TRNs from formal treaty-based international organizations, such as the WTO, IMF, World Bank, and European Union, as well as from regulatory forums intended to facilitate the development and implementation of binding international law instruments, such as the multiple networks of national regulators that assist the European

(describing these three networks).

11. See, e.g., Anu Piilola, *Assessing Theories of Global Governance: A Case Study of International Antitrust Regulation*, 39 STAN. J. INT'L L. 207 (2003); Raustiala, *supra* note 4, at 43-49.

12. See Philip Alston, *The Myopia of the Handmaidens: International Lawyers and Globalization*, 8 EUR. J. INT'L L. 435 (1997); David Kennedy, *The Politics of the Invisible College: International Governance and the Politics of Expertise*, 5 EUR. HUM. RTS. L. REV. 463 (2001); Sol Picciotto, *Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-Liberalism*, 17 NW. J. INT'L L. & BUS. 1014 (1996-97).

13. See Raustiala, *supra* note 4; Zaring, *supra* note 4; see also SLAUGHTER, *supra* note 4, at 48; David Zaring, *Informal Procedure, Hard and Soft*, in *International Administration*, 5 CHI. J. INT'L L. 547, 569-72 (2005) (discussing common characteristics of TRNs).

14. See Zaring, *supra* note 4, at 301-02.

15. *Id.* at 303.

16. *Id.* at 303-04.

17. Slaughter defines a network as "a pattern of regular and purposive relations among like government units working across the borders that divide countries from one another and that demarcate the 'domestic' from the 'international' sphere." SLAUGHTER, *supra* note 4, at 14. Importantly, Slaughter's very broad definition encompasses not only networks of regulators, but also networks of judges and legislators. My argument is limited to Slaughter's examination of *regulatory* networks and whether it supports her general theory of global network governance.

Union in its regulation of financial services.¹⁸ It also excludes purely bilateral arrangements, such as mutual recognition and cooperation agreements between the U.S. Securities and Exchange Commission (SEC) and individual foreign securities regulators, and high-level networks of heads of state or government or cabinet-level officials, such as the G-7 or the British Commonwealth. Finally, while this definition does not exclude networks in which nongovernmental actors participate in an advisory capacity, it assumes that government participants retain the authority to approve and implement the resulting regulatory decisions or standards.

In addition to their descriptive work, Raustiala and Zaring develop tentative functionalist accounts of the emergence of TRNs in world affairs. Raustiala argues that the disaggregation of the state through direct international cooperation among national regulatory agencies was a logical response to changes in the regulatory environment brought about by technological innovation, the expansion of domestic regulation, and economic globalization.¹⁹ Zaring also gives a largely positive account of TRNs, while noting the concern that regulators might use networks to free themselves from domestic constraints and pursue self-regarding aims.²⁰

B. *Networks and Global Governance*

This earlier work has given way more recently to an ambitious normative defense of TRNs as a privileged instrument of global governance. Thus, in *A New World Order*, Anne-Marie Slaughter argues that TRNs can solve what she describes as the “globalization paradox.”²¹ On the one hand, globalization creates collective problems—global markets, weapons of mass destruction, environmental threats—that “can only be addressed on a global scale.”²² On the other, world government is “both infeasible and undesirable,” as it would not only fail to provide meaningful democratic representation but could also ultimately threaten individual freedoms.²³ This paradox threatens to leave the world without effective institutional mechanisms to address a host of transnational problems, except at the price of sacrificing democratic accountability.

Slaughter argues that TRNs solve this paradox. Unlike formal international institutions that are often paralyzed by politics, TRNs have the advantages of speed, flexibility, and inclusiveness, and the capacity to dedicate sustained attention to complex regulatory problems.²⁴ Once TRNs adopt rules, the domestic implementation efforts by national regulators lend them “hard power” and make them effective.²⁵ Therefore, TRNs can

18. Thus, the scope of this Article is limited to what Slaughter dubs “horizontal networks” of regulators from different countries cooperating across borders, in contrast with “vertical networks” involving the implementation of formal international legal rules. SLAUGHTER, *supra* note 4, at 19-22.

19. See Raustiala, *supra* note 4, at 10-16. In a later article, Raustiala develops a theoretical account of international soft law that also has implications for TRNs. See *infra* Section V.C.

20. See Zaring, *supra* note 4, at 326-27.

21. SLAUGHTER, *supra* note 4, at 8.

22. *Id.*

23. *Id.*

24. *Id.* at 167; see also Raustiala, *supra* note 4, at 24-26.

25. SLAUGHTER, *supra* note 4, at 168-69, 185.

effectively address many of the collective problems caused by globalization. However, because they are "decentralized and dispersed, incapable of exercising centralized coercive authority," they do not raise the same democratic concerns as a centralized world government.²⁶ Moreover, because their members are government actors, TRNs are ultimately accountable to their constituencies. From the standpoint of democratic theory, they are clearly preferable to amorphous and unaccountable "global policy networks" that bring together governments and private actors such as corporations and nongovernmental organizations (NGOs).²⁷

TRNs, in sum, solve the "globalization paradox" because they "expand[] our global governance capacity without centralizing policy-making power."²⁸ It is no surprise, according to Slaughter, that regulatory networks have proliferated in recent years. Beyond striving toward policy convergence in their respective domains, they also play an important role in producing and disseminating information relevant to policymaking and providing a framework for enforcement cooperation.²⁹ More generally, TRNs promote repeated interaction among national regulators, creating patterns of shared expectations and trust that facilitate future cooperation.³⁰ This, however, is not enough: Slaughter goes well beyond the detached functionalist account of TRNs and unreservedly advocates their active development. TRNs, in her view, are "a key feature of world order in the twenty-first century, but they are underappreciated, undersupported, and underused to address the central problems of global governance."³¹ Instead, she claims, they should be "embraced" as "the architecture of a new world order."³² Slaughter's scholarship on TRNs has proven very influential. Several scholars working on international regulatory cooperation have drawn extensively on her theoretical framework, although they do not uniformly accept its normative claim.³³

C. *Three Limitations of Network Scholarship*

While the existing literature on TRNs adequately identifies the phenomenon and many of its potential benefits and concerns, developing a systematic account that synthesizes these findings and incorporates them within a normative vision of global governance has proven challenging. This

26. *Id.* at 11.

27. *Id.* at 9-10. On global policy networks, see generally WOLFGANG REINICKE, *GLOBAL PUBLIC POLICY: GOVERNING WITHOUT GOVERNMENT?* (1998).

28. SLAUGHTER, *supra* note 4, at 167; *see also* Raustiala, *supra* note 4, at 51.

29. *See* SLAUGHTER, *supra* note 4, at 51-61.

30. *Id.* at 3.

31. *Id.* at 1.

32. *Id.* at 213.

33. *See, e.g.,* Francesca Bignami, *Transgovernmental Networks vs. Democracy: The Case of the European Information Privacy Network*, 26 MICH. J. INT'L L. 807 (2005); Patrick X. Delaney, *Transnational Corruption: Regulation Across Borders*, 47 VA. J. INT'L L. 413 (2007); Imelda Maher, *Competition Law in the International Domain: Networks as a New Form of Governance*, 29 J.L. & SOC'Y 111 (2002); Piilola, *supra* note 11; Jenia Iontcheva Turner, *Transnational Networks and International Criminal Justice*, 105 MICH. L. REV. 985 (2007); Charles K. Whitehead, *What's Your Sign?—International Norms, Signals, and Compliance*, 27 MICH. J. INT'L L. 695 (2006); Christopher A. Whytock, *A Rational Design Theory of Transgovernmentalism: The Case of E.U.-U.S. Merger Review Cooperation*, 23 B.U. INT'L L.J. 1 (2005).

Article argues that Slaughter's attempt to develop such an account suffers from three limitations that are symptomatic of important blind spots in TRN scholarship more generally.

First, the claim that networks of government actors are intrinsically more accountable than broader policy networks, while probably accurate, inevitably clashes with the idea that TRNs can consistently act in the interest of a "hypothetical global polity."³⁴ The issue is not merely whether TRNs are "accountable" in some abstract sense, but to whom they are accountable. What is meant, presumably, is that the domestic legal and political mechanisms that normally hold national regulators accountable to their constituencies continue to apply when regulators participate in TRNs. This hypothesis, however, raises the question whether these mechanisms, which are designed to control domestic regulation, operate as intended in the context of international regulatory cooperation. Even if they do, it is crucial to realize that they inevitably anchor national regulators to the demands of domestic constituencies rather than to the goal of international cooperation for its own sake. Thus, understanding international regulatory cooperation in TRNs requires an examination of how domestic preferences shape the positions of national regulators on specific issues.³⁵

Second, if, as noted above, the accountability mechanisms that shape the behavior of national regulators bind them to domestic interests, then the outcome of TRN initiatives will turn on the strategic interaction among participating states. If most international regulatory problems faced by TRNs involved simple coordination games—setting neutral "rules of the road" for transnational economic activity—this would be a relatively simple matter. There is little reason, however, to assume that this is the case. If, on the contrary, international regulatory cooperation involves distributive and enforcement problems, prevailing domestic interests in different states may clash over alternative rules, attempt to resist or dilute international standards, and resist compliance. The existing scholarship, however, systematically downplays conflicts of interests among states within TRNs. While there is a substantial international relations literature on the ways in which states can structure international agreements and institutions to overcome distributive and enforcement problems, the networks literature does not draw substantially on this scholarship to assess whether and how TRNs can produce effective cooperation when faced with these more contentious regulatory issues.

Third, while the existing scholarship identifies several prominent TRNs and provides detailed and generally optimistic accounts of their activities, it glosses over notable difficulties. Little attention is given to evidence that TRNs sometimes fail to address well-known international regulatory problems, and have been mired in persistent disagreement over proposed rules.

34. SLAUGHTER, *supra* note 4, at 29.

35. See Rachel Brewster, *The Domestic Origins of International Agreements*, 44 VA. J. INT'L L. 501 (2004). One very important point that is often neglected both in the TRN literature and in the rationalist literature on international cooperation is that state preferences may be configured in such a way as to make cooperation unprofitable for all, in which case it will not occur, no matter what international mechanisms are in place. See DANIEL W. DREZNER, *ALL POLITICS IS GLOBAL: EXPLAINING INTERNATIONAL REGULATORY REGIMES* 24 (2007).

Discussion of the use of TRNs as instruments of powerful states to impose their preferred standards, or the failure of networks to prevent noncompliance with their standards, is limited. An examination of these problems is essential to a balanced account of TRNs and the conditions under which they are likely to be effective. Indeed, much of the discussion of actual TRN activity is descriptive: regulators established a network, discussed regulatory policies, and issued statements.³⁶ As Kenneth Anderson points out, however, we cannot assume that this means these networks have been successful, because “unfortunately this is also precisely the procedure followed when networks create *unsuccessful* outcomes.”³⁷ A meaningful debate over the promise and perils of TRNs cannot proceed much further without some evaluation of their effectiveness in solving concrete international regulatory problems, one that takes into account failures as well as successes.³⁸

III. NETWORKS AND INTERNATIONAL REGULATORY COOPERATION: CONSTRAINTS AND CHALLENGES

This Part attempts to address the first two limitations of network scholarship described above. It does so by drawing on international relations theory to define the concept of international regulatory cooperation and to explain the challenges posed by distributive and enforcement problems in international regulatory matters. Moreover, it describes the multifaceted domestic constraints, both legal and political, that bind national regulators to the demands of domestic constituencies and argues that these constraints, along with other distinctive characteristics of TRNs, impair the effectiveness of TRNs to address distributive and enforcement problems. Finally, this Part synthesizes these two arguments into a concise theoretical framework to guide the three case studies presented in Part IV.

A. *International Regulatory Cooperation*

Robert Keohane states that “intergovernmental cooperation takes place when the policies actually followed by one government are regarded by its partners as facilitating realization of their own objectives, as the result of a process of policy coordination.”³⁹ This broad definition encompasses phenomena as diverse as states allying against a common threat, choosing uniform telecommunications protocols, and harmonizing their business laws.

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

37. *Id.* at 1278 (emphasis in original).

38. This is not to say that network theorists have given no thought to these issues. Raustiala, for instance, recognizes that there are limits to network cooperation: “while networks can do much, they cannot, given their informal and flexible nature, achieve everything that regulators might desire or even what a strong multilateral agreement could.” Raustiala, *supra* note 4, at 50. This recognition, however, takes the form of general disclaimers rather than a substantive exploration of the kind of factors cited above.

39. ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* 51-52 (1984) (emphasis removed); see also DREZNER, *supra* note 35, at 11 (defining “regulatory coordination” as “the codified adjustment of national standards in order to recognize or accommodate regulatory frameworks from other countries”).

In each of these areas, one may find a range of possible configurations of state capabilities and interests that make it more or less difficult to achieve international cooperation. These obstacles are most visible in dramatic areas of “high politics,” such as nuclear deterrence, arms control, or alliance formation. They are, however, no less present in more technical fields such as banking, securities law, and antitrust.

At one end of the spectrum are so-called “pure coordination games,” in which states share a common interest in coordinating their actions. The classic example is driving rules. Individual states may require automobile drivers to drive on the right or left side of the road. Assuming that no state has made preexisting investments in infrastructure, each state is indifferent between the two rules. All states, however, share an interest in agreeing on a common rule.⁴⁰ One important feature of pure coordination games is that the optimal outcome is self-sustaining—that is, once coordination is achieved, states lack incentives to deviate from the rule. As a result, coordination does not generally require extensive monitoring and enforcement mechanisms but can be achieved through simple agreement.⁴¹ The agreement need not be binding at international law, as long as it provides a “focal point” for states to anticipate each other’s actions. Thus pure coordination problems seem particularly amenable to resolution through informal, nonbinding mechanisms such as regulatory networks.

This kind of situation is not uncommon in the international regulatory context. Consider the case of a transnational cartel involving enterprises located in two states. The cartel is illegal in both states and, in fact, each state would benefit from eliminating it because it imposes net social costs on its residents.⁴² In the absence of cooperation among regulatory authorities, however, the cartel members can arrange their affairs so that they cannot be effectively investigated and prosecuted. Some of the witnesses and evidence may be located in each state, with neither state having enough to form a complete picture of the conspiracy. The conspirators may respond to enforcement action in one state by moving some of their activities or evidence to the other. Even if a prosecution succeeds in one state, that state’s judgments in antitrust matters may not be enforceable in the other’s courts. In such a case, each state clearly benefits from coordinating its enforcement procedures with the other. They may, for example, adopt agreements providing for mutual assistance in obtaining evidence and compelling witnesses, require consultations between prosecutors to coordinate the timing of their

40. The pure coordination game is illustrated by the following payoff matrix:

		State B	
		Left	Right
State A	Left	1,1	0,0
	Right	0,0	1,1

Figure 1: Pure Coordination Game

41. See Arthur A. Stein, *Coordination and Cooperation: Regimes in an Anarchic World*, in INTERNATIONAL REGIMES 115, 125 (Stephen D. Krasner ed., 1983).

42. That is, it increases the prices charged to consumers in each state sufficiently to outweigh any benefits accruing to producers in that state.

investigations, and guarantee recognition of judgments rendered by the other's courts. Once the agreements are adopted, prosecutors will be able to rely on them to fight transnational cartels.

As will be seen below, one would expect TRNs to be successful in achieving this kind of procedural coordination of enforcement efforts. There are, however, two important categories of problems that may hinder international cooperation efforts and that are not captured by the pure coordination game: distributive problems and enforcement problems.

Distributive problems arise when "there are multiple self-enforcing agreements or outcomes that two or more parties would all prefer to no agreement, but the parties disagree in their ranking of the mutually preferable agreements."⁴³ In game theory, this situation is often illustrated by the so-called "Battle of the Sexes," wherein a husband and wife have to choose between attending a boxing match or the ballet. In line with time-honored stereotypes, the husband prefers the former, the wife the latter. Crucially, however, both would prefer attending the same event together to attending his or her preferred event alone.⁴⁴

In the regulatory context, distributive problems frequently arise when states attempt to harmonize their domestic rules to a global standard, because states often have divergent preferences regarding what the global standard should be. To build on the preceding example, suppose that states wished to go beyond coordinating their antitrust enforcement procedures and harmonize all or part of their substantive laws. This might involve adopting common rules and definitions to determine under what conditions certain controversial competitive practices—for instance, agreements between manufacturers and their distributors to set a single retail price for merchandise, or to allocate market segments or regions to specific distributors—are deemed illegal. Even if states agree that a common standard would benefit all, each state might prefer a different standard—presumably one closer to its existing law and to the preferences of influential domestic industries.

These distributive implications make cooperation harder to attain, because each state may attempt to "hold out" at the negotiation stage in the hope that the other will settle for its preferred outcome.⁴⁵ Distributive obstacles to international cooperation are often solved through side payments; that is, if the costs and benefits of each alternative rule can reliably be estimated, the "winner" states may agree *ex ante* to compensate the "loser" states to induce them to adopt their preferred solution. These side payments may take a variety of forms, from cash payments to an agreement to follow

43. James Fearon, *Bargaining, Enforcement, and International Cooperation*, 52 INT'L ORG. 269, 274 (1998).

44. The resulting payoff matrix is illustrated below:

		State B	
		Event A	Event B
State A	Event A	2,1	0,0
	Event B	0,0	1,2

Figure 2: Battle of the Sexes

45. See Fearon, *supra* note 43, at 274.

the other state's preferred rule in a different area of international cooperation. Alternatively, if states lack sufficient information to estimate the relative costs and benefits of each rule, they may build flexibility provisions that allow the agreement to be renegotiated after some time has elapsed and the distributive effects are revealed.⁴⁶ Powerful states may simply use their clout to steer others toward their preferred outcome by threatening unilateral action.⁴⁷ Once attained, cooperation may be self-sustaining without the need for elaborate institutional monitoring, dispute-resolution, or enforcement mechanisms.⁴⁸

In contrast, *enforcement problems* arise once an agreement has been reached as individual states face incentives to renege on the agreed rules and pursue short-term benefits. This risk of opportunistic defection is frequently illustrated in game theory by reference to the Prisoner's Dilemma.⁴⁹ In essence, the answer to the cooperation problem posed by the Prisoner's Dilemma lies in the dynamics created by repeated iterations of the game. If both states know that the game will be repeated indefinitely and care enough about future gains (in other words, they have a low discount rate), they may develop retaliation strategies that will provide mutual incentives to cooperate and attain the Pareto-optimal outcome.⁵⁰ The success of these strategies depends on several conditions, including the availability of reliable information to participants regarding defections by others, participants' capacity to threaten retaliation credibly, and self-restraint (as excessive retaliation strategies can further disrupt cooperation).⁵¹

In such cases, institutional mechanisms can play a central role in facilitating cooperation. An oft-cited example is the international trade regime, in which each state benefits from the cooperative outcome in which all states open their markets, but each state would prefer to defect by erecting barriers

46. See Barbara Koremenos, *Contracting Around International Uncertainty*, 99 AM. POL. SCI. REV. 549 (2005); Barbara Koremenos, *Loosening the Ties that Bind: A Learning Model of Agreement Flexibility*, 55 INT'L ORG. 289 (2001); James D. Morrow, *Modeling the Forms of International Cooperation: Distribution Versus Information*, 48 INT'L ORG. 387 (1994).

47. See Stephen D. Krasner, *Global Communications and National Power: Life on the Pareto Frontier*, 43 WORLD POL. 336 (1991).

48. See Stein, *supra* note 41, at 125-27, 129-30.

49. The "Prisoner's Dilemma" is named after a scenario in which two prisoners are being interrogated separately by the police. If neither confesses, each will receive a light sentence; if only one confesses, he will be released and his confession will be used to secure a life sentence against the other; if both confess, each will receive a heavy sentence, but short of life imprisonment. No matter what the other does, each prisoner is better off confessing. The result is that both confess and receive heavy sentences. Both prisoners, however, would both have been better off if neither had confessed and both had received light sentences. The Prisoner's Dilemma is illustrated by the following payoff matrix:

		State B	
		Cooperate	Defect
State A	Cooperate	3,3	1,4
	Defect	4,1	2,2

Figure 3: Prisoner's Dilemma

50. See ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 126-32 (1984).

51. See generally JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005); ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* (2008); ROBERT E. SCOTT & PAUL B. STEPHAN, *THE LIMITS OF LEVIATHAN: CONTRACT THEORY AND THE ENFORCEMENT OF INTERNATIONAL LAW* (2006); George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AM. J. INT'L L. 541 (2005).

to trade while others liberalize. Importantly, the WTO does not include a central enforcement mechanism that would directly apply sanctions to states that violate trade rules. Instead, enforcement comes in the form of countermeasures by individual states. Nevertheless, the WTO plays a central role in facilitating and maintaining the cooperative outcome, as it mediates the negotiation of clear rules identifying the expected cooperative behavior, periodically reviews its members' trade policies for possible violations of global rules, provides an impartial dispute-resolution mechanism to authoritatively identify defections, and provides a legal regime governing countermeasures that limits responses by aggrieved states to what is necessary and proportionate.

It is important to realize that distributive and enforcement problems are not mutually exclusive: a single international regime may face both of these problems at various stages. When negotiating, states may have difficulty agreeing on a single set of rules if distributive considerations lead them to prefer different outcomes. At this stage, one is likely to observe reciprocal concessions and the exercise of power to secure a state's preferred outcome. Once an agreement is reached, the focus will turn to compliance and enforcement. If states have no incentives to deviate from the agreement, collaboration will likely be self-sustaining. If, however, states have incentives to cheat, the factors that facilitate or hinder cooperation in an iterated Prisoner's Dilemma will take center stage. The two problems may also interact. For instance, James Fearon has argued that, while a low discount rate facilitates cooperation once an agreement is reached, it also raises the distributive stakes of the agreement and makes the initial negotiations more difficult and likely to fail.⁵²

B. *Domestic Constraints on TRNs*

If the participants in TRNs were free to disregard domestic preferences in their states and pursue globally optimal policies, distributive and enforcement problems would not hinder international regulatory cooperation. However, the regulators who participate in TRNs are not, as Anderson points out, "masterless *ronin*."⁵³ They are instead politically and legally accountable to numerous domestic constituencies, including not only their superiors in the executive branch but also the legislature, the courts, the media, and the public. This Section describes in some detail the principal domestic accountability and incentive structures that shape the actions of national regulators. It also discusses the effect of these structures on the capacity of TRNs to effectively address international regulatory issues, especially when they involve distributive or enforcement problems.

1. *Political Constraints*

Modern regulatory agencies are often designed to secure some degree of independence from the executive and legislative branches. Nevertheless,

52. See Fearon, *supra* note 43.

53. Anderson, *supra* note 36, at 1296.

politicians exercise significant influence over the administrative process. Senior appointments are typically made by the executive, and in some constitutional systems, they also require approval by the legislature. In addition, legislative bodies typically exercise continuing supervisory authority over regulatory agencies and departments, conducting periodic hearings and reviewing budgets and appropriations. In some cases, concerned parties succeed in convincing legislators to override agency rules through special laws or even to radically restructure or consolidate agencies.

As a result, politicians may intervene through several channels to prevent or override the adoption of international standards that would threaten their reelection prospects or other political objectives. They may also steer the international regulatory agenda toward politically salient issues that regulators would not otherwise treat as priorities. Even without direct intervention, agency activities are constrained by the possibility of such intervention. In other words, while regulators exercise some discretion in both their domestic and international actions, they do so in the shadow of the executive and legislature's views and interests. This fact is well recognized in the political science literature, which often models agency behavior on the basis that bureaucratic discretion is circumscribed by the possibility of legislative intervention.⁵⁴

Importantly, not all regulators are created equal in this respect. They benefit from various degrees of autonomy within the domestic political system, ranging from largely independent bodies such as the U.S. Federal Reserve, to expert agencies with substantial independence like the SEC and the Federal Trade Commission (FTC), to subdivisions of the executive branch like the Antitrust Division of the U.S. Department of Justice. While the degree of autonomy possessed by a specific regulator is hard to measure, important dimensions of autonomy include length and security of tenure for senior appointments, autonomous funding sources, judicial review standards, and the relative political strength of other domestic actors. Thus, which regulator has jurisdiction over a given issue-area in a given country is likely to be a significant factor in the success or failure of a TRN.⁵⁵ The significant discrepancies in regulatory independence between countries may also hinder agreement. Even a powerful and independent regulator like the Federal Reserve might hesitate to commit itself to a demanding international standard if it suspected that some of its foreign counterparts would be unable to resist domestic political pressures to breach that standard.

In addition to these direct political constraints, regulators are typically subject to administrative law requirements to open their proposed standards to public scrutiny.⁵⁶ This process allows regulated industries, the media, and the

54. See, e.g., David Andrew Singer, *Capital Rules: The Domestic Politics of International Regulatory Harmonization*, 58 INT'L ORG. 531, 535-38 (2004).

55. See Mark A. Pollack & Gregory C. Shaffer, *Who Governs?*, in TRANSATLANTIC GOVERNANCE IN THE GLOBAL ECONOMY 287, 298, 302-03 (Mark A. Pollack & Gregory C. Shaffer eds., 2001); Whytock, *supra* note 33, at 31.

56. In the United States, the Administrative Procedure Act (APA), Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.), governs regulators' rulemaking activities by requiring them to give public notice of proposed rules and consider public comments before issuing a final rule. See 5 U.S.C. § 553 (2000).

public to play a role in the rulemaking process. Even after the rules are adopted, their implementation may be substantially hindered if regulators cannot count on some degree of voluntary compliance by regulated entities. Finally, regulatory standards are normally subject to judicial review under substantive and procedural standards. While courts typically allow expert regulators broad discretion in adopting standards and policies, the possibility of complex regulatory standards being struck down by the courts is real, as illustrated by the SEC's ill-fated hedge fund rule.⁵⁷ The looming possibility of judicial review limits the ability of regulators to credibly commit themselves to international rules and sustain international cooperation.

2. *Legal Constraints*

A crucial and little-discussed limitation on the effectiveness of TRNs is the array of domestic legal constraints they face in their efforts. National regulators participating in TRNs are subject to domestic legal limitations on their jurisdiction. Most obviously, when the regulatory standards they administer and enforce are statutory, they normally have no authority to modify them by agreement with foreign regulators. This reality circumscribes the set of international policies to which they can agree. Even where the law gives regulators substantial discretion to elaborate policies, it almost always limits their authority to a specific issue-area. These jurisdictional boundaries limit the extent to which domestic regulators who are negotiating with foreign counterparts can offer side payments to overcome distributional obstacles to an agreement or link the agreement to existing enforcement mechanisms.⁵⁸ For example, since U.S. antitrust regulators have no authority over international trade policy, they cannot offer tariff concessions or foreign aid payments to convince other states to subscribe to their preferred antitrust rules. Likewise, they cannot on their own incorporate harmonized standards into WTO agreements in order to benefit from its dispute-resolution and enforcement regimes.

In other cases, international cooperation may be further hindered by domestic jurisdictional rivalries among regulatory agencies. This tendency is most apparent in the United States, where major areas of economic regulation—such as banking, securities and commodities, and antitrust—are parceled out among multiple federal and state regulators. As will be discussed below, the process leading to the adoption of the Basel II Accord involved years of contentious negotiations, not only at the international level but also among U.S. regulators, including the Federal Reserve Board (FRB), the Office

57. See *Goldstein v. SEC*, 451 F.3d 873, 883 (D.C. Cir. 2006) (invalidating a hedge fund registration rule promulgated by the SEC as “arbitrary”). More generally, courts in the United States frequently invalidate administrative actions because they are based on unreasonable statutory interpretations by agencies, see, e.g., *Chevron USA v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984), or because the rules promulgated are “arbitrary or capricious,” see, e.g., *Motor Vehicles Mfrs. Ass’n v. State Farm Ins.*, 463 U.S. 29, 43 (1983). A recent empirical study finds significant evidence of political bias in both types of review. See Thomas J. Miles & Cass R. Sunstein, *Depoliticizing Administrative Law* (Univ. of Chi. Law & Econ. Working Paper No. 143, 2008), available at <http://ssrn.com/abstract=1150404>.

58. See Picciotto, *supra* note 12, at 1039.

of the Comptroller of the Currency (OCC), the Federal Reserve Bank of New York, the Federal Deposit Insurance Corporation (FDIC), federal thrift regulators, and state banking authorities. This problem may also arise in Europe due to ongoing shifts in rulemaking and supervisory responsibilities among the European Commission, EU legislative institutions, the European Central Bank, and national regulators. Where such jurisdictional feuds prevail, international rulemaking by TRNs may reduce the odds of an effective outcome relative to negotiations between traditional foreign affairs departments empowered to override jurisdictional constraints on subordinate agencies.

C. *Implications and Theoretical Framework*

The theoretical argument developed above—that national regulators are subject to domestic constraints that bind their actions to national preferences, and that international regulatory issues often raise distributive and enforcement problems—suggests three hypotheses regarding the effectiveness of TRNs. First, when domestic interests clash with international cooperation, one expects that national regulators will remain loyal to the former. If the negotiation of a global regulatory standard involves distributive issues, national regulators will have incentives to promote their domestic constituents' preferred outcome. If domestic interests point toward reneging on a standard previously agreed upon, national regulators will be under pressure to abandon the rule or facilitate reneging by domestic actors. In short, national regulators participating in TRNs will adopt positions that are primarily driven by domestic preferences. Crucially, as seen above, clashes of interests do not invariably prevent cooperation from emerging. For instance, networks are likely to be effective in providing stable "focal points" to resolve pure coordination problems in which many states benefit more or less equally from a common standard. They do, however, raise the question whether TRNs provide a suitable framework for resolving distributive and enforcement problems when they arise.

Second, TRNs are likely to encounter substantial obstacles when the choice among possible regulatory standards has distributive implications. In such cases, the negotiation stage will be influenced by states' attempts to secure their preferred solution, either through bargaining or through coercion. If bargaining is the chosen method, the tradeoffs that would be necessary to secure agreement to a proposed standard may not be within the domestic authority of regulators. Even if the negotiators have such authority, the informal, consensus-based procedures used by TRNs may be ill suited to foster the complex tradeoffs required to reach agreement. Without the possibility of offering side payments in other issue-areas, regulators will be tempted to simply water down the proposed standards to make them acceptable to each participant without requiring tangible offsetting concessions. While they might succeed in inducing an agreement, such concessions are likely to weaken the standard, compromising its effectiveness in achieving and sustaining international cooperation. The presence of distributive implications also raises the possibility that power disparities and,

in some cases, excessive coercion, will influence the negotiations. At one extreme, powerful states may coerce other states to participate in international regulatory efforts to which they would otherwise be opposed or indifferent. Even in those cases in which coordination would produce mutual benefits, powerful states may use incentives and threats to secure their preferred outcome. The resulting standards, while beneficial to all, will likely disproportionately benefit powerful states.

Finally, the incapacity of TRNs to provide credible commitment mechanisms is likely to cause significant difficulties in ensuring compliance with common standards when enforcement problems arise. While TRNs may deter some defections through reputational incentives, this mechanism falls short of the enforcement measures available in the context of formal treaties and institutions.⁵⁹ Moreover, cooperation requires a sacrifice of short-term national interests that may not be within the legal authority or political capability of national regulators operating within domestic constraints. If courts or politicians can override regulators and their network's standards when domestic considerations so dictate, the commitment will not be perceived as credible. These considerations indicate that the theoretical case for networks is much stronger in the absence of enforcement problems.⁶⁰ Thus, in areas where international regulatory cooperation raises enforcement problems, regulatory networks will either not be established, adopt shallow standards that provide few benefits and little incentives for states to defect, or be hindered by defections.

In line with the theoretical argument above, the analysis of specific case studies of TRNs in Part IV of this Article will rely on a "two-step" approach that looks first to the domestic determinants of government preferences and capabilities, and second to the resulting international strategic interaction.⁶¹ The first step thus involves an examination of how domestic politics shape the goals and capabilities of national regulators regarding a given transnational regulatory problem. The second step involves identifying the coordination, distribution, and enforcement problems, if any, posed by the international configuration of preferences and capabilities, how TRNs have attempted to address them, and how successful they have been.

IV. CASE STUDIES OF REGULATORY NETWORKS

This Part begins to address the third limitation of network scholarship described above through case studies of three TRNs: the Basel Committee on

59. For an account of international law compliance that relies extensively on reputational sanctions, see GUZMAN, *supra* note 51. *But see* Rachel Brewster, *Unpacking the State's Reputation*, 50 HARV. INT'L L.J. (forthcoming 2009) (noting that a state's reputation is an amorphous concept that does not lend itself well to sanctions even if such sanctions were sufficient to ensure compliance).

60. Anderson makes precisely this point when discussing the Y2K problem. *See* Anderson, *supra* note 36, at 1275-76 ("Y2K was not a matter in which policies would produce winners and losers—all would gain by cooperating. . . . Indeed, the success of global cooperation to address Y2K may have been due to the characteristics of the problem, rather than to anything about the networks created to solve it.").

61. *See* DREZNER, *supra* note 35, at 39-40; Jeffrey W. Legro, *Culture and Preferences in the International Cooperation Two-Step*, 90 AM. POL. SCI. REV. 118 (1996); Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513 (1997).

Banking Supervision, IOSCO, and the ICN. The choice of these cases was guided by the existing scholarship, in which they are almost universally cited as examples of successful TRNs.⁶² There are several reasons why those networks have come to occupy a salient position in the literature. All three deal with areas of economic regulation that are deeply affected by globalization. In response, the activities of both the Basel Committee and IOSCO have expanded rapidly since the beginning of the 1990s. IOSCO now includes many developing country members, and while formal Basel Committee membership is limited to G-10 countries, the IMF and World Bank have incorporated its standards in their efforts to promote financial infrastructure improvements in the developing world. The ICN, while more recently created, appears to be rapidly overtaking other international antitrust cooperation forums. In addition, within the universe of TRNs, those three networks are relatively formal, producing a steady and increasing output of readily available documents, holding frequent meetings, and publicizing their activities through the Internet and in professional and academic circles.

I have chosen these three TRNs as my case studies for the very reason that they are generally viewed as successful. A recurring difficulty concerning the use of case studies is selection bias: the risk that the method used to choose the relevant observations may detrimentally affect the determinacy or reliability of the outcome.⁶³ The most obvious form of selection bias arises when researchers—consciously or not—select cases likely to vindicate their desired conclusion.⁶⁴ As a result, conclusions drawn from cases, while consistent with the researcher's theory, may not be representative of the broader social phenomenon that the theory purports to address. To avoid this difficulty, I have deliberately chosen the three cases that are most widely seen in TRN scholarship as the strongest examples of successful networks.⁶⁵ If

62. See, e.g., SLAUGHTER, *supra* note 4, ch. 1 (referring to the Basel Committee, IOSCO, and the Global Competition Network as leading examples of TRNs); Michael S. Barr & Geoffrey P. Miller, *Global Administrative Law: The View from Basel*, 17 EUR. J. INT'L L. 15, 17 (2006) ("It is fair to say that Basel I is one of the most successful international regulatory initiatives ever attempted. . . . The Basel Committee is perhaps the most important example of a transgovernmental regulatory network that exercises vast powers, seemingly without any form of democratic accountability."); Youri Devuyt, *Transatlantic Competition Relations*, in TRANSATLANTIC GOVERNANCE IN THE GLOBAL ECONOMY 127, 127 (Mark A. Pollack & Gregory C. Shaffer eds., 2001) (arguing that "transatlantic relations in the sphere of competition policy are a perfect example of what Anne-Marie Slaughter . . . has labeled a 'new transgovernmental order'"); Raustiala, *supra* note 4, at 28-35 (discussing IOSCO and regulatory cooperation in securities regulation), 35-43 (discussing regulatory cooperation in antitrust); Anne-Marie Slaughter, *Governing the Global Economy Through Government Networks*, in THE ROLE OF LAW IN INTERNATIONAL POLITICS 177, 181-86 (Michael Byers ed., 2000) (discussing the Basel Committee, IOSCO, and IAIS); Turner, *supra* note 33, at 993 (mentioning Basel and IOSCO); Zaring, *supra* note 13, at 555-69 (discussing the Basel Committee and IOSCO); Zaring, *supra* note 4, at 287-301 (discussing the Basel Committee, IOSCO, and IAIS).

63. See JOHN GERRING, CASE STUDY RESEARCH: PRINCIPLES AND PRACTICES chs. 2-6 (2007); GARY KING, ROBERT O. KEOHANE & SIDNEY VERBA, DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH 128-39 (1994); David Collier & James Mahoney, *Insights and Pitfalls: Selection Bias in Qualitative Research*, 49 WORLD POL. 56 (1996).

64. See GERRING, *supra* note 63, at 86-150; KING ET AL., *supra* note 63, at 128; Collier & Mahoney, *supra* note 63.

65. There are other global TRNs one might examine, but most of them, such as the IAIS, have been less active and are not frequently cited as leading instances of successful networks. Another prominent global network is the International Network for Environmental Compliance and Enforcement, but its broad structure—encompassing regulators, NGOs, and international governmental organizations

anything, the selection of these cases is biased toward successful outcomes; from this Article's skeptical perspective on the effectiveness of TRNs, they constitute "hard cases." In this light, if closer examination reveals limitations consistent with the theoretical argument developed above, it will support the view that these limitations are intrinsic to the TRN form and not limited to its weakest incarnations.⁶⁶

A. *The Basel Committee on Banking Supervision*

The Basel Committee was established in 1974 by the governors of the central banks of the G-10 countries and Switzerland. It serves as an informal cooperation forum on issues of bank regulation and supervision. Although the Committee has initiated several regulatory cooperation efforts over the years, by far its most significant and well-known achievement is the 1988 Basel Accord on bank capital adequacy (Basel I). This Accord, which sets uniform regulatory capital requirements for internationally active banks, has been adopted by some 120 countries, including the United States, the European Union, and Japan. Basel I is an informal understanding among national bank regulators, not a treaty. As a result, it does not bind any of the adopting states under international law, but rather is implemented by national regulators exercising their regulatory powers under domestic law.⁶⁷ The Basel Committee does not have any formal review, monitoring, or enforcement mechanism.

This Section analyzes Basel I in light of the theoretical framework elaborated above. Whereas most of the literature on the Accord focuses on the events leading up to its adoption in 1988, this Part also discusses subsequent compliance with the Accord and the process leading to its successor, the 2004 Basel II Accord.⁶⁸ This analysis reveals that, although the Accord is often considered the "crown jewel" of international banking regulation,⁶⁹ its negotiation and implementation reflect the strong influence of domestic

(IGOs)—makes it closer to the "global policy networks" criticized by Slaughter. See SLAUGHTER, *supra* note 4, at 4. Several regulatory networks are embedded within the European Union, particularly in the areas of banking and securities regulation, but they are essentially facilitative bodies within a treaty structure. The same can be said of the North American environmental and labor networks created alongside the North American Free Trade Agreement (NAFTA).

66. A second form of selection bias is that which arises when the cases allow for insufficient variation on the dependent variable. See GERRING, *supra* note 63, at 97-101; KING ET AL., *supra* note 63, at 129. In this Article, the dependent variable is the effectiveness of TRNs. As will be seen, the cases selected show significant variation both among the networks and between different issues addressed by the same network. Thus, this form of selection bias should not affect the conclusions drawn here.

67. See Lawrence L.C. Lee, *The Basle Accords as Soft Law: Strengthening International Banking Supervision*, 39 VA. J. INT'L L. 1, 16-25 (1998).

68. See BASEL COMM. ON BANKING SUPERVISION, INTERNATIONAL CONVERGENCE OF CAPITAL MEASUREMENT AND CAPITAL STANDARDS: A REVISED FRAMEWORK (2005). A consolidated version incorporating earlier Basel Committee rules regarding capital requirements for market risk and other elements of the original framework not revised in Basel II was released in 2006. See BASEL COMM. ON BANKING SUPERVISION, INTERNATIONAL CONVERGENCE OF CAPITAL MEASUREMENT AND CAPITAL STANDARDS: A REVISED FRAMEWORK (2006).

69. See HAL S. SCOTT, INTERNATIONAL FINANCE: TRANSACTIONS, POLICY, AND REGULATION 306 (13th ed. 2006). For the consolidated version of the original 1988 accord, reflecting amendments made between 1988 and 1998, see BASEL COMM. ON BANKING SUPERVISION, INTERNATIONAL CONVERGENCE OF CAPITAL MEASUREMENT AND CAPITAL STANDARDS (1998).

interests and the limited ability of TRNs to secure compliance. The Accord, strongly supported by the United States and United Kingdom—whose international banks were mired in crisis following several emerging market defaults—was adopted over the objections of Japan and continental Europe. To secure support, proponents of the Accord resorted to both coercive tactics, including threats to exclude noncompliant foreign banks from their markets, and substantive concessions that weakened the long-term effectiveness of the Accord. While the Committee's efforts were initially successful in raising global bank capital levels, as time went on national regulators began exploiting ambiguities in the Accord to secure a competitive advantage for their banks. Without dispute-resolution or enforcement powers, the Committee was largely powerless to counter this gradual weakening of capital standards. On the contrary, the Accord was eventually replaced by a revised set of rules—Basel II—that placed significantly greater discretion in the hands of national regulators and large banks in determining appropriate levels of capital.

1. *Explaining the Basel Accord*

To assess the effectiveness of Basel I, consider first the nature of the problem faced by national regulators when setting domestic capital adequacy standards. Functionalist accounts of the Accord emphasize the common interest of national regulators in controlling the systemic risk associated with divergent national capital rules. In this view, the Accord solves the collective action problem that arises because individual banks and their regulators have incentives to maintain suboptimal capital levels in order to improve their competitiveness.

Regulatory capital requirements force banks to maintain sufficient capital to absorb significant losses without becoming insolvent.⁷⁰ In a globalized financial system, however, competition among states may undermine the effectiveness of domestic capital regulation. Individual countries stand to gain significant benefits by attracting banking activity within their jurisdiction. International banking produces sizable tax income, high-paying employment, and financial infrastructure that supports local economic growth.⁷¹ Thus, when setting its regulatory capital level, each country has incentives to weigh the benefits of greater financial stability

70. Two policy reasons are generally invoked to justify regulatory capital requirements. First, most jurisdictions protect depositors by providing deposit insurance and acting as lenders of last resort to prevent bank failures. While these policies promote confidence in the banking system, they also create moral hazard by reducing the incentives for depositors to monitor bank creditworthiness. Second, regulators are concerned that bank failures may reverberate through the financial system and, in extreme cases, paralyze the economy—a phenomenon known as systemic risk. On this and other functions of bank capital, see DUNCAN WOOD, *GOVERNING GLOBAL BANKING: THE BASEL COMMITTEE AND THE POLITICS OF FINANCIAL GLOBALISATION* 72-73 (2005).

71. For instance, the United Kingdom is arguably the world's premier international banking center, with a large financial industry largely oriented toward the provision of cross-border services. In 2007, the British Bankers' Association reported that banking and financial services accounted for £70 billion of the United Kingdom's national output (6.8% of GDP), employed over 1.1 million people, and provided 25% of total corporation tax revenue (£8 billion) to the U.K. government. See British Bankers' Ass'n, *Top 10 Facts* (May 4, 2007), <http://www.bba.org.uk/bba/jsp/polopoly.jsp?d=469&a=7447>.

against those of attracting banking activity. This is likely to result in capital levels that are lower than what would prevail in the absence of regulatory competition. In other words, observers fear that autonomous rulemaking on bank capital by national authorities could lead to a "race to the bottom," meaning the inefficient lowering of regulatory standards in each country.⁷²

The traditional functionalist account of Basel I holds, in essence, that over the 1980s bank regulators around the world became aware of the systemic risks associated with bank lending.⁷³ This "consensual knowledge" was produced by events such as the failures of Bankhaus Herstatt and Franklin National Bank (1974) and the massive bank losses produced by the Latin American debt crisis (1982). The rise of systemic risk in international banking created a demand for collective action in the form of uniform bank capital rules, a demand fulfilled by the adoption of Basel I. Indeed, an important objective of Basel I was to create a "level playing field" in international banking by preventing countries with lower capital requirements from acquiring a disproportionate share of business.⁷⁴

Recent research on the Accord, however, has been more skeptical of the functionalist hypothesis and supplements it by looking to domestic politics as the primary factor in the demand by certain regulators for international regulatory cooperation.⁷⁵ The following Subsection examines the adoption of Basel I and its subsequent compliance record in the light of this perspective.

2. *The Basel Experience: Adoption and Compliance*

a. *The Negotiation Stage*

The functionalist account of Basel I has been criticized for failing to recognize the depth and significance of the conflict between the objectives of U.S. and U.K. bank regulators, who strongly favored the Accord, and those of the authorities in Japan, Germany, and France, who opposed it.⁷⁶ If global demand for a solution to the collective action problem posed by systemic risk is taken as the primary explanatory factor behind the Accord, the stark opposition between these two groups of regulators cannot be easily explained.

In response, David Singer develops a model in which national regulators are the primary actors, constrained by the need to avoid legislative intervention. Legislatures are in turn driven by two competing considerations: maintaining confidence in the financial system on the one hand and preserving

72. See WOOD, *supra* note 70, at 9.

73. See RICHARD J. HERRING & ROBERT E. LITAN, FINANCIAL REGULATION IN THE GLOBAL ECONOMY (1995); Ethan B. Kapstein, *Resolving the Regulator's Dilemma: International Coordination of Banking Regulations*, 43 INT'L ORG. 323 (1989); Frederic S. Mishkin, *Prudential Supervision: Why Is It Important and What Are the Issues?*, in PRUDENTIAL SUPERVISION: WHAT WORKS AND WHAT DOESN'T ch. 1 (Frederic S. Mishkin ed., 2001).

74. See JOSEPH J. NORTON, DEVISING INTERNATIONAL BANK SUPERVISORY STANDARDS 33-36 (1995); Heath Price Tarbert, *Rethinking Capital Adequacy: The Basle Accord and the New Framework*, 56 BUS. LAW. 767, 784 (2001).

75. See DAVID A. SINGER, REGULATING CAPITAL: SETTING STANDARDS FOR THE INTERNATIONAL FINANCIAL SYSTEM (2007); Thomas Oatley & Robert Nabors, *Redistributive Cooperation: Market Failure, Wealth Transfers, and the Basle Accord*, 52 INT'L ORG. 35 (1998); Singer, *supra* note 54.

76. See Oatley & Nabors, *supra* note 75, at 46-48; Singer, *supra* note 54, at 550.

the international competitiveness of the country's financial institutions on the other. This creates a situation in which regulators effectively have discretion to set regulatory policy within a "win-set" defined by the risk of legislative intervention, which will occur if regulation is too lenient (thus threatening financial stability) or too stringent (thus undermining competitiveness). Exogenous shocks may create demand for more stringent regulation to which regulators must respond to avoid legislative intervention. By bolstering regulatory standards unilaterally, however, regulators run the risk that domestic institutions will become less competitive and lobby the legislature to intervene. They can avoid this result if, instead of acting unilaterally, they push for the adoption of uniform international regulatory standards that will preserve the competitive position of their institutions. Thus, domestic factors explain the demand by particular states for international regulatory cooperation.

Within this theoretical framework, one can explain the debate surrounding the adoption of Basel I. The 1982 sovereign debt crisis had ushered in an era of severe financial difficulties for major U.S. banks. In 1982, U.S. bank loans to Mexico, Brazil, and Argentina amounted to more than 140% of the capital of the nation's nine largest banks.⁷⁷ As a result, the debt crisis threatened the solvency of several major institutions and the stability of the U.S. financial system. The regulatory response was to implement stricter regulatory capital standards to prevent future crises. However, it became clear that unilateral adoption of such standards would jeopardize the competitiveness of U.S. banks in international markets. Starting in the mid-1980s, the United States proposed the adoption of uniform international capital standards, which would allow it to raise its own capital standards while preserving a "level playing field" in international banking.⁷⁸

Several countries resisted the proposal, including Japan and Germany, two major financial centers. Japanese banks in particular had been much less involved in lending to less developed countries (LDCs) than their counterparts in the United States and United Kingdom. Due to their size and their close relationships with politicians and regulators, they also benefited from a market perception of a much stronger government safety net to prevent bank failures, through direct intervention if necessary. As a result, lower capital levels were needed to sustain market confidence in their stability, and these lower levels in turn increased their competitiveness as they rapidly expanded their international operations.⁷⁹ While German and other European regulators supported capital regulation in principle, they argued that their unique banking structure—including substantial corporate equity holdings by banks—made uniform rules inappropriate. The exposure of German and other European banks to LDCs was also much less than that of the U.S. and U.K. banks.

A breakthrough occurred in January 1987, when the United States and the United Kingdom announced a bilateral accord on capital adequacy. The two countries then initiated further talks with Japan and Germany, backed by

77. See Oatley & Nabors, *supra* note 75, at 42.

78. See REINICKE, *supra* note 27, at 108-09.

79. See SINGER, *supra* note 75, at 59-60.

the implicit threat that they would restrict access to their markets by banks from countries that did not implement the new capital adequacy standards.⁸⁰ The resulting negotiations led to the adoption of Basel I in 1988. In essence, the Accord includes a definition of regulatory capital and a risk-weighting formula designed to determine how much capital a bank must maintain given the size and riskiness of its investments. The global capital standards advocated by the United States and the United Kingdom were clearly perceived as producing unequal gains for the potential participants. In particular, Japan and Germany resisted the bilateral accord's definition of capital, which did not include holdings of corporate equities, traditionally an important class of Japanese and German bank assets. Japanese banks also had large unrealized gains on securities and real estate, which their country wished to see included in regulatory capital.

In Singer's view, the debate surrounding the Accord reveals the importance of domestic factors in determining the demand for international rules. U.S. and U.K. regulators faced with an exogenous shock to confidence in their financial institutions had to increase their regulatory capital requirements. In order, however, to avoid impairing the international competitiveness of their banks, they also strove to have those requirements adopted internationally and applied to foreign banks. Given this demand, the adoption of the Accord over the resistance of other countries was simply a function of relative power: at that time, the dominance of U.S. and U.K. financial markets was such that the threat to exclude noncompliant foreign banks was sufficient to overcome countervailing interests.⁸¹ This account of the Accord's adoption is consistent with the idea that the actions of national regulators in TRNs are driven primarily by domestic preferences.

While the United States and the United Kingdom clearly leveraged their relative power in international finance to push the recalcitrant countries toward an agreement, it is notable that Basel I contained significant concessions to the domestic economic and political interests of Japan and Germany. These concessions came, not in the form of side payments, but as substantive tradeoffs within the provisions of the Accord itself. For instance, the final Accord did not commit national regulators to apply the new capital standards to all banks, but only to internationally active ones. While the United States and the United Kingdom applied the rules to all their banks, Japanese regulators only applied them to a small number of international banks.⁸² Likewise, the Accord split regulatory capital into two "tiers" and provided significant flexibility for national regulators to recognize various assets—such as unrealized gains on securities in real estate and subordinated debt—as regulatory capital.⁸³ National regulators also retained substantial discretion to classify assets among the broadly defined risk-weighting categories of the Accord.⁸⁴ Importantly, by granting more discretion to

80. See REINICKE, *supra* note 27, at 109-10.

81. See SINGER, *supra* note 75, at 61.

82. See WOOD, *supra* note 70, at 88.

83. See REINICKE, *supra* note 27, at 115-16; Tarbert, *supra* note 74, at 796.

84. See Hal S. Scott & Shinsaku Iwahara, *In Search of a Level Playing Field: The Implementation of the Basel Capital Accord in Japan and the United States* 46-49 (Group of Thirty,

national regulators, these concessions made the Accord more difficult to monitor and enforce, compromising its goal of creating a "level playing field" and preventing a "race to the bottom" in capital regulation.⁸⁵

Other tradeoffs designed to garner political support from various constituencies also made the Accord less reflective of actual risk than is often supposed. For instance, the United States insisted on a lower risk weighting for home mortgage loans than corporate loans,⁸⁶ a politically palatable policy that bore little relationship to actual risk measurement or financial stability. The OECD countries that negotiated the Accord also adopted very low risk weightings for loans to their own governments and banks, despite their wide variation in creditworthiness. These findings are consistent with the theoretical argument that, without the possibility of tradeoffs across issue-areas, TRNs tend to produce watered-down standards to accommodate divergent domestic preferences.

b. *The Enforcement Stage*

The Accord's implementation deeply affected international banking in the short term. Both regulators and banks devoted considerable resources to implementing the Accord. More significantly, average bank capital ratios increased around the world ahead of the Accord's entry into force in 1992.⁸⁷ This initial effectiveness is consistent with Singer's theory: the United States and United Kingdom, having gone to great lengths to secure the Accord, naturally expected it to be diligently implemented, especially in Japan and Europe.

Over time, however, the balance of domestic interests shifted, paving the way for substantial inconsistencies in domestic implementation of the Accord. First, pressure from the United States and United Kingdom to maintain uniform capital levels receded. Their banks successfully recapitalized and managed to move outstanding LDC loans off their balance sheets by issuing Brady Bonds.⁸⁸ Second, the economic slump in Japan in the 1990s left its banks struggling to manage an enormous amount of nonperforming loans. As a result, the international competitive threat from Japanese banks waned, reducing demand from U.S. and U.K. banks for strong global capital standards.⁸⁹ At the same time, the costs of compliance by Japanese banks dramatically increased, leading to strong domestic pressures on Japanese regulators to underenforce the Accord.⁹⁰ Third, sophisticated banks around the world, pointing to the discrepancies between the Accord's simple risk-weighting formulas and modern risk management techniques, lobbied their regulators to adopt interpretations of the Accord that would allow them to

Occasional Paper No. 46, 1994).

85. See *infra* Subsection IV.A.2.

86. See SCOTT, *supra* note 69, at 317.

87. See ETHAN B. KAPSTEIN, GOVERNING THE GLOBAL ECONOMY: INTERNATIONAL FINANCE AND THE STATE 120-22 (1994); TONY PORTER, STATES, MARKETS AND REGIMES IN GLOBAL FINANCE 76-78 (1993).

88. See SCOTT, *supra* note 69, at 779-85.

89. *Id.* at 264-66.

90. See Whitehead, *supra* note 33, at 726, 732.

maintain lower capital levels. Finally, the absence of formal monitoring, dispute-resolution, or enforcement mechanisms limited the options available to the Basel Committee to ensure continued compliance with the Accord. With this decline in U.S. and U.K. demand for strict global capital rules, the underlying collective action problem manifested itself anew as individual regulators weakened certain features of the Accord.

Thus, regulators used their discretion under the Accord to allow their domestic banks to count as capital various items whose ability to support short-term losses was doubtful. At Japan's insistence, the Accord allowed regulators to include 45% of the unrealized appreciation of certain securities and real estate holdings in Tier II capital. Japan immediately allowed its banks to do so, whereas the United States waited until 1998 to do so. The plummeting value of these assets in the 1990s was a major factor in Japan's long banking crisis and economic stagnation, and suggests that these assets were unreliable sources of regulatory capital in the first place. Such decisions appear to have been aimed primarily at accommodating domestic financial practices. While they may have been justifiable in some instances, they clearly jeopardized the comparability of the capital levels maintained in different countries.

National regulators also exercised substantial forbearance in applying regulatory capital requirements, in order to avoid the failure or costly recapitalization of large domestic banks. Several of the largest Japanese banks would likely have been considered insolvent in the late 1990s had their regulators forced them to write off their enormous holdings of nonperforming loans, or declined to let them include deferred tax assets and certain public investments in regulatory capital.⁹¹ Likewise, Germany allowed Deutsche Bank to issue ten-year preferred stock that was functionally the same as debt and include it in its Tier I capital.⁹² While this appears inconsistent with the letter of the Accord, in the absence of any authoritative interpretation mechanism, there was little to prevent Germany from adopting an interpretation that favored its largest international bank. Germany's decision triggered a chain reaction, as other regulators—including the U.S. Federal Reserve—allowed their banks to issue similar preferred stock to offset the competitive advantage of German banks.⁹³ More generally, a 2004 IMF study found that “[c]apital adequacy measures are often loosely applied to promote indigenous banks, or are unreliable due to weak loan classification and provisioning practices.”⁹⁴

91. See SCOTT, *supra* note 69, at 270; see also Whitehead, *supra* note 33, at 728-30. Japanese regulators measured the regulatory capital of their banks only twice a year, thus allowing greater scope for fluctuations and possible evasion of requirements between measurements. See Scott & Iwahara, *supra* note 84, at 55.

92. See Tarbert, *supra* note 74, at 796-97.

93. In 1996, the U.S. Federal Reserve approved the issuance of perpetual preferred shares by bank holding companies. Those instruments would be treated as debt for tax purposes (thus making the interest payments tax-deductible), but as Tier I capital for bank regulatory purposes. This move was followed by analogous permissive moves by other regulators and was perceived as weakening global capital standards. See WOOD, *supra* note 70, at 127-28.

94. INT'L MONETARY FUND [IMF], FINANCIAL SECTOR REGULATION: ISSUES AND GAPS 4 (2004).

An additional indication that the Accord failed to achieve harmonization is its lack of effect on the allocation of regulatory jurisdiction among states. Following a successful substantive harmonization effort, one would expect states to achieve further efficiencies by curtailing concurrent jurisdiction and entrusting a single regulator with the authority to supervise each bank. For example, if capital standards were effectively harmonized and consistently applied, it would be efficient for each bank's home regulator to supervise its aggregate capital position without duplicative intervention by the states hosting the bank's foreign branches and subsidiaries. Conversely, if states are less than confident about harmonization, one would expect those that are able to do so to protect themselves by independently supervising the capital levels of foreign banks, or requiring additional assurances that supervision is adequate.

The adoption of the Accord did not catalyze a move toward a single-regulator approach for capital adequacy purposes. The United States continues to apply strict safety and soundness standards to foreign bank branches, even if they are subject to consolidated, Basel-compliant requirements by their home regulator.⁹⁵ The European Union recently adopted a directive requiring financial conglomerates to be subject to consolidated supervision and capital standards considered "equivalent" by the relevant European regulator.⁹⁶ The persistence of duplicative supervision and equivalence requirements suggests that states lack confidence that an approach under which each home state would exclusively supervise its banks' worldwide activities would adequately protect their consumers. This in turn points to the limitations of the Accord in achieving substantive harmonization.

3. *Toward Basel II*

Between 1998 and 2004, the Basel Committee developed a second-generation accord on international capital standards. This effort was motivated by widespread criticism of Basel I, which fell into two broad categories. First, as discussed above, many believed that the original Accord failed to create a level competitive playing field among countries, due both to differences in national conditions and accounting rules, and to the imprecision of its provisions.⁹⁷ Second, and more prominently, market participants and commentators were preoccupied with several inefficiencies arising from the Accord. The rules oversimplified the capital weighing process by classifying assets into only four risk categories with fixed risk weights. This inaccuracy gave banks skewed incentives in planning their lending activity, and commentators believed that the resulting market shifts had deleterious macroeconomic effects.⁹⁸ The Accord also created incentives for banks to

95. See SCOTT, *supra* note 69, at 145-56.

96. See Parliament and Council Directive 2002/87/EC, 2003 O.J. (L 35) 1.

97. See Hal S. Scott, *The Competitive Implications of the Basle Capital Accord*, 39 ST. LOUIS U. L.J. 885, 895 (1995); Tarbert, *supra* note 74, at 798-99.

98. For instance, some argued that the 0% risk weight assigned to OECD government securities led banks to invest massively in U.S. Treasury securities in the early 1990s instead of focusing on lending, creating a global capital crunch and prolonging the recession. See SCOTT, *supra* note 69, at 320-21; Tarbert, *supra* note 74, at 794-95.

"arbitrage" by migrating their lending to the riskiest assets within each risk-weight category in order to maximize their return on capital.⁹⁹ Other technical criticisms abounded.¹⁰⁰ Commentators concluded that the Accord was failing in its objective to provide a level playing field in international banking.¹⁰¹

Basel II attempts to address these criticisms by establishing a substantially more complex measurement system for credit risk exposure. A full description of the new approach is beyond the scope of this Article.¹⁰² In brief, Basel II allows regulators to apply an "advanced internal ratings-based" approach (A-IRB) to their largest and most sophisticated banks.¹⁰³ In essence, under A-IRB, banks determine internally certain statistical indicators with respect to each credit exposure, such as the probability that the borrower will default, the amount of the loss to the bank should the borrower default, and the effective maturity of the exposure. These indicators are then processed by a standardized formula designed to determine the amount of capital needed to cover unexpected losses within a predetermined confidence interval. A-IRB attempts to maintain a degree of standardization through the use of common definitions and formulae, and does not allow banks to freely use internal risk measures to determine the necessary amount of capital. Nevertheless, it constitutes a substantial increase in flexibility for banks to use their internal risk management techniques instead of relying on regulatory weightings. Within this framework, national regulators have a crucial supervisory role, as they must certify that the internal techniques used comply with the Basel II guidelines.

Several features of the Basel II adoption process are noteworthy. First, in sharp contrast with the confidential negotiations that led to the 1988 Accord, the Committee adopted an extensive public notice and comment process to develop Basel II, and made extensive use of its website to publicize draft rules,

99. On regulatory capital arbitrage, see David Jones, *Emerging Problems with the Basel Capital Accord: Regulatory Capital Arbitrage and Related Issues*, 24 J. BANKING & FIN. 35 (2000). For instance, banks had an interest in lending to Mexico, one of the riskiest OECD countries, before the 1994 peso crisis. The rules also favored short-term over long-term lending to non-OECD banks, a possible factor in the massive short-term bank lending whose sudden flight was instrumental in the 1997 Asian financial crisis. In essence, the criticism was that the Accord's risk-weighting formula provided only a blunt approximation of the actual risk of individual assets, thus encouraging regulatory arbitrage and distorting market incentives.

100. These included: the lack of a solid empirical foundation for choosing 8% as the required risk ratio, see Tarbert, *supra* note 74, at 797; the fact that the risk-weighting formula ignored the role of portfolio diversification in mitigating risk, see *id.* at 799-800; and, the Accord's failure to properly address derivatives and other innovative financial instruments, which are now an enormous market for banks, see *id.* at 800.

101. See, e.g., Scott & Iwahara, *supra* note 84, at 69.

102. Indeed, whereas the original Basel Accord was a thin document of 30 pages, the final 2005 version of Basel II is 272 pages long. The U.S. implementing release is even longer, at 629 pages.

103. Less sophisticated banks are subject to either of two other approaches: standardized or internal ratings-based (IRB). The standardized approach is essentially an updated version of the Basel I risk-weight formula, made more precise by determining risk by reference to the ratings of borrowers by recognized rating agencies such as Standard & Poor's and Moody's. For example, instead of assigning a 100% weight to all loans to corporate borrowers, the Basel II standardized approach would assign only a 20% weight to a loan to an AAA-rated company, with higher weights applying to less creditworthy companies. Basel II's reliance on credit-rating agencies has attracted substantial criticism, mostly on the grounds that the agencies have conflicts of interest and that most corporate borrowers are unrated. The IRB approach is similar to the A-IRB approach, but it allows banks to determine fewer of the relevant statistics internally.

studies, and related documents.¹⁰⁴ According to Barr and Miller, the Committee received more than 200 comment letters on the first consultative paper published in 1999, 259 comments on the second consultative package released in 2001, and 187 comments on its third consultative package of 2003.¹⁰⁵ Although it is difficult to determine whether subsequent changes to the standards originated in public comments, it is likely that they had a significant impact. In addition, the Committee initiated several rounds of quantitative impact studies to evaluate the impact of the proposed rules on financial institutions, in which more than 350 banks from 40 countries participated.¹⁰⁶ In parallel with these ongoing rounds of public comments at the Committee level, Basel II proposals were submitted to domestic administrative rulemaking procedures—often involving another layer of public notice and comment—in the United States,¹⁰⁷ Europe,¹⁰⁸ and elsewhere.¹⁰⁹ As will be discussed below, global administrative law scholars argue that this expanded process increased the transparency and legitimacy of the rules adopted by the Committee. However, in contrast with the swift adoption and implementation of Basel I, the Basel II process has formally been ongoing since 1999, and its full domestic implementation in major banking markets, when completed, will have taken nearly a decade.

Second, despite the fact that the process was steered by expert regulators acting within a well-established network, distributive concerns, domestic pressures, and other political considerations played a central role. The initial consultative package was stalled for months because of disputes between the United States and Germany.¹¹⁰ Following its release, a major lobbying effort by banks and financial industry groups further delayed the process and resulted in significant modifications to the initial approach.¹¹¹ The second consultative package attracted a flood of comments and criticism from market participants and the media, some suggesting that global capital standards should be abandoned.¹¹² German concerns about the effect of Basel II on small and medium enterprises (SMEs) escalated to the point where Chancellor Schroeder himself announced in 2001 that he would not support EU implementation of the proposal.¹¹³ His challenge was met with substantial concessions by the Basel Committee.¹¹⁴ International banks also obtained

104. See Zaring, *supra* note 13, at 577.

105. See Barr & Miller, *supra* note 62, at 24-27.

106. *Id.* at 27.

107. *Id.* at 29-31.

108. *Id.* at 35-39.

109. *Id.* at 39-41 (regarding China and India).

110. The disputes concerned the use of agency ratings (which favored the United States) and the legitimacy of German regulatory rulings assigning low risk weights to commercial mortgages (which favored German banks). The consultative paper retained the use of agency ratings and contained compromise language regarding commercial loans, which appeared to accommodate German practice. See WOOD, *supra* note 70, at 130-33.

111. See *id.* at 134-35.

112. See *id.* at 140-41.

113. See Klaus C. Engelen, *Basel II Under Siege*, INT'L ECON., Winter 2002, at 18.

114. In July 2002, the Committee announced that it would allow banks to allocate a lower capital charge to SMEs. In Duncan Wood's words, "political wrangling had indeed been successful in gaining a key dispensation for the German economy." WOOD, *supra* note 70, at 143.

significant modifications to the initial proposal.¹¹⁵ Finally, under the pressure of smaller banks, U.S. regulators announced in 2003 that, contrary to previous expectations, they would only apply Basel II to a small number of internationally active banks.¹¹⁶ Their move was regarded as brinksmanship, but was instrumental in securing favorable changes to the proposals in 2004.¹¹⁷ In 2007, U.S. regulators retreated from this position and announced that the advanced Basel II approaches would apply to large, international “core” banks, while other banks would be subject to Basel II’s standardized approach unless they voluntarily opted into A-IRB.¹¹⁸

Finally, many aspects of Basel II may aggravate the flaws that led to the inconsistent application of Basel I. The revised Accord preserves the loose definition of capital from Basel I, leaving open the possibility that regulators might continue to give inconsistent interpretations. Basel II also expands the discretionary role of national supervisors, particularly with respect to large international banks adopting the A-IRB approach. This expansion will multiply the opportunities for national regulators to adopt variable standards in response to domestic political pressures. In addition, the technical capacity of even sophisticated regulators to effectively supervise the internal risk functions of large banks has been questioned. In sum, Basel II does not enhance international monitoring and enforcement capabilities, and its flexible rules will make defections harder to detect, limiting the impact of existing reputational sanctions. Indeed, if this assessment is correct, then Basel II may be a manifestation of the same domestic political shifts that underlie the movement toward greater laxity in the implementation of Basel I.

4. *Conclusions*

The history of the Basel Accord is consistent with the limitations of TRNs discussed in Part III. The debates surrounding the adoption of the Accord reveal that, even when faced with a collective action problem that requires cooperation to reduce systemic risk and improve global financial stability, national regulators take positions that reflect the interests of domestic constituencies. As a result, the adoption of common standards will require solving distributive problems where the interests of these constituencies diverge. In this case, the Accord was brought into existence by coercive pressure on the part of U.S. and U.K. regulators motivated by domestic considerations. Moreover, because bank regulators have no authority to offer side payments or linkages to other issues, the tradeoffs needed to

115. *See id.* at 143-44.

116. *See id.* at 145; *see also* Denis Bouton & Daniel Amadieu, *Les possibles conséquences d'une application différenciée de la réforme Bâle II aux États-Unis et en Europe* [The Possible Consequences of a Differential Application of the Basel II Reforms in the United States and Europe], 87 REVUE D'ÉCONOMIE FINANCIÈRE 121 (2007); Christopher Whalen, *Gunfight at the Basel II Corral*, INT'L ECON., Winter 2004, at 72.

117. *See* WOOD, *supra* note 70, at 146.

118. *See* Joint Press Release, Bd. of Governors of the Fed. Reserve Sys. et al., Fed. Deposit Ins. Corp., Office of the Comptroller of the Currency & Office of Thrift Supervision, Banking Agencies Reach Agreement on Basel II Implementation (July 20, 2007), available at <http://www.federalreserve.gov/newsevents/press/bcreg/20070720a.htm>.

overcome distributive problems had to be incorporated within the substantive provisions of the Accord itself, undermining its effectiveness.

The Accord appears to have been remarkably effective in the years immediately following its adoption, as substantial resources were devoted to compliance and bank capital levels increased around the world. But in later years, the decline of domestic interest in bank capital adequacy rules in the United States and United Kingdom, pressures to renege in Japan due to an ongoing financial crisis, and lobbying by banks around the world for a more lenient regime combined to undermine the effectiveness of the Accord. The lack of monitoring and of a dispute-resolution or enforcement mechanism beyond reputational considerations made it difficult for the Committee to counteract these domestic pressures. The Basel II negotiations proved more intensely political, and the final framework, while more reflective of modern risk management practices, is also a product of the domestic pressures for more flexibility in regulatory capital standards. The limitations of the Basel Accord offer sobering perspective on the claim that networks “offer an alternative to the paradigm of a regulatory race to the top or bottom.”¹¹⁹

B. *The International Organization of Securities Commissions*

The IOSCO was established in its present form in 1986 and is one of the most institutionalized TRNs, with a permanent secretariat headquartered in Madrid and a membership that includes regulators from more than 170 jurisdictions. Most of IOSCO’s specialized work takes place within a Technical Committee composed of regulators from the most developed securities markets. This Section will first examine IOSCO’s most visible achievement, namely the worldwide coordination of international securities law enforcement through an extensive network of Memoranda of Understanding (MOUs). It will then turn to other significant IOSCO initiatives, including the failed effort to establish uniform capital adequacy rules for securities firms, the successful adoption of a standardized form for nonfinancial disclosure by public companies, and efforts to draft substantive best practices for securities regulation.

This examination reveals that IOSCO has been largely successful at coordinating securities enforcement among developed countries because they share strong domestic preferences in preventing transnational securities fraud. In contrast, IOSCO faced considerable resistance in its efforts to secure enforcement cooperation from offshore financial centers (OFCs), which have strong domestic incentives to protect their financial industry through strict privacy laws and lax securities fraud enforcement. This fundamental conflict went unaddressed until September 11, 2001, when fighting international money laundering and other forms of financial crimes became a political priority within developed countries. In response, developed countries turned to a coercive approach through various forums to compel OFCs to strengthen their regulatory standards. Other IOSCO efforts reveal similar patterns

119. Anne-Marie Slaughter & David Zaring, *Networking Goes International: An Update*, 2 ANN. REV. L. & SOC. SCI. 211, 217 (2006).

consistent with this article's theoretical framework. For instance, in sharp contrast with the Basel Accord, IOSCO's efforts to adopt uniform capital rules for securities firms were defeated by conflicting domestic preferences between the two major financial powers, the United States and the United Kingdom, and the proposal was eventually abandoned.

1. *Coordinating Securities Law Enforcement*

In the past two decades, several trends in global finance have raised the profile of securities law enforcement as an international regulatory issue. Because the securities of major corporations are now traded simultaneously in several countries, the effects of accounting fraud and other corporate wrongdoing are felt by investors everywhere. In addition, the rise of efficient, low-cost telecommunications and the development of the Internet have accelerated financial market integration, but have also created new opportunities for fraud and market manipulation, as perpetrators can easily conduct their activities far from the jurisdiction of their victims.

National securities regulators have responded to these trends by developing an elaborate informal system to coordinate their enforcement activities. Starting in the mid-1980s, IOSCO adopted a series of resolutions aimed at promoting mutual assistance among its members in protecting their markets against fraud. The 1986 Rio Declaration called upon national regulators to "provide assistance on a reciprocal basis for obtaining information related to market oversight and protection of each nation's markets against fraudulent securities transactions."¹²⁰ In the following decades, IOSCO developed an increasingly elaborate set of recommendations to address myriad technical obstacles to effective assistance. When national laws requiring "double illegality" as a prerequisite for assistance hindered enforcement efforts, and when national confidentiality requirements and limited investigative powers limited information sharing, IOSCO encouraged national regulators to request domestic legislative changes.¹²¹

Over time, IOSCO encouraged the development of a network of bilateral MOUs between national regulators, which could better take into account specific national laws and policies. It published general principles to ensure that all of the MOUs shared certain basic standards of cooperation.¹²² Over the 1990s, hundreds of bilateral and regional MOUs were concluded among IOSCO members.¹²³ In 2002, the organization adopted a Multilateral Memorandum of Understanding (MMOU) to provide for "the fullest mutual

120. Int'l Org. of Sec. Comm'ns [IOSCO], *A Resolution Concerning Mutual Assistance ("Rio Declaration")*, para. 4(a) (Nov. 1986), available at <http://www.iosco.org/library/resolutions/pdf/IOSCORES1.pdf>.

121. See, e.g., IOSCO, *A Resolution on Cooperation*, para. 6 (June 1989), available at <http://www.iosco.org/library/resolutions/pdf/IOSCORES2.pdf>; see also IOSCO, *Principles for Memoranda of Understanding* (Sept. 1991), available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD17.pdf>; IOSCO, *A Resolution on Enforcement Powers* (Nov. 1997), available at <http://www.iosco.org/library/resolutions/pdf/IOSCORES14.pdf>.

122. See IOSCO, *Principles for Memoranda of Understanding*, *supra* note 121. The principles have been used as the starting point for many bilateral MOU negotiations.

123. See IOSCO, List of Bilateral MOUs Signed by IOSCO Members, <http://www.iosco.org/library/index.cfm?section=mou> (last visited Nov. 13, 2008).

assistance possible” based on uniform principles.¹²⁴ Although legally nonbinding, the IOSCO MMOU is now the principal international instrument for securities enforcement cooperation, having been signed by forty-eight different regulatory agencies from around the world.¹²⁵

As a general rule, the MMOU provides that signatories will, within its framework, “provide each other with the fullest assistance permissible to secure compliance [of their respective securities laws and regulations].”¹²⁶ It includes precise rules concerning the scope of assistance required, the procedures to be followed, permissible uses of the information provided, confidentiality, and the limited circumstances under which assistance may be denied. IOSCO members may only sign the MMOU after undergoing a review process confirming that they have the legal authority to comply with all of its provisions.¹²⁷ IOSCO also maintains an expert panel to monitor each member’s continued “willingness and ability” to comply with the MMOU, and has the authority to expel members who persistently fail to do so.¹²⁸ While comprehensive statistics have not been compiled, surveys by IOSCO indicate that a substantial number of assistance requests are made between national regulators.¹²⁹ The SEC points to several high-profile examples of successful enforcement cooperation within the IOSCO framework, including cases related to the Ahold, Royal Dutch/Shell, Parmalat, and Vivendi Universal corporations.¹³⁰

124. See IOSCO, *Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information*, para. 4 (May 2002), available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD126.pdf> [hereinafter IOSCO, *Multilateral Memorandum of Understanding*].

125. See IOSCO, List of Signatories to the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information, http://www.iosco.org/library/index.cfm?section=mou_siglist (last visited Nov. 13, 2008).

126. See IOSCO, *Multilateral Memorandum of Understanding*, *supra* note 124, § 7(a).

127. See *id.* app. B.

128. *Id.* § 16(b).

129. The SEC reports that in its fiscal year 2003, it made 309 requests for assistance to foreign regulators, and responded to 344 requests. SEC, INTERNATIONAL COOPERATION IN SECURITIES LAW ENFORCEMENT 2 n.1 (Fall 2004), available at http://www.sec.gov/about/offices/oia/oia_enforce/intercoop.pdf [hereinafter SEC, INT’L COOPERATION]. In an April 2007 survey, out of thirty-two developing country IOSCO members, four reported receiving more than fifty requests a year, four reported between sixteen and fifty requests, and ten reported between one and five requests. Only two regulators reported no requests. IOSCO, Emerging Mkts. Comm., *Obstacles to Joining the IOSCO MOU*, at 7 (Apr. 2007), available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD246.pdf>.

130. See SEC, INT’L COOPERATION, *supra* note 129, at 6-7. In these four high-profile cases, the SEC cooperated with the home regulators of foreign companies listed in the United States to investigate fraudulent accounting and disclosure practices. In the Ahold case, the SEC cooperated with Dutch authorities in an investigation of accounting fraud at a U.S. subsidiary of Ahold, a Dutch company. Notably, at the request of Dutch authorities conducting a parallel investigation in the Netherlands, the SEC did not seek penalties in its enforcement action “because of potential double jeopardy issues under Dutch law” and because of “the need for continued cooperation between the SEC and regulatory authorities in other countries.” See SEC Charges Royal Ahold and Three Former Top Executives with Fraud, Accounting & Auditing Enforcement Release No. 2124, Litigation Release No. 18,929, 83 SEC Docket 2976 (Oct. 13, 2004). In the case of Royal Dutch/Shell, the SEC cooperated extensively with U.K. and Dutch authorities in investigating massive overstatements of proven hydrocarbon reserves by major British and Dutch oil and gas companies. See SEC, INT’L COOPERATION, *supra* note 129, at 6. Likewise, in the Parmalat case, the SEC cooperated with Italy’s securities regulator in investigating large-scale accounting fraud at a U.S.-listed Italian dairy company. See SEC Charges Parmalat with Financial Fraud, Accounting & Auditing Enforcement Release No. 1936, Litigation Release No. 18,527, 81 SEC Docket 3142 (Dec. 30, 2003); SEC Alleges Additional Violations by Parmalat, Accounting &

IOSCO appears to have been largely successful in increasing securities enforcement cooperation among developed countries. This success can be accounted for by these states' parallel domestic preferences for effective securities fraud enforcement and the absence of substantial distributive or enforcement issues. In developed economies, the financial markets play an essential role in capital allocation; these states would gain very little by letting this role be undermined by widespread fraud, even when it targets foreigners. For instance, when U.S. courts developed the doctrines governing their jurisdiction in transnational securities fraud cases, they put a premium on protecting U.S. investors.¹³¹ Nevertheless, they also indicated that the United States should not "be used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners."¹³² Expressed more formally, each country is legitimately concerned that, if its financial markets are used as a base to defraud foreigners, international confidence will be undermined and the role of its markets in channeling international capital to domestic productive uses will be weakened.

This reasoning also applies to smaller developed economies, as their access to international capital markets would be compromised by a persistent failure to protect foreign investors. While the costs of lax securities enforcement would be significant, its benefits would be marginal in terms of employment, tax, or infrastructure development. Coordination is also assisted by the fact that virtually all legal systems and cultures view fraud as reprehensible. Thus, there is little prospect of an international "race to the bottom" in securities fraud regulation among developed economies. On the contrary, developed states share an interest in maintaining robust standards and coordinating their efforts to prevent fraudsters from circumventing them. Once achieved, coordination is largely self-sustaining, which is why compliance with the IOSCO standards does not require dispute-resolution or enforcement mechanisms.

Auditing Enforcement Release No. 2065, Litigation Release No. 18,803, 83 SEC Docket 1416 (July 28, 2004). In the case of Vivendi Universal, French authorities provided assistance to the SEC in investigating false disclosures regarding a French company's liquidity. See SEC Files Settled Civil Fraud Action Against Vivendi Universal, Accounting and Auditing Enforcement Release No. 1935, Litigation Release No. 18,523 (Dec. 24, 2003), available at <http://www.sec.gov/litigation/lit/releases/lr18523.htm>. For additional accounts of international cooperation in securities enforcement, see Felice B. Friedman, Elizabeth Jacobs & Stanley C. Macel IV, *Taking Stock of Information Sharing in Securities Enforcement Matters*, 10 J. FIN. CRIME 37 (2002).

131. U.S. courts have long recognized the extraterritorial reach of the United States's securities fraud laws. In general, transnational securities fraud falls within the jurisdiction of U.S. courts if it involves either conduct or effects within the United States. The conduct test is applied broadly. See *Itoba Ltd. v. Lep Group PLC*, 54 F.3d 118, 122 (2d Cir. 1995); see also *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 29-30 (D.C. Cir. 1987); *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041, 1045-46 (2d Cir. 1983). Even in cases where conduct in the United States is not established, jurisdiction may be asserted under the "effects test" where "conduct outside the United States has had a substantial adverse effect on American investors or securities markets." *Robinson v. TCI/US West Commc'ns Inc.*, 117 F.3d 900, 905 (5th Cir. 1997); see also *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d Cir.) (asserting the extraterritorial jurisdiction of the Exchange Act), *rev'd on other grounds*, 405 F.2d 215 (2d Cir. 1968) (en banc).

132. *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1017 (2d Cir. 1975); see also *United States v. Cook*, 573 F.2d 281 (5th Cir. 1978) (supporting jurisdiction over a scheme that victimized foreign investors but involved U.S. securities and conduct).

This success, while remarkable, has significant limits. While regulators agree in the MMOU to assist one another in the enforcement of their laws regarding cross-border conduct, the system does not attempt to substantially harmonize securities laws. Different states retain very different laws on securities fraud, and they also disagree on such fundamental matters as the prosecutor's burden of proof, the appropriateness of criminal penalties, and the definition of offenses such as market manipulation and insider trading. In salient cases, these discrepancies sometimes lead to acrimonious judicial disputes regarding which jurisdiction's laws should apply to a cross-border transaction.¹³³ The vast differences that persist in securities laws are illustrated by the fact that, while regulators may assist their foreign counterparts in investigating and prosecuting fraudulent activity, the resulting foreign judgments will generally not be entitled to recognition or enforcement.¹³⁴ Thus, the scope of the IOSCO instruments has been carefully limited to areas in which domestic preferences among the major financial powers were aligned.

2. *Reining in Offshore Financial Centers*

The calculus, however, leads to a quite different result for OFCs with small domestic markets but relatively large financial sectors that primarily service nonresidents. Since the competitive advantage of OFCs arises in large part from their lax regulatory systems and the secrecy they offer, they have strong incentives to resist international regulatory cooperation.¹³⁵ The rapid expansion of offshore finance in the 1990s caused increasing concern in developed countries that OFCs might serve as havens for tax evasion, international securities fraud, money laundering, and terrorist financing. After the terrorist attacks of September 11, 2001, developed states turned to a coercive approach to secure greater cooperation by OFCs.¹³⁶ While these efforts focused primarily on terrorist financing and money laundering, they affected securities fraud cooperation as well.

By 1999, the Financial Action Task Force (FATF), an international body created at the G-7's initiative to combat international money laundering and terrorist financing, had launched a process aimed at identifying countries that failed to cooperate with international anti-money laundering efforts.¹³⁷ The FATF's membership is composed of developed countries and large emerging economies that are "strategically important," notably in terms of GDP,

133. See, e.g., *Roby v. Corp. of Lloyd's*, 824 F. Supp. 336 (S.D.N.Y. 1992). In *Roby*, U.S. investors in Lloyd's insurance syndicates sued Lloyd's for several alleged violations of U.S. securities laws, and urged U.S. courts to disregard a U.K. choice-of-law clause in the agreement. The Second Circuit, while refusing to override the clause, acknowledged that U.S. securities laws "would provide the [plaintiffs] with a greater variety of defendants and a greater chance of success due to lighter scienter and causation requirements." *Roby*, 996 F.2d at 1366.

134. See William S. Dodge, *Breaking the Public Law Taboo*, 43 HARV. INT'L L.J. 161, 187-89 (2002).

135. See DREZNER, *supra* note 35, at 128-29; DALE D. MURPHY, THE STRUCTURE OF REGULATORY COMPETITION 101 (2004); Beth A. Simmons, *The International Politics of Harmonization: The Case of Capital Market Regulation*, 55 INT'L ORG. 589, 606-07 (2001).

136. DREZNER, *supra* note 35, at 142-45; Simmons, *supra* note 135, at 607-09.

137. See Jared Wessel, *The Financial Action Task Force: A Study in Balancing Sovereignty with Equality in Global Administrative Law*, 13 WIDENER L. REV. 169, 171-80 (2006).

banking sector size, and commitment to enforcement efforts.¹³⁸ Among the criteria used by the FATF to determine whether countries have adequate regulation and supervision of financial institutions is compliance with IOSCO standards on securities regulation.¹³⁹ The FATF criteria also expressly required countries to remove laws prohibiting the exchange of information and provision of enforcement assistance to foreign authorities.¹⁴⁰ The FATF encouraged its members to consider adopting countermeasures against noncooperative states that failed to improve their records. Examples of such countermeasures included: bolstering customer identification requirements, requiring financial institutions to report transactions linked with noncooperative countries, and eventually restricting or prohibiting transactions with these countries.¹⁴¹

On a national level, the United States's adoption of the USA PATRIOT Act in 2001 lent teeth to the FATF list by looking to international compliance assessments in building its own list of noncooperative jurisdictions and imposing costly requirements on U.S. financial institutions doing business with entities therein.¹⁴² In the most visible case of concerted action, the FATF imposed sanctions on Nauru in 2001 following reports that the country was used extensively for money laundering by the Russian mafia.¹⁴³ This followed similar threats against the Philippines and Ukraine.¹⁴⁴ Following these actions, the FATF reported substantial improvements in individual countries' practices.¹⁴⁵ By October 13, 2006, no countries were left on the FATF list.¹⁴⁶ Nevertheless, doubts persist regarding the effectiveness of this process, as determinations of compliance are largely based on self-reporting.

The apparent progress in the fight against money laundering reflects the high political priority accorded to the issue by major powers, particularly the United States. In particular, the coercive approach adopted by the FATF to enforce cooperation was stronger than that of the Financial Stability Forum (FSF), another network of regulators set up to address global financial stability issues. In 2000, the FSF embarked upon an initiative to evaluate the level of compliance of OFCs with major international financial standards, including IOSCO's. In a June 2000 press release, the FSF classified 25 states

138. See Fin. Action Task Force [FATF], *FATF Membership Policy* (Feb. 29, 2008), available at <http://www.fatf-gafi.org/dataoecd/25/48/41112798.pdf>.

139. FATF, REPORT ON NONCOOPERATIVE COUNTRIES AND TERRITORIES 2 n.4 (Feb. 14, 2000), available at <http://www.fatf-gafi.org/dataoecd/57/22/33921735.pdf>.

140. *Id.* at 5.

141. *Id.* at 8.

142. See *Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism* (USA PATRIOT Act), Pub. L. No. 107-56, §§ 311-12, 115 Stat. 272, 298-306 (2001).

143. See *Tiny Pacific Island Is Facing Money-Laundering Sanctions*, N.Y. TIMES, Dec. 6, 2001, at A5.

144. See DREZNER, *supra* note 35, at 143; Mark Landler, *The Philippines Moves Against Bank Secrecy*, N.Y. TIMES, Oct. 13, 2001, at C1.

145. FATF's annual Noncooperative Countries and Territories (NCCT) reports describing the progress made by jurisdictions previously listed as uncooperative, proposed sanctions, and de-listings are available at <http://www.fatf-gafi.org> (follow "Publications" hyperlink). On the concessions made by offshore financial centers (OFCs) under FATF pressure, see DREZNER, *supra* note 35, at 143-45.

146. See FATF, Noncooperative Countries and Territories, http://www.fatf-gafi.org/document/4/0,3343,en_32250379_32236992_33916420_1_1_1_1,00.html (last visited Nov. 13, 2008).

in “Group III,” which included jurisdictions whose legal infrastructure, supervisory practices, regulatory resources and/or level of cooperation were “largely of a lower quality” than those of other OFCs. While the FSF did not directly recommend coercive measures, the initial list of “noncooperative states” issued by FATF in June 2000 included eleven countries previously identified in the May 2000 FSF press release.¹⁴⁷ In addition, the FSF launched a large cooperative effort with the IMF to systematically review OFCs’ compliance.¹⁴⁸ In 2005, the FSF, while acknowledging that further work was necessary to improve compliance, stated that the initial list had “served its purpose” and was “no longer operative.”¹⁴⁹ Again, the combined strategy of “naming and shaming” by the FSF, compliance review by the IMF, and pursuit of more coercive measures by the FATF pushed a number of important offshore jurisdictions to cooperate. That said, others have not yet volunteered for IMF assessment.¹⁵⁰

3. *Other IOSCO Initiatives*

In addition to enforcement cooperation, IOSCO has been active in several areas of international securities regulation. While a full account of IOSCO’s activities is beyond the scope of this Article, three of its other high-profile initiatives deserve mention. First, as pointed out by David Singer, an important but little-discussed “negative case” of international regulatory cooperation is IOSCO’s failed effort to adopt uniform capital adequacy rules for securities firms.¹⁵¹ This effort, which occurred in parallel with the Basel Committee’s development of its accord on bank capital adequacy and was strongly supported by U.K. authorities, met with substantial resistance from U.S. and Japanese regulators and was abandoned in 1993.

Singer’s account of this case points to the domestic considerations that motivated each regulator. After the 1987 market crash threatened the stability of British financial institutions, Britain’s Securities and Investments Board (SIB) needed to address contradictory pressures: the demand for stricter capital regulation on the one hand and the declining international competitiveness of British securities firms on the other. The SIB reacted by

147. See FATF, *Review To Identify Noncooperative Countries or Territories: Increasing the Worldwide Effectiveness of Anti-Money Laundering Measures* (June 22, 2000), available at <http://www.fatf-gafi.org/dataoecd/56/43/33921824.pdf>; Press Release, Fin. Stability Forum [FSF], Financial Stability Forum Releases Grouping of Offshore Financial Centres (OFCs) To Assist in Setting Priorities for Assessment (May 25, 2000), available at http://www.fsforum.org/press/pr_000526.pdf [hereinafter FSF Grouping of OFCs]. These eleven countries were the Bahamas, the Cayman Islands, Cook Islands, Lebanon, Liechtenstein, Marshall Islands, Nauru, Niue, Panama, St. Kitts and Nevis, and St. Vincent and the Grenadines.

148. See FSF Grouping of OFCs, *supra* note 147; Press Release, IMF, IMF Board Reviews Issues Surrounding Work on Offshore Financial Centers (July 26, 2000), available at <http://www.imf.org/external/np/sec/nb/2000/nb0062.htm>. Many of the IMF’s staff assessments of OFCs are available at <http://www.imf.org/external/np/ofca/ofca.asp>.

149. Press Release, FSF, New Process To Promote Further Improvements in Offshore Financial Centres (OFCs) (Mar. 11, 2005), available at http://www.fsforum.org/press/pr_050311b.htm.

150. See IMF, MONETARY AND FIN. SYS. DEP’T, OFFSHORE FINANCIAL CENTERS: THE ASSESSMENT PROGRAM—A PROGRESS REPORT (2006), available at <http://www.imf.org/external/np/pp/eng/2006/020806.pdf>.

151. Singer, *supra* note 54, at 553.

seeking an international accord on capital adequacy through IOSCO. U.S. banks, fearful that such an accord might lead to the adoption of consolidated supervision and impair their unrivaled international competitiveness in derivatives and other innovative financial instruments, pressured their regulators to resist U.K. plans. Japanese regulators were also skeptical, and eventually the draft accord failed to gather sufficient support. Thus, despite a plausible case that uniform capital standards for securities firms would have reduced global systemic risk, domestic political considerations overrode the collective interest.

In 1998, IOSCO adopted a standardized form intended to be used by its members as a uniform standard for nonfinancial disclosure by foreign firms raising capital in their jurisdiction. The form was in fact virtually identical to the SEC's existing form for foreign private issuers,¹⁵² and its adoption reflected little more than an exercise of U.S. market power in setting global disclosure standards. IOSCO has also adopted many other consultative papers, voluntary standards, and best practices, most notably its Objectives and Principles of Securities Regulation, a high-level compendium meant to assist national authorities in establishing and maintaining high regulatory standards. While these standards have undoubtedly assisted domestic efforts to improve financial market regulation and are used by the IMF and World Bank to evaluate progress in these areas, they also tend to be pitched at a general level and to avoid precise normative pronouncements on potentially controversial issues.¹⁵³

4. *Conclusions*

IOSCO's achievements and failures are consistent with the hypotheses articulated in Part III. IOSCO has been successful in coordinating mutual assistance in securities law enforcement among regulators in developed countries, an area where preferences are aligned and distributive and enforcement problems are largely absent. The clash of interests between major financial markets and OFCs undermined cooperation, until the September 11, 2001 terrorist attacks escalated concerns about money laundering and terrorist financing and encouraged the FATF and U.S. authorities to adopt coercive measures. Even under this new regime, OFCs have incentives to renege, and it is doubtful that sustained compliance can be achieved through TRNs. Likewise, divergent domestic preferences influenced the position of national regulators in negotiating an agreement on capital adequacy for securities firms, eventually leading to the demise of the proposed rules. Other efforts by IOSCO have been characterized by the dominance of certain regulators or by avoidance of controversial substantive standards.

152. For a description of the SEC form, see SCOTT, *supra* note 69, at 121.

153. See, e.g., Harry McVea, *Hedge Fund Asset Valuations and the Work of the International Organization of Securities Commissions (IOSCO)*, 57 INT'L & COMP. L.Q. 1 (2008).

C. *The International Competition Network*

From the end of World War II until the 1980s, antitrust was a frequent source of regulatory conflict among Western market economies. Thus, before turning to an examination of the ICN's structure and achievements, it is useful to examine the patterns of international antitrust cooperation before its establishment. This examination shows that, in the immediate postwar period, fundamentally divergent policy preferences created a deadlock between the United States and Europe that prevented most transatlantic antitrust cooperation. In the following decades, Europe's preferences shifted toward alignment with the United States on the fundamental goals and principles of antitrust. This development raised the possibility of joint gains through administrative and enforcement coordination. The two regulators, however, retain substantial differences on specific doctrines and enforcement practices, which have so far prevented substantive harmonization. On the contrary, the two systems became rival standards, competing for influence on antitrust reform worldwide. It is against this background that the ICN was launched in 2001. While innovative and promising, it is just beginning to overcome its initial reluctance to address controversial issues. Whether its ambitious recent efforts in this direction will be successful remains to be seen.

1. *International Antitrust Since 1945: Conflict, Convergence, and Rivalry*

Prior to World War II, fundamental differences of economic policy between the United States and Europe made even the most elementary international antitrust cooperation efforts problematic. While modern U.S. antitrust law appeared in the late nineteenth and early twentieth centuries, when the Sherman and Clayton Acts were adopted and vigorously enforced to counter powerful monopolies,¹⁵⁴ European countries tolerated and sometimes encouraged cartels well into the 1930s.¹⁵⁵ As part of the postwar effort to restructure the international economic system, Western states attempted to incorporate basic antitrust provisions into the International Trade Organization structure contemplated by the 1948 Havana Charter. That effort failed, and in the decades immediately following World War II, there was a very clear divide between the United States's forceful antitrust policy and Western Europe's support for several international cartels as instruments of national economic and security policy.

This fundamental clash of domestic preferences over the desirability of strong antitrust policy precluded international cooperation. Instead, a pattern of recurrent conflict emerged, with each side attempting to vindicate its

154. Sherman Act, 15 U.S.C. §§ 1-7 (2000); Clayton Act, 15 U.S.C. §§ 12-27 (2000) & 29 U.S.C. §§ 52-53 (2000).

155. See Marie-Laure Djelic & Thibaut Kleiner, *The International Competition Network: Moving Towards Transnational Governance*, in TRANSNATIONAL GOVERNANCE: INSTITUTIONAL DYNAMICS OF REGULATION 287, 288-89 (Marie-Laure Djelic & Kerstin Sahlin-Andersson eds., 2006). As a result, efforts by the League of Nations to create a legal framework for international competition did not produce substantial progress. See Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343, 349-50 (1997).

preferred policy internationally through unilateral action. Thus, the United States applied its antitrust laws extraterritorially to prosecute several international cartels. In the *Alcoa* case, Judge Learned Hand famously held that anticompetitive practices "were unlawful, though made abroad, if they were intended to affect imports and did affect them," a doctrine that came to be known as the "effects principle."¹⁵⁶ European countries responded to U.S. assertions of jurisdiction by adopting blocking statutes to hinder the extraterritorial enforcement of U.S. antitrust laws.¹⁵⁷ They also strenuously resisted U.S. antitrust actions through legal and diplomatic means.¹⁵⁸ In sum, the United States and Western European countries faced a deadlock on antitrust: their respective preferences were diametrically opposed, leaving virtually no room for joint gains through cooperation. As the hegemonic power in the postwar period, the United States was largely able to impose its preferred policy extraterritorially. But this ability was tempered by the U.S. desire to maintain strong security relationships with Western Europe, and by the enforcement difficulties posed by blocking statutes.¹⁵⁹

This deadlock, however, gradually abated after the 1950s, as the preferences of European states shifted toward stricter antitrust policy under the influence of several factors. American authorities in occupied Germany imposed a decartelization law that, over time, developed into an extensive competition regime.¹⁶⁰ Following the adoption of the Treaty of Rome and the creation of the European Economic Community, European states gradually

156. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 444 (2d Cir. 1945). Judge Learned Hand also stated the effects principle in more general terms by maintaining that "any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends." *Id.* at 443.

157. Blocking statutes evolved over time. The later ones typically included provisions allowing authorities to prohibit private persons from complying with discovery requests relating to U.S. antitrust suits, denying recognition and enforcement of foreign antitrust judgments, and allowing parties to recover treble damages awarded in foreign antitrust suits, known as "clawback statutes." See, e.g., Foreign Proceedings (Excess of Jurisdiction) Act, 1984, c. 3 (Austl.); Foreign Extraterritorial Measures Act, 1984 S.C., ch. 49 (Can.); Protection of Trading Interests Act, 1980, c. 11 (U.K.); see also Law No. 80-538 of July 16, 1980, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], July 17, 1980, p. 1799 (amending similar legislation).

158. In these efforts, European countries appealed to customary international law to curtail extraterritorial U.S. prosecutions, taking the position that the effects principle was an illegitimate basis for jurisdiction. These protests were never adjudicated, and the legality of extraterritorial antitrust prosecutions based on the so-called "effects principle" remained controversial.

159. These considerations may have led prosecutors and courts to incorporate considerations of international comity into their extraterritorial application of U.S. antitrust laws. Over the 1970s and 1980s, U.S. courts developed doctrines based on comity, reciprocity, reasonableness, and similar factors to restrain the reach of the antitrust statutes. See, e.g., *Montreal Trading Ltd. v. Amax Inc.*, 661 F.2d 864 (10th Cir. 1981), *cert. denied*, 455 U.S. 1001 (1982); *Mannington Mills v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979); *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597 (9th Cir. 1976). The Third Restatement of Foreign Relations Law similarly adopted a balancing approach. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 402-03 (1986). This view, however, was not universally held even during that period. See, e.g., *Laker Airways Ltd. v. Sabena*, 731 F.2d 909 (D.C. Cir. 1984); *Nat'l Bank of Can. v. Interbank Card Ass'n*, 666 F.2d 6 (2d Cir. 1981). Notably, the Supreme Court later rejected balancing doctrines in favor of a return to effects-based jurisdiction. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993). For more on this topic, see generally Andreas F. Lowenfeld, *Conflict, Balancing of Interests, and the Exercise of Jurisdiction To Prescribe: Reflections on the Insurance Antitrust Case*, 89 AM. J. INT'L L. 42 (1995). For a discussion of current U.S. competition law, see generally Eleanor M. Fox, *Competition Law*, in INTERNATIONAL ECONOMIC LAW, *supra* note 2, at 340.

160. See Djelic & Kleiner, *supra* note 155, at 290.

centralized competition policy and enforcement in the hands of supranational institutions, and this common competition law became stronger than their preexisting national laws.¹⁶¹ The decline of state-centered economic policy and the corresponding trends toward economic liberalization and privatization also pushed competition policy closer to the consumer-oriented standards favored in the United States.¹⁶² Thus, by the 1990s, the divide between European and U.S. preferences had substantially narrowed: both now agreed on the fundamental goals and principles of antitrust policy, while they disagreed on several specific doctrines. During that period, Europe also grew in size and influence in international economic affairs. Its integrated economy now rivals that of the United States, and a large proportion of multinational firms operated or maintained assets within European territory, making them vulnerable to enforcement by EU authorities.¹⁶³ The combination of these trends—Europe's preference shift and its newfound status as a world economic power—has had two important consequences for international antitrust.

First, there is now greater space for joint gains through transatlantic cooperation. Europe now has both a greater interest in combating foreign anticompetitive practices that affect its markets and substantial capacity to compel foreign firms to comply with its laws. This realignment of interest and capabilities led to the rise of extraterritorial enforcement of European competition law, as Europe gradually abandoned its insistence on the illegality of the effects principle and effectively applied it to reach anticompetitive practices by foreign firms.¹⁶⁴ Conversely, while European competition law

161. See Andrew Guzman, *The Case for International Antitrust*, 22 BERKELEY J. INT'L L. 355, 361 (2004).

162. See Djelic & Kleiner, *supra* note 155, at 291-93.

163. On Europe as a great world economic power, see DREZNER, *supra* note 35, at 35-39.

164. See Joined Cases 89, 104, 114, 116, 117 & 125-29/85, *Åhlström Osakeyhtiö v. Comm'n*, 1988 E.C.R. 5193 (holding several non-EC wood pulp producers liable for conspiring to raise prices within the European Community). Both the European Court of Justice and European commentators have attempted to maintain a distinction between the "implementation doctrine" applied in this case and the "effects doctrine" applied by U.S. courts. See EINER ELHAUGE & DAMIEN GERADIN, *GLOBAL ANTITRUST LAW AND ECONOMICS* 1137-39 (2007). In virtually all plausible scenarios, however, the two approaches are bound to lead to the same result. European insistence at maintaining the distinction parallels the pre-*Alcoa* U.S. antitrust cases formally requiring substantial U.S. activities as a basis for jurisdiction, but nevertheless satisfying themselves with minimal contacts that were in no way central to the alleged violation. See *id.* at 1144; see also Andre Fiebig, *Modernization of European Competition Law as a Form of Convergence*, 19 TEMP. INT'L & COMP. L.J. 63, 81 (2005) ("The implementation requirement is simply another name for the effects test."). Likewise, in *Gencor*, a case involving a transaction through which British and South African companies would combine their platinum operations in South Africa and that had been approved by South African authorities, the European Court of First Instance concluded that the assertion of EU merger review jurisdiction over transactions between foreign firms was "justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community." Case T-102/96, *Gencor Ltd. v. Comm'n*, 1999 ECR II-753, II-785. The German government specifically submitted that the turnover criteria invoked by European Community (EC) law were justified under public international law by the effects principle. See *id.* at II-781. Under current law, proposed mergers and other "concentrations" between undertakings must be reviewed by the European Commission if it has a "Community dimension," meaning if the sales turnover of the undertakings concerned in Europe exceed certain thresholds. See Council Regulation 139/2004, On the Control of Concentrations Between Undertakings, 2004 O.J. (L 24) 1, 6 [hereinafter EC Merger Regulation]. At least one prominent commentator has concluded that, at least in the context of antitrust regulation, the effects principle is now generally accepted as a basis for jurisdiction. See Fox, *supra* note 159, at 350 ("Jurisdiction over offshore acts that directly harm a

now reaches foreign conduct with effects in the European Union, it does not condemn European conduct whose effects are felt abroad.¹⁶⁵ The same jurisdictional pattern—extraterritorial application of antitrust laws based on the effects principle and disregard of anticompetitive conduct which only affects foreign markets—is also well established in the United States.¹⁶⁶

Since, however, each regulator faces practical and legal limits to its capacity to gather evidence and enforce its process abroad, it frequently needs the other's assistance in enforcing its antitrust laws extraterritorially to protect its markets. In addition, in an increasingly integrated transatlantic economy, both recognize the efficiency benefits of coordinating their policies and procedures in matters such as concurrent merger reviews. As a result, the United States and European Union—along with several other important jurisdictions—have, since the early 1990s, pursued antitrust cooperation agreements that attempt to strike a delicate balance between, on the one hand, reaping gains from international cooperation and, on the other, preserving the distinctive substantive features of their respective regimes and retaining discretion to refuse or limit cooperation when genuine differences of policies exist or domestic political pressures make cooperation too costly.

More specifically, the 1995 Agreement between the United States and European Commission¹⁶⁷ requires the parties to notify each other when their enforcement activities may affect their respective "important interests," to exchange information relevant to the other party's enforcement activities and render assistance related thereto, and to coordinate their enforcement activities when "it is in their mutual interest" to do so.¹⁶⁸ The Agreement includes a positive comity provision by which each party can request that the other initiate enforcement activities in respect of anticompetitive practices carried out in the latter's territory and which adversely affect "important interests" of

regulating state, once the center of controversy, is now well accepted in the world.").

165. See ELHAUGE & GERADIN, *supra* note 164, at 1156 ("A consequence of the 'territorial jurisdiction' principle applied in the European Commission is that practices by European firms whose only impact is outside the European Commission fall short of the substantive reach of European competition law."). Elhaug and Geradin point out that there are exceptions to this rule in cases where export cartels create artificial scarcity in European markets or limit imports within the European Community, but these exceptions are consistent with the argument of this Article. On mergers, the turnover threshold in the EC Merger Regulation effectively constitutes a proxy for effects within the European Commission.

166. Despite earlier suggestions that the effects principle be tempered by a reasonableness requirement, the Supreme Court reaffirmed it in *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993). Conversely, Congress has passed statutes confirming its lack of concern for effects abroad. The Webb-Pomerene Act of 1918, 15 U.S.C. §§ 61-66 (2000), and the more recent Export Trading Company Act of 1982, 15 U.S.C. §§ 4011-21 (2000), had long protected certain export cartels against antitrust suits. They were supplemented in 1982 by a more general legislative statement of U.S. antitrust jurisdiction: the Foreign Trade Antitrust Improvements Act (FTAIA), codified at 15 U.S.C. §§ 6a, 45(a)(3) (2000). As stated by the Supreme Court, "the FTAIA seeks to make clear to American exporters (and to firms doing business abroad) that the Sherman Act does not prevent them from entering into business arrangements . . . , however anticompetitive, as long as those arrangements adversely affect only foreign markets." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 161 (2004).

167. Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, U.S.-EC, Apr. 10, 1995, 1995 O.J. (L 95) 47, 30 I.L.M. 1491 (1991) [hereinafter 1991 Competition Agreement].

168. *Id.* arts. II-IV.

the former.¹⁶⁹ It also contains a negative comity provision in which the parties agree to “consider important interests of the other Party” in decisions relating to investigations or proceedings.¹⁷⁰ In particular, when important interests of the other party are at stake, the parties agree to consider a series of balancing factors in deciding whether and how to proceed.

Several features of the Agreement, however, mitigate its cooperative implications. Assistance is required only “to the extent compatible with the assisting party’s laws and important interests” and is thus largely discretionary.¹⁷¹ None of the parties is bound or authorized to release confidential business information to the other without the consent of the private parties involved in the investigation or review.¹⁷² Enforcement coordination is limited to “cases where both parties have an interest in pursuing enforcement activities,” leaving each party free to withhold cooperation.¹⁷³ The positive comity provision makes it clear that it does not “limit[] the discretion of the notified Party under its competition laws and enforcement policies as to whether or not to undertake enforcement activities with respect to the notified anticompetitive activities.”¹⁷⁴ Likewise, the main obligation relating to negative comity is to “consider the following factors . . . in seeking an appropriate accommodation of the competing interests,” a very low standard.¹⁷⁵ Indeed, a commitment to refrain from extraterritorial enforcement would only make sense in the presence of a reciprocal commitment by the requested party to investigate but, as seen above, no such obligation is imposed by the Agreement.

Taken together, these qualifications strongly suggest that the purpose of the Agreement is limited to coordinating enforcement in cases where both parties share an interest in prohibiting anticompetitive practices adversely affecting both markets. For instance, if U.S. and European firms formed a transatlantic cartel to fix the price of a product in both markets, clearly both regulators would have an interest in pursuing enforcement action. In that case, the Agreement would be helpful because each regulator may need evidence from the other jurisdiction, to avoid imposing conflicting orders and remedies, and to avoid unnecessary duplication of costs for the regulators and businesses involved.¹⁷⁶ But just as clearly, the Agreement is not meant to compel a party to conduct enforcement activities against anticompetitive activities, such as export cartels, that externalize negative welfare effects onto foreigners.¹⁷⁷

169. *Id.* art. V.

170. *Id.* art. VI.

171. *Id.* art. IV.

172. *Id.* art. VIII; see Devuyt, *supra* note 62, at 148. The 1995 Van Miert Report stated that “it is clear that the ban on exchanging confidential information has created a major obstacle to close cooperation.” *Competition Policy in the New Trade Order: Strengthening International Cooperation and Rules*, at 7, COM (1995) 359 final (July 12, 1995); see also *id.* at 14.

173. 1991 Competition Agreement, *supra* note 167, art. IV(2).

174. *Id.* art. V(4). The enabling legislation for the most recent antitrust cooperation agreements entered into by the United States, the International Antitrust Enforcement Assistance Act, specifically conditions cooperation in individual cases on the Attorney General or the FTC’s determination that such cooperation is “consistent with the public interest of the United States.” 15 U.S.C. § 6207(a)(3) (2000).

175. 1991 Competition Agreement, *supra* note 167, art. VI(3).

176. See Devuyt, *supra* note 62, at 132.

177. The positive comity provisions of the 1991 Agreement were supplemented by a 1998 Agreement dealing specifically with this topic. See Agreement Between the Government of the United

Neither does it compel that party to provide assistance that would help the affected state effectively exercise extraterritorial jurisdiction. The emphasis on coordination is confirmed by the practical experience of regulators, who appreciate the benefits of mutual assistance but recognize that "bilateral cooperation agreements . . . remain limited in scope and in effect."¹⁷⁸

Besides this procedural coordination, the second consequence of the rise of Europe as a major antitrust regulator has been increasing competition between its regime and that of the United States. Despite convergence on fundamental policies, important differences persist on substantive issues such as vertical restraints and the evaluation of potential unilateral effects following a proposed merger.¹⁷⁹ More generally, European competition policy is often seen as more hospitable to noneconomic policy concerns such as protecting certain categories of producers from competition or accommodating state-led cultural and industrial policies. There are also crucial differences between the blocs regarding antitrust enforcement: while U.S. authorities see private antitrust suits, treble damages, and severe criminal penalties as essential deterrents, these methods are generally frowned upon in Europe, which relies

States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, U.S.-EC, June 4, 1998, 1998 O.J. (L 173) 28, 1998 U.S.T. LEXIS 72. The 1998 Agreement essentially provides for more detailed procedures for cooperation in cases where the requested party agrees to conduct enforcement proceedings. It does not, however, turn the discretionary standard of the 1991 Competition Agreement into a binding one. Indeed, as stated by the U.S. International Competition Policy Advisory Committee:

The historic enforcement record of antitrust agencies around the world does not instill confidence in those agencies' willingness to pursue antitrust actions against domestic firms in instances where the practices of those firms have allegedly impaired the ability of foreign firms to compete effectively. In the absence of a nation's serious commitment to undertake such actions, where legally warranted, the benefits of positive comity may remain modest or illusory.

INT'L COMPETITION POLICY ADVISORY COMM., FINAL REPORT TO THE ATTORNEY GENERAL AND ASSISTANT ATTORNEY GENERAL FOR ANTITRUST 23 (2000), available at <http://www.usdoj.gov/atrp/icpac/finalreport.htm>.

178. Communication from the Commission to the Council, *Towards an International Framework of Competition Rules*, at 8, COM (1996) 284 final (June 18, 1996); see also Waller, *supra* note 155, at 377 (noting the difficulty weak bilateral regimes posed to antitrust enforcement actions in the diamond trade). These agreements are part of a broader set of international efforts at antitrust cooperation. The OECD maintains a set of recommendations for national antitrust authorities, last updated in 1995. See OECD, *Revised Recommendation of the Council Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade*, OECD Doc. C(95)130/Final (Sept. 21, 1995), available at <http://www.oecd.org/dataoecd/60/42/21570317.pdf> [hereinafter *Cooperation Between Member States*]. It also maintains a more recent set of guidelines on prosecuting "hard core" cartels. See OECD, *Recommendation of the Council Concerning Effective Action Against Hard Core Cartels*, OECD Doc. C(98)35/Final (May 13, 1998), available at <http://www.oecd.org/dataoecd/39/4/2350130.pdf> [hereinafter *Action Against Hard Core Cartels*]. However, as in the case of the U.S.-EC agreements, the OECD instruments expressly preserve each state's "full freedom of ultimate decision" in cooperating with foreign investigations. See *Action Against Hard Core Cartels*, *supra*, § I(B)(2)(c) ("[A] Member country may decline to comply with a request for assistance, or limit or condition its co-operation on the ground that it considers compliance with the request to be not in accordance with its laws or regulations or to be inconsistent with its important interests or on any other grounds, including its competition authority's resource constraints or the absence of a mutual interest in the investigation or proceeding in question."); *Cooperation Between Member States*, *supra*, § I(B)(4)(b) ("Without prejudice to the continuation of its action under its competition law and to its full freedom of ultimate decision the Member country so addressed should give full and sympathetic consideration to the views expressed by the requesting country . . .").

179. See Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy*, 94 AM. J. INT'L L. 478, 490 (2000).

primarily on public enforcement through civil penalties.¹⁸⁰ As a result, attempts to harmonize substantive aspects of international competition policy through the OECD and U.N. Conference on Trade and Development (UNCTAD) proved essentially fruitless,¹⁸¹ and U.S. and EU laws became “rival standards”¹⁸² that, especially during the 1990s, competed actively to shape emerging competition regimes in other countries. Thus, the European Union’s rapid expansion ensured the dominance of its competition model in the new democracies of Eastern Europe. Conversely, the U.S. model became increasingly influential within the United States’s immediate economic sphere, as illustrated by reforms of Mexican and Canadian antitrust laws that followed NAFTA.

2. *The International Competition Network*

a. *Origins and Accomplishments*

In 1997, the Clinton Administration convened an International Competition Policy Advisory Committee to provide recommendations for the future of U.S. international antitrust policy. In its influential 2000 report, the Committee called for the creation of “a *new* venue where government officials, as well as private firms, NGOs, and others can consult on matters of competition law and policy.”¹⁸³ As a result, the ICN was launched in 2001 to “address antitrust enforcement and policy issues of common interest and formulate proposals for procedural and substantive convergence.”¹⁸⁴

The ICN’s concise governing instrument makes it clear that, while the ICN will “encourage the dissemination of antitrust experience and best practices,” it will not “exercise any rule-making function” and will leave it to individual antitrust agencies “to decide whether and how to implement the recommendations.”¹⁸⁵ The ICN is nonhierarchical in nature and consists of several working groups focused on specific aspects of international antitrust policy (such as cartels, mergers, and unilateral conduct), whose work is coordinated by a steering group of representatives from national antitrust agencies. The ICN is intended to be as inclusive as possible, welcoming members from both developed and developing countries as well as nongovernmental advisers from international organizations, industry and consumer groups, antitrust practitioners, and academics.¹⁸⁶ In May 2007, the ICN announced that its membership had reached 100 agencies from 88 jurisdictions.¹⁸⁷ The ICN does not maintain a permanent secretariat, and much

180. See ELHAUGE & GERADIN, *supra* note 164, at 4.

181. See Waller, *supra* note 155, at 350-52.

182. On the concept of rival standards, see DREZNER, *supra* note 35, at 78-81.

183. INT’L COMPETITION POLICY ADVISORY COMM., FINAL REPORT 282 (2000), available at <http://www.usdoj.gov/atr/icpac/finalreport.htm> (emphasis in original).

184. INT’L COMPETITION NETWORK [ICN], MEMORANDUM ON THE ESTABLISHMENT AND OPERATION OF THE INTERNATIONAL COMPETITION NETWORK 1 (2002), available at <http://www.internationalcompetitionnetwork.org/media/library/mou.pdf>.

185. *Id.*

186. *Id.* at 2.

187. ICN, A STATEMENT OF ACHIEVEMENTS 1 (2007), available at http://www.internationalcompetitionnetwork.org/media/library/conference_6th_moscow_2007/1StatementofICNAchievements

of its activity takes place at a yearly conference where recommendations and other important documents are officially adopted.

While it is too early to evaluate the ICN's impact on international antitrust cooperation, some preliminary observations may be made. First, the ICN's creation appears to have created significant momentum in the international antitrust world, and its working groups have been more active in recent years than more formal forums such as the OECD, UNCTAD, or the WTO. Most of the early activity dealt with procedural matters and capacity building. Thus, the Cartels Working Group drafted several chapters of a manual on anticartel enforcement techniques that is being used by antitrust agencies around the world to enhance their investigatory capabilities.¹⁸⁸ The Merger Working Group has produced detailed recommended practices on merger notification and review procedures to help streamline the approval process for transnational mergers.¹⁸⁹ The working groups have also organized international workshops to build enforcement capacity and disseminate best practices. They also encourage informal assistance to newer agencies on technical aspects of their work.

At the same time, the working groups have been gathering comparative information on substantive aspects of national regimes, and—more recently and with evident caution—have initiated projects to promote substantive convergence. Thus, the Unilateral Conduct Working Group compiled an extensive report on the objectives of unilateral conduct laws, the approaches used by various agencies to define “dominance” as a threshold for intervention, and state-created monopolies, and has published sets of recommended practices in the latter two areas.¹⁹⁰ It is also moving forward with analyses of specific unilateral practices—such as predatory pricing and exclusive dealing—based on which it plans to “consider work on a general framework for assessing conduct.”¹⁹¹

The Cartels Working Group, for its part, released important reports on international anticartel cooperation and on the roles of public and private

June2006-May2007.pdf [hereinafter STATEMENT OF ACHIEVEMENTS].

188. See *id.* at 2; ICN, CO-OPERATION BETWEEN COMPETITION AGENCIES IN CARTEL INVESTIGATIONS (2007), available at http://www.internationalcompetitionnetwork.org/media/library/conference_6th_moscow_2007/19ReportonCo-operationbetweencompetitionagenciesincartelinvestigations.pdf [hereinafter CO-OPERATION IN CARTEL INVESTIGATIONS].

189. See STATEMENT OF ACHIEVEMENTS, *supra* note 187, at 4.

190. See ICN, DOMINANCE/SUBSTANTIAL MARKET POWER ANALYSIS PURSUANT TO UNILATERAL CONDUCT LAWS (2008), available at http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/Unilateral_WG_1.pdf; ICN, REPORT ON THE OBJECTIVES OF UNILATERAL CONDUCT LAWS, ASSESSMENT OF DOMINANCE/SUBSTANTIAL MARKET POWER, AND STATE-CREATED MONOPOLIES (2007), available at http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/Objectives%20of%20Unilateral%20Conduct%20May%202007.pdf; ICN, STATE-CREATED MONOPOLIES ANALYSIS PURSUANT TO UNILATERAL CONDUCT LAWS (2008), available at http://internationalcompetitionnetwork.org/media/library/unilateral_conduct/Unilateral_WG_2.pdf.

191. See ICN, UNILATERAL CONDUCT WORKING GROUP 2008-2009 WORK PLAN (2008), available at <http://www.internationalcompetitionnetwork.org/media/library/conference%207th%20brno%202008/2008-09WorkPlanFINAL.pdf>; see also ICN, REPORT ON PREDATORY PRICING (2008), available at http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/FINALPredatoryPricingPDF.pdf; ICN, REPORT ON SINGLE BRANDING/EXCLUSIVE DEALING (2008), available at http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/Unilateral_WG_4.pdf.

enforcement, as well as templates comparing national enforcement regimes.¹⁹² Perhaps most remarkably, the Merger Working Group has produced guidance on crafting precise definitions of “merger” for the purposes of notification requirements, as well as a set of recommended practices for substantive merger analysis.¹⁹³ While the document does not address more controversial substantive issues such as the assessment of potential unilateral and coordinated effects and their likelihood, the Working Group has placed these matters on its agenda for 2008-09.¹⁹⁴ In all of these fields, there appears to be a shift in focus from procedural matters and comparative studies to actively promoting substantive policy convergence.

b. *The ICN’s Prospects*

The historical background outlined above is crucial to understanding the prospects and limits of the ICN and other network-based approaches to international antitrust. When the world’s major economic powers were deadlocked by fundamentally incompatible preferences, international antitrust cooperation was intrinsically unattainable. Gradual convergence on the fundamental premises of competition policy has now created a space for mutually beneficial cooperation, leading to the adoption of bilateral treaties and other coordination mechanisms. But can the ICN build on these previous efforts and generate deeper international cooperation?

As illustrated by the failure of ambitious harmonization attempts and the weak obligations incorporated in bilateral treaties, governments have been reluctant to enter into deep and legally binding international antitrust commitments. Two distinctive characteristics of international antitrust help explain the limits of formal cooperation mechanisms. First, unlike other areas of international regulation where rules can be reduced to formal instruments and used to monitor compliance, domestic antitrust policy has been, since its inception, based on broadly worded legal provisions that establish general principles meant to be applied in a highly contextualized manner by specialized agencies and the courts.¹⁹⁵ Given the diversity and complexity of the factual situations faced by regulators, antitrust analysis often requires detailed understanding of specific markets embedded in broader national regulatory environments, which makes it difficult to capture in rules and formulae except at the most general level. In this context, consultation and the development of common understandings through TRNs might be an attractive

192. See CO-OPERATION IN CARTEL INVESTIGATIONS, *supra* note 188.

193. See ICN, RECOMMENDED PRACTICES FOR MERGER ANALYSIS (2008), available at http://internationalcompetitionnetwork.org/media/library/Cartels/Merger_WG_1.pdf. The recommended practices, adopted by consensus, address (at a high level) the importance of a comprehensive and procompetitive legal framework for merger analysis; the use of market shares, thresholds, and presumptions; and the role of potential entry and expansion in evaluating the competitive impact of proposed mergers.

194. See ICN, MERGER WORKING GROUP 2008-2009 WORK PLAN (2008), available at http://www.internationalcompetitionnetwork.org/media/library/mergers/Merger_WG_3.pdf.

195. In this respect, U.S. antitrust laws are often analogized to constitutional provisions. See, e.g., *United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972); *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-60 (1933).

alternative to largely fruitless attempts at drafting meaningful international rules.¹⁹⁶

Second, the reluctance to establish deep legal commitments also reflects the unilateral roots of international antitrust. As described above, both the U.S. and EU competition regimes follow jurisdictional rules that exclude domestic anticompetitive practices that affect only foreign markets from the scope of their antitrust laws, while enforcing the same laws extraterritorially against foreign practices with effects on their markets. In this framework, bilateral cooperation agreements are designed not to replace unilateralism, but to complement it by enlisting the assistance of foreign authorities in carrying out extraterritorial enforcement. While these agreements work in situations where state interests are aligned—for instance, when fighting international cartels whose net effects are negative in both jurisdictions or reducing duplicative transaction costs and delays for transnational mergers—regulators cannot bind themselves systematically to cooperate with foreign investigations or defer to their results, because they know that sometimes the targets will be practices that benefit their countries or are otherwise unassailable for domestic political reasons.¹⁹⁷ Examples of this include not only export cartels, but also a range of situations where political considerations are alleged to result in weak antitrust enforcement, such as high-profile mergers involving loss of national control over politically sensitive industries or “national champions.”¹⁹⁸ In this light, the language of the bilateral treaties appears tailored to coordinate enforcement in the many cases where interests coincide, while preserving a pressure valve for noncooperation where powerful domestic constituencies oppose it.

196. See Tarullo, *supra* note 179, at 478-79, 482, 490.

197. Both U.S. and EU antitrust authorities are required to act according to law, and their institutions were designed to insulate them from political pressures. Nevertheless, they are held accountable to their respective political constituencies through regular oversight of their activities. FTC and Department of Justice officials frequently appear before Congress, and the EC competition commissioner is “regularly grilled” by the European Parliament. Devuyt, *supra* note 62, at 130. The Commission, while independent, nevertheless values good relations with European member states, whose votes on the Council of Ministers are necessary to bring its legislative proposals into law. Moreover, legal constraints also limit the ability of the Commission to act on its own initiative to deepen international cooperation. In 1994, the European Court of Justice held that the Commission had exceeded its jurisdiction by entering into the 1991 antitrust cooperation agreement with U.S. authorities, as only the Council has the power to bind Europe in international law. See Case C-327/91, *France v. Comm’n*, 1994 E.C.R. I-3641; see also Corrigendum to Decision 95/145, 1995 O.J. (L 131) 38. While the agreement was subsequently ratified by the Council, the case confirmed the need to escalate binding cooperation initiatives from the Commission to the Council, thus reducing the experts’ freedom of action vis-à-vis Europe’s political authorities.

198. The result is a situation where U.S. and EU regulators may differ substantially in their assessment of a case and participants on each side accuse the other of covert political motives. In the Boeing/McDonnell Douglas case, for instance, the European Commission initially prohibited a merger between two large U.S. manufacturers of large passenger aircraft. It eventually approved the transaction after imposing much stricter conditions than those demanded by the United States. See Commission Decision 97/816, 1997 O.J. (L 336) 16 (EC). The Commission’s role became controversial because of perception in the United States that it was unduly protecting the interests of Boeing’s only remaining competitor, Airbus. See Eleanor M. Fox, *Mergers in Global Markets: GE/Honeywell and the Future of Merger Control*, 23 U. PA. J. INT’L ECON. L. 457, 467 (2002). Similarly, in the GE/Honeywell case, the Commission prohibited a merger between two U.S. manufacturers of jet engines and avionics that had previously been approved by U.S. authorities. See Commission Decision 2004/134, 2004 O.J. (L048) 1.

Given this background, it may well be that networking through the ICN is the best, and perhaps the only realistic, option for progress on international antitrust cooperation. As seen above, the legal doctrines governing many areas of antitrust law have converged to such an extent that differences arise not from the rules themselves, but in the application of economic theories to analyze specific practices and industries. In this context, informal networking through the ICN can plausibly catalyze deeper convergence among the methods used by various national regulators. Another reason the ICN approach may be desirable is that, according to some international antitrust experts, greater harmonization has been impeded in the past by substantial uncertainties concerning its distributive effects.¹⁹⁹ Unlike a formal agreement on antitrust principles, informal cooperation through the ICN may allow regulators to reduce such uncertainties by experimenting with different approaches and developing a sense of their economic impact without making binding commitments. If this happens, sociological accounts of TRNs may be able to draw usefully on the ICN as a favorable case study. It is crucial to acknowledge, however, that a very substantial degree of convergence happened before reaching this stage, with that convergence attributable to exogenous factors in the absence of TRNs.

3. Conclusions

Although it is too early to assess the impact of the ICN's efforts, there are reasons to be cautiously hopeful. It must be recalled, however, that any assessment of the ICN takes place within a broader historical context where expectations regarding international antitrust cooperation are limited by several factors. Because of the important differences in substantive antitrust law and practice, the unilateral nature of international antitrust enforcement, and persistent domestic pressures to use antitrust policy for national gain in specific cases, antitrust regulators recognize the practical limits of international cooperation. For instance, the idea of an optimal global competition policy based on deep substantive harmonization or reciprocal assistance commitments is widely seen as infeasible. Given the dispersion of antitrust authority within both the United States and the European Union, complex internal bureaucratic disputes also complicate the prospects for greater cooperation.²⁰⁰ Against this background, TRNs shine as an attractive alternative, but it remains to be seen whether the ICN succeeds in promoting further substantive convergence and reducing the incidence of conflicting decisions. In the meantime, the claims that international antitrust is "rife with informal cooperation" and that network regulation "avoids the race" between national competitors appear, although not devoid of foundation, somewhat premature.²⁰¹

199. Anu Bradford argues that, even if harmonization would create joint gains, it may be impaired by a dual distributional and informational problem. In essence, states know that there will be winners and losers, but because the effects on their firms and consumers are hard to predict, they cannot agree ex ante on equivalent concessions in other areas. Anu Bradford, *International Antitrust Negotiations and the False Hope of the WTO*, 48 HARV. INT'L L.J. 383, 413-32 (2007).

200. See Waller, *supra* note 155, at 378-80.

201. Slaughter & Zaring, *supra* note 119, at 217.

V. REASSESSING REGULATORY NETWORKS

A. *The Limits of Regulatory Networks*

Based on these case studies, what conclusions can we draw regarding the role and importance of TRNs in global governance? At the outset, these cases invalidate the hypothesis that TRNs are, in essence, technocratic forums where specialized regulators settle complex issues of international regulatory cooperation free from domestic politics. Admittedly, this claim is rarely made in such absolute terms, but it nevertheless underlies the idea that regulators acting within TRNs can—and should—develop a dual loyalty to domestic interests and to “the rights and interests of all peoples,”²⁰² as well as the network literature’s disinterest in the distributive and compliance issues raised by international regulation. Far from being removed from domestic politics, regulators are tied to them by multiple channels of accountability and incentives structures that generally outweigh their loyalty to global interests.

The impact of domestic pressures on regulatory networks is most dramatically illustrated by instances of direct political intervention. The Basel II negotiations provide a vivid example: it is perfectly clear that Chancellor Schroeder would not have permitted German banking regulators to agree to rules that would harm SMEs, even if they had thought the policy would improve global financial stability. More significant, however, is that all three case studies demonstrate the weight of domestic preferences in shaping the strategic interactions among national regulators and the eventual outcome. This is why, for instance, negotiations on capital regulations played out very differently in the Basel Committee and IOSCO. Domestic pressures on U.S. and U.K. regulators to improve confidence in their financial system while preserving the competitiveness of their international banks led to the Basel Accord, while U.S. domestic resistance and a lesser sense of urgency doomed IOSCO’s effort to establish capital rules for securities firms. Likewise, global efforts to enforce securities laws and combat money laundering faced resistance by OFCs eager to protect their domestic financial industry, until the September 11, 2001 attacks raised the stakes and led developed economies to adopt a more coercive approach.

Importantly, the fact that regulators are bound to domestic interests does not mean that TRNs are unable to pursue collective aims. It means, however, that the clashes of state interests that generally hinder international cooperation efforts also occur in TRNs. As a result, if one leaves aside pure coordination games, efforts by TRNs to establish global regulatory standards must address distributive and enforcement problems. The difficulty is that TRNs lack the institutional capacity to respond effectively. As regulators generally lack legal jurisdiction to offer linkages or side payments, distributive problems may be “papered over” by diluting the substantive global standards, thus undermining their effectiveness. Thus, some Basel I rules adopted to secure broad agreement to the Accord—such as the flexible

202. Anne-Marie Slaughter, *Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks*, 39 GOV'T & OPPOSITION 159, 163 (2004).

definition of capital and artificially low requirements for home mortgages and short-term loans to OECD countries and banks—favored investment in assets and countries that later were at the center of major financial upheavals. Had the Basel I rules been determined exclusively in relation to the objective of preserving global financial stability, these assets would likely have been treated less favorably.

The presence of distributive problems also creates opportunities for powerful states to secure their preferred outcome through incentives and threats, as illustrated by the imposition of money laundering and securities fraud rules on OFCs. On their own, there is little chance that OFCs would have agreed to take extensive steps against money laundering, as their domestic constituencies strongly preferred lax regulation. Their cooperation was secured through threats of sanctions and loss of access to the markets on which their financial industry depends. In such cases, the resulting standards may be globally efficient, but powerful states will enjoy a disproportionate share of the benefits. This was also arguably the case when the United States and the United Kingdom maneuvered to secure adoption of the Basel I. While the higher capital levels mandated by Basel I likely improved global financial stability, the Accord also allowed the two sponsors to maintain their competitive position despite the recapitalization they would have had to accomplish in any event.

In addition, given their lack of monitoring, dispute-resolution, or enforcement mechanisms, TRNs are ill equipped to effectively address enforcement problems. Thus, the 1988 Basel I Accord gradually unraveled as national regulators adopted self-serving exceptions and interpretations because the Committee had little effective leverage to enforce its rules. Similarly, while antitrust assistance agreements facilitate enforcement coordination when mutually beneficial, they painstakingly avoid commitments that would bind the two powers to act against important domestic interests in specific cases. IOSCO has likewise largely avoided adopting substantive rules that might be undermined by opportunism.

B. *Alternative Arguments for TRNs*

The existing literature suggests—but does not fully develop—two hypotheses regarding how TRNs might overcome these difficulties. First, although TRNs lack enforcement capabilities, market pressures may effectively compel states and private actors to comply with global standards once they are adopted. Second, repeated interactions through TRNs might “socialize” participants into patterns of norms and expectations favoring the pursuance of international cooperation over parochial state interests.

1. *Market Enforcement of Network Rules*

The paradigmatic example invoked in support of the first hypothesis is Basel I, as many commentators believe that open noncompliance by a developing country with bank capital adequacy rules would likely trigger

capital flight and other severe market consequences.²⁰³ This argument is based on a valid intuition, but it suffers from serious limitations. While it addresses the enforcement problem, it does nothing to solve the inevitable distributive issues that arise in negotiation; in fact, it likely aggravates them. If states know that markets will constrain them to comply with regulatory standards developed by TRNs, they will be even more hesitant to make concessions to reach an agreement.

More importantly, the argument that markets will enforce global standards is highly contingent on the circumstances of individual regulatory efforts. Market pressures may have favored compliance with Basel I, but in another era they also destroyed the Bretton Woods fixed exchange-rate system. Likewise, the WTO system, with its extensive dispute-resolution and countermeasures mechanisms, was clearly designed on the assumption that market incentives are insufficient to override domestic protectionist interests and achieve mutual trade liberalization. If markets systematically rewarded compliance with regulation, there would be little need for domestic regulatory enforcement—or indeed for any regulation at all beyond voluntary standards. Yet few of us would be satisfied with market-enforced, voluntary standards for food and drug safety, environmental protection, or securities regulation. If market failures provide the theoretical justification for regulation in the first instance, it appears paradoxical to insist that market discipline will systematically compensate for the enforcement deficiencies of TRNs. At the very least, the claim that TRN standards are effectively enforced by markets requires more theoretical development and empirical support.

2. *Sociological Theories of Compliance*

The second hypothesis is that, by virtue of the ties created by the proliferation of TRNs, regulators are gradually becoming “socialized” into systematically pursuing international cooperation. Thus, Slaughter contends, government officials—like “[s]heep farmers, diamond merchants, and sumo wrestlers”—can develop and enforce collective norms without formal legal structures or enforcement capabilities.²⁰⁴ By drawing attention to the importance of transnational social interactions among government actors in shaping international regulatory initiatives, some scholars open up the intriguing possibility that TRNs might function as an alternative mode of international governance alongside markets and formal hierarchies.²⁰⁵ If this is indeed the case, the network of ties among national regulators may, over time, counterbalance their domestic constraints and foster greater cooperation than is in fact observed in contemporary case studies.²⁰⁶

203. See, e.g., KAPSTEIN, *supra* note 87, at 13; SINGER, *supra* note 75, at 9-10; Simmons, *supra* note 135, at 601-05.

204. See, e.g., SLAUGHTER, *supra* note 4, at 198.

205. See Mark S. Granovetter, *The Strength of Weak Ties*, 78 AM. J. SOC. 1360 (1973); Mark Granovetter, *The Strength of Weak Ties: A Network Theory Revisited*, 1 SOC. THEORY 201 (1983); Walter W. Powell, *Neither Market Nor Hierarchy: Network Forms of Organization*, 12 RES. ORG. BEHAV. 295 (1990).

206. For instance, there is evidence that in certain economic contexts, the existence of social networks between participants in the production process may produce Pareto-efficient behavior that

Here again, several caveats are in order. For instance, there is no doubt that the literature on TRNs can draw important insights from the extensive and growing scholarship on social networks.²⁰⁷ One of the foundational principles of this scholarship, however, is that detailed empirical analysis of specific networks is necessary in order to draw conclusions regarding their effects in a given area. In particular, formal social network analysis involves difficult but crucial methodological issues. It typically begins by specifying the relevant actors (“nodes”), identifying the nature of the links (“ties”) between them, and “rigorously applying mathematical graph and topology principles to the data.”²⁰⁸ Beyond mapping networks, social network analysis attempts to draw conclusions by quantifying numerous factors, including the centrality of actors, the relative density of parts of the network, identification of “cores” and “peripheries,” blocks and cliques of densely-related actors, and many others. Through both pictorial representation and quantitative analysis, “the structural analyst seeks to uncover the fundamental forms and processes of social and political behavior.”²⁰⁹

It is plain that fruitfully applying this approach to TRNs would require extensive study of specific networks and a thoughtful and cautious approach to vexing methodological issues. Are the relevant actors states, agencies, or individual officials? What is the nature of the ties that should be studied? Are we interested in official cooperation arrangements, common membership in TRN governing boards or specialized committees, common attendance at conferences, or personal links of acquaintance or friendship? What are the boundaries of the network? If, as one might expect, the boundaries are set so as to focus on the emerging transnational ties among regulators, is there not a risk of downplaying the impact of domestic social links among officials, politicians, and industry groups? Are we interested in the causes or effects of TRNs, and in compliance with their output or their effectiveness in addressing concrete problems? Slaughter and other advocates of TRNs do not, however, engage this scholarship directly or draw on its techniques to conduct a systematic analysis of TRNs.²¹⁰

defeats “game theoretic predictions that rely on self-interested motives to explain cooperation.” Brian Uzzi, *Social Structure and Competition in Interfirm Networks: The Paradox of Embeddedness*, 42 ADMIN. SCI. Q. 35, 55 (1997).

207. This is not to suggest, however, that social network theory is the only sociological approach that might be fruitfully applied to TRNs. For example, Ryan Goodman and Derek Jinks have developed a detailed theory of how human rights norms may spread through global acculturation processes. See Ryan Goodman & Derek Jinks, *How To Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004); Ryan Goodman & Derek Jinks, *International Law and State Socialization: Conceptual, Empirical and Normative Challenges*, 54 DUKE L.J. 983 (2005); Ryan Goodman & Derek Jinks, *Toward an Institutional Theory of Sovereignty*, 55 STAN. L. REV. 1749 (2003). This approach might also be applied to TRNs, although it would have to carefully examine how acculturation processes can be successful in regulatory areas where interstate externalities and differences in preferences are more pronounced than in the human rights arena, and isomorphism between state institutions does not necessarily lead to interstate cooperation. For an attempt to incorporate sociological research on norms into an account of a TRN, see Whitehead, *supra* note 33.

208. DAVID KNOCKE, POLITICAL NETWORKS: THE STRUCTURAL PERSPECTIVE 9 (1990).

209. *Id.*

210. On a more fundamental level, one might also question whether the social network paradigm is appropriate to the study of the more formal TRNs (such as the Basel Committee and IOSCO), which have fairly elaborate organizational forms, including formal membership rules, deliberations, and decisionmaking structures, and that produce written standards and recommendations.

Beyond its lack of empirical support, this approach is problematic in light of the fact that social networking is not always beneficial—indeed, it can have severe perverse effects. In an influential discussion of the role of social networks in economic life, Mark Granovetter insists that he is not “rejecting one kind of optimistic functionalism for another, in which networks of relations, rather than morality or arrangements, are the structure that fulfills the function of sustaining order.”²¹¹ Not only do networks “penetrate irregularly and in differing degrees in different sectors of economic life, thus allowing for what we already know: distrust, opportunism, and disorder are by no means absent,”²¹² but sometimes they also actively foster these phenomena. “[W]hile social relations may indeed often be a necessary condition for trust and trustworthy behavior,” he goes on, “they are not sufficient to guarantee these and may even provide occasion and means for malfeasance and conflict on a scale larger than in their absence.”²¹³ Thus, the mutual trust created by social links can create new opportunities for malfeasance; networks can help sustain cooperative relationships among actors pursuing undesirable goals; and certain configurations of social relations can promote conflicts by creating rival coalitions.²¹⁴ The double-edged nature of social networks also infuses Granovetter’s challenge of the assumption of efficacy of hierarchical power within organizations, where he points to studies showing how networks of social relations among employees undermined the internal auditing and accounting policies of their firm, and thus its economic efficiency.²¹⁵

The implications of these two deficiencies of TRN scholarship—its lack of systematic empirical support and its inattention to the potential perverse effects of social networking—undercut its ability to draw on social network analysis to buttress its argument that TRNs improve global governance. In particular, the latter deficiency raises the troublesome possibility that the increasing social connections among regulators might facilitate cooperation in pursuance of self-interested objectives rather than the public good,²¹⁶ while

Jens Meierhenrich provides a much more comprehensive critique of the TRN literature from a methodological perspective. Jens Meierhenrich, *A Social Theory of International Law: Whither Network Analysis?* (Apr. 7, 2007) (unpublished manuscript, on file with author).

211. Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, 91 AM. J. SOC. 481, 491 (1985).

212. *Id.*

213. MARK S. GRANOVETTER & RICHARD SWEDBERG, *THE SOCIOLOGY OF ECONOMIC LIFE* 58 (2d ed. 2001).

214. Granovetter, *supra* note 211, at 491-93. In a social network analysis of IGO relationships between states, Hafner-Burton and Montgomery note that “[s]ocial network literature on conflict in general demonstrates neither universally positive nor negative effects on aggressive behavior,” and they find evidence to support their hypothesis that “IGO social networks are similarly complex; they can and do increase and decrease conflict behavior for different state members under different circumstances.” Emilie M. Hafner-Burton & Alexander H. Montgomery, *Power Positions: International Organizations, Social Networks, and Conflict*, 50 J. CONFLICT RES. 3, 8 (2006).

215. Granovetter, *supra* note 211, at 499-500. Granovetter refers specifically to Dalton’s study of cost accounting at a large chemical plant, where department managers were frequently tipped off “surprise” inventory audits and cooperated in hiding parts, equipment, and materials in each other’s facilities and other inaccessible locations, and to Eccles’ account of the internal politics involved in pricing and accounting for transfers of products and services between different divisions of a single firm.

216. The possibility that regulators might act out of such self-interested motives raises considerations that parallel those typically addressed by public choice analysis. For a discussion of public choice theory, see *infra* Section V.D.

the former prevents any definitive judgment on the actual effects and merits of the social connections created by specific TRNs. One might object that the study of TRNs is in its infancy, and that the existing literature has had the merit of indicating the need for further, more specific research. While this is true, it is hardly consistent with Slaughter's strong normative claim in favor of TRNs.

C. *Networks and Soft Law*

Importantly, none of these considerations implies that TRNs lack a proper place in the constellation of global governance mechanisms. For instance, the largely successful coordination of securities fraud and money laundering enforcement among developed countries illustrates the usefulness of TRNs in addressing regulatory coordination problems. The effectiveness of independent national regulation was challenged by exogenous events, including technological developments and the globalization of financial markets. TRNs allowed national authorities to coordinate their responses and achieve their common objectives. Likewise, the United States and Europe entered into limited antitrust enforcement agreements that facilitate coordination but preserve national autonomy in cases where important national interests diverge. Beyond enforcement coordination, TRNs have proven useful in several contexts where state interests are largely aligned, such as collecting and disseminating reliable information, developing best practices, and building regulatory capacity in developing countries.

These successes of TRNs, alongside the limits described above, point to the possibility of a theoretical account of TRNs that eschews excessive optimism in favor of a pragmatic understanding of the circumstances under which networks can effectively promote international regulatory cooperation. The recent literature on "soft law" indicates that there are several reasons why states seeking to cooperate may rationally avoid resorting to legally binding agreements.²¹⁷ States often favor informal agreements in areas where uncertainty is high because they retain more flexibility to modify the agreement in light of changed circumstances. Since informal agreements signal a lower degree of international commitment than formal agreements, divergences in preferences among states are easier to bridge with informal agreements, and the reputational costs of breach or withdrawal are smaller. They can also be concluded quickly, because they are not subject to the same domestic ratification procedures as treaties and have a lower public profile. The main drawback of informal agreements relative to treaties is that, since the reputational costs and enforcement mechanisms are weaker, informal commitments are less credible and less likely to constrain opportunism by states.

This essentially functionalist account of international soft law is a useful starting point for a rationalist account of TRNs, because many of the characteristics of the former—flexibility, speed, facilitating compromise—are

217. See, e.g., Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, in *LEGALIZATION AND WORLD POLITICS* 37 (Judith L. Goldstein et al. eds., 2001); Charles Lipson, *Why Are Some International Agreements Informal?*, 45 INT'L ORG. 495 (1991).

also associated with the latter. The two phenomena are also linked by the fact that TRNs often adopt regulatory standards in the form of nonbinding instruments, such as Basel I and the IOSCO MMOU. The case studies developed in this article, however, point to two important qualifications to the functionalist account of soft law. First, as demonstrated by Kal Raustiala, the account developed by Lipson, Abbott, and Snidal is insufficient to explain the prevalence of formal international instruments unless supplemented by an examination of domestic preferences and the resulting demand for international cooperation.²¹⁸ Raustiala's argument is consistent with the findings of this Article regarding the role of domestic pressures in shaping the preferences that national regulators take to TRN negotiations.

Second, the functionalist literature insufficiently emphasizes that, while it may be rational for states to act through informal networks and agreements in certain circumstances, this does not mean that the results constitute an optimal regulatory outcome from a collective standpoint. While these authors make no such claim, their existing theoretical framework is too easily enlisted to support an overly optimistic outlook on international regulatory cooperation. Based on the hypotheses—that “technical areas” of international regulatory cooperation exhibit low risks of opportunism; benefit from expertise, secrecy, speed, and flexibility; and generate less pressure from domestic interest groups who usually favor treaties over informal agreements²¹⁹—widespread use of informal networks and agreements seems like the natural, and optimal, outcome.

The reality of international regulatory cooperation is less tidy. It is true that cooperation efforts initiated by TRNs and embodied in informal instruments are often “coordination problems,”²²⁰ but this is precisely because TRNs generally avoid ambitious, substantive efforts at regulatory harmonization that would require the sacrifice of short-term domestic interests and create enforcement problems they could not handle effectively. It is also true that informal cooperation can often produce some agreement despite divergent state preferences, but this observation misleadingly suggests that papering over differences with a vague or unenforceable agreement—possibly aimed at appeasing vocal domestic constituencies—constitutes effective global governance. While informal cooperation may well be optimal in cases where mere coordination is needed, it would be rash to discount the likelihood that it serves as a second-best alternative in many situations where deeper regulatory cooperation would be optimal but no instrument exists that adequately reconciles the needs for speed, flexibility, and compromise with the mechanisms needed to overcome distribution and enforcement problems. Research on TRNs should also be mindful of Daniel Drezner's theory that powerful states intentionally steer international regulatory efforts toward forums that are more likely to produce their desired outcomes.²²¹ This suggests that, in some cases, states that resist cooperation may support TRN

218. See Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581 (2005).

219. See *id.* at 600.

220. *Id.*

221. See DREZNER, *supra* note 35, at 87-88.

efforts precisely because they provide an appearance of cooperation but are unlikely to constrain those states' preferred policies.

D. *Networks, Global Administrative Law, and Public Choice*

One of the consequences of the growing visibility of TRNs has been to raise concerns regarding the transparency and accountability of network rulemaking in comparison with national regulatory processes. Thus, recent scholarship on the globalization of administrative law views favorably the implementation of notice and comment as well as other accountability procedures in international rulemaking.²²² Michael Barr and Geoffrey Miller argue that the extensive consultation process undertaken by the Basel Committee to revise its capital accord "could be a model for international rule-making with greater accountability and legitimacy."²²³ The original Basel Accord and its 1996 amendments were the results of confidential international negotiations and were presented for comments in the United States after they had been finalized by the Committee and endorsed by U.S. regulators. This led to complaints that the normal regulatory process had been circumvented: the Accord was effectively presented as a *fait accompli* and the scope of public comments was limited to the Accord's implementation rather than its content.²²⁴ By contrast, the Basel II adoption process incorporated several rounds of drafting, hundreds of public comments, and fundamental revisions to the original proposal.

Barr and Miller's position is understandable. Admittedly, international rulemaking can hardly be legitimate without some accountability mechanisms. A better process may also, as Zaring argues, strengthen the resulting norms against domestic judicial review.²²⁵ One may wonder, however, whether implementing extensive procedures modeled on domestic administrative law will destroy—or at least dilute—the very informality, speed, and flexibility that are said to be the main benefits of TRNs. At the very least, the extensive delays experienced by Basel II call into question the idea of simply mirroring domestic notice and comment procedures, as the result may be an endless gauntlet of public review, first at the international level and then domestically within each participating state. More importantly, while praising the Basel II consultative process, Barr and Miller show little interest in evaluating its actual output. From their standpoint, the superposition of international and national regulatory processes leads to desirable national variation, which, as long as it is "consistent with the essential principles of a global standard," can enhance its legitimacy and practical reach.²²⁶ But when states face a cooperation problem, as in the case of global capital standards, national variation and regulatory discretion may be symptoms of an ineffective regime.

222. See Barr & Miller, *supra* note 62; Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490, 1530-34 (2006); Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 34-35, 37-39 (2005).

223. Barr & Miller, *supra* note 62, at 17.

224. See Zaring, *supra* note 13, at 574.

225. See *id.* at 600.

226. Barr & Miller, *supra* note 62, at 31.

If, as argued above, Basel II's substantive weaknesses aggravate some of the flaws in Basel I, greater accountability and transparency may have been purchased at the price of the "essential principles" the revision was meant to promote.

Finally, an important dimension of international regulatory cooperation that has not been explicitly explored in this Article is the agency problem caused by delegation to regulators. I have hypothesized that, in most cases, domestic legal and political controls are sufficiently strong to align the actions of national regulators with prevailing domestic interests. This hypothesis appears to fit the case studies. Nevertheless, a substantial body of public choice theory suggests that regulators—like other governmental actors—act according to self-regarding incentives, with results that may be detrimental to the welfare of their constituents. The nature and effects of this agency problem are notoriously difficult to identify or measure. Bureaucrats may strive to maximize their agency's budget or their discretion.²²⁷ In both cases, predictions have proven hard to make and to confirm empirically.²²⁸ In the context of international regulatory cooperation, these problems are compounded by the multiplicity of national regulators facing different domestic constituencies, incentives and constraints.

Public choice scholars have suggested that TRNs may be vehicles for domestic regulators to advance initiatives that would not be politically feasible without outside support. While this may be beneficial in some cases, it may also allow regulators to create a common front to expand their bureaucratic power in their respective states to the detriment of their constituents' welfare.²²⁹ This possibility raises additional concerns when one considers the phenomenon of "regulatory capture" by which, through constant lobbying and revolving-door policies, regulators come to identify their interests with those of the industry they regulate.²³⁰ While these considerations do not support definitive conclusions about the implications of public choice theory for TRNs, they suggest a paradox. On the one hand, if networks are effectively held accountable through domestic legal and political constraints, then their contribution to global governance will be limited. On the other hand, the more domestic autonomy they have, the more likely they are to enhance international enforcement and harmonization of standards—but also to act in ways that reflect the self-interest of regulators rather than aggregate welfare.

227. See, e.g., WILLIAM A. NISKANEN, JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* 36-42 (1971); Jean-Luc Migué & Gérard Bélanger, *Toward a General Theory of Managerial Discretion*, 17 *PUB. CHOICE* 27 (1974); Paul G. Wycoff, *The Simple Analytics of Slack-Maximizing Bureaucracy*, 67 *PUB. CHOICE* 35 (1990).

228. See Edward L. Rubin, *Public Choice and Legal Scholarship*, 46 *J. LEGAL EDUC.* 490, 496 (1996).

229. See, e.g., Enrico Colombatto & Jonathan R. Macey, *A Public Choice Model of International Economic Cooperation and the Decline of the Nation State*, 18 *CARDOZO L. REV.* 925 (1996).

230. See, e.g., Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 *J.L. ECON. & ORG.* 167 (1990).

VI. CONCLUSION

The pioneers of regulatory network scholarship have made an important contribution to international law scholarship by attracting attention to a significant and unrecognized phenomenon. This Article has shown, through a theoretical analysis and case studies of prominent networks, that TRNs can effectively solve some, but not all, problems of international regulatory cooperation. In particular, TRNs are unlikely to be effective in areas that raise significant distributive or enforcement problems. Like any policy instrument, their full potential can only be realized when both their benefits and limitations are recognized. The challenge for future work on TRNs is consequently to conduct detailed theoretical and empirical analysis to reveal under what circumstances and through which mechanisms TRNs can produce effective regulatory cooperation. This Article offers three suggestions in this respect.

First, and most importantly, future research on TRNs must be sensitive to the political aspects of international regulatory cooperation. This Article proposes a theoretical framework for doing so, by first looking to the domestic preferences that shape the positions of national regulators, and then to the resulting configuration of national preferences and capabilities at the international level. In some areas, one might find states deadlocked over the most basic aspects of cooperation, in which case TRN standards will likely be shallow and ineffective. In others, TRNs may be successful at solving pure coordination games to the benefit of all states concerned. Many areas of cooperation, however, will involve distributive or enforcement problems, and the efforts of TRNs to address those areas require careful scrutiny to identify phenomena such as coercion by powerful states, distributive tradeoffs that undermine the effectiveness of cooperation, and records of recurrent noncompliance or defection. In all cases, legal scholarship on TRNs should avoid taking their output at face value and should instead draw on specialized legal scholarship on the substantive areas involved, which is often critical of the effectiveness of informal international standards. It should also, whenever possible, draw on international relations scholarship, which often points out the strategic conflicts inherent in international regulatory efforts.

Second, as noted above, some recent scholarship on TRNs draws on sociological theories of compliance to explain how participation in networks might lead regulators to redefine their interests and prefer international cooperation. These accounts, however, tend to be conjectural and pitched at a high level of generality, and are thus difficult to prove or falsify. This Article does not deny—much less disprove—that sociological phenomena such as persuasion or acculturation might facilitate international regulatory cooperation. It calls, however, for much more detailed theoretical and empirical analysis by those who wish to rely on such theories to establish the effectiveness of TRNs, particularly in circumstances where the framework proposed here predicts ineffective results. While proposing specific orientations for this research is beyond the scope of this Article, an important challenge will be to elaborate a convincing account of how the relatively diffuse contacts created by TRNs can outweigh the multiple pressures, both

formal and informal, that tend to align regulators with the preferences of domestic constituencies. In this respect, it will be crucial to explain how sociological accounts, which have been most prominently deployed in the area of international human rights, can be transposed to international regulatory issues that raise very different strategic interactions. With appropriate caveats due to the substantial degree of preexisting convergence due to domestic factors, the case study of the nascent ICN suggests that it might be promising ground for further research along these lines.

Finally, this Article calls for research on TRNs to turn away from ambitious normative claims toward a more cautious approach. The case studies clearly indicate that even the most prominent TRNs, such as the Basel Committee and IOSCO, suffer from substantial shortcomings. The domestic legal and political constraints they face, and the role that international power relationships play in their activities, shows that TRNs are, in essence, an extension of traditional politics. Clearly, states may choose to interact through networks in complex regulatory areas where speed, expertise, and flexibility are essential, and many issues can be addressed through simple coordination. The intrinsic institutional limitations of TRNs, however, raise doubts that, without fundamental institutional changes, they will build upon these existing successes to secure effective cooperation when state interests diverge. In theory, TRNs could, with the support of states, develop mechanisms to effectively overcome distributive and enforcement problems: countries could expand the jurisdiction of their regulators to facilitate cross-area linkages; they could free regulators to pursue the global public good by loosening their accountability structures; and they could empower them to set up verification and dispute-resolution mechanisms. The problem, of course, is that this would undermine the very features of TRNs—specialization, decentralization, and informality—that make them normatively attractive in the first instance. The globalization paradox identified by Slaughter is real and abiding. TRNs do not eliminate the tensions between effective global governance, subsidiarity, and democratic accountability. Hopes that they may create “a genuinely new set of possibilities for a future world order”²³¹ will likely remain elusive.

231. SLAUGHTER, *supra* note 4, at 6.