

**TRANSNATIONAL FINANCIAL RULEMAKING:
AN APPLICATION OF COMPARATIVE LAW &
GLOBAL LEGAL PLURALISM**

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Abstract

Nowadays, financial regulation is more complex than ever before. Financial rules are designed at the transnational level, by organizations composed of many different national regulators seeking to create uniform and harmonized legal frameworks. Furthermore, the financial crisis has created global norms and codes for the industry, driven by the moral outcry against the banks, informing regulation. Therefore, no nation state is self-autonomous on financial rulemaking. It is argued in this paper that comparative legal theory and global legal pluralism have become essential tools for understanding financial regulation. Such an approach allows for new insights into: the difficulties of creating uniform rules; why nation states decide to implement them; and how to measure the effectiveness of this implementation. Furthermore, this approach can also be extended to incorporate various transnational norms, for example concerning the behavior of bankers.

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I. Introduction

Over the last few decades, the financial services industry has grown enormously.² Banks, once merely national champions, have grown to become enterprises spanning the globe.³ Along with the growth of the financial sector, and its banks in particular, there has been a sharp increase in financial regulation.⁴ With financial services becoming more transnational, regulation has followed, moving out of the exclusive domain of the nation state.⁵ Organizations comprised of national regulators, such as the Basel Committee on Banking Supervision (BCBS) and the International Organisation for Securities Exchange Commissions (IOSCO), are well known in the field but perhaps relatively unknown to the rest of the world.⁶ Their aim is to set

² Robin Greenwood & David Scharfstein, *The Growth of Finance*, 27 J. ECON. PERSPECTIVES 3, 3 (2013) (“During the last 30 years, the financial services sector has grown enormously.”).

³ Nicola Cetorelli & Linda S. Goldberg, *Banking Globalization and Monetary Transmission*, 67 J. FIN. 1811, 1811 (2012) (“As financial markets have become increasingly globalized, banks have expanded their global operations, developing growing networks of physical branches and subsidiaries in foreign countries.”).

⁴ See Michael D. Bordo, *An Historical Perspective on the Quest for Financial Stability and the Monetary Policy Regime*, 78 J. ECON. HIST. 319, 332 (2018) (“[T]he [2008 Financial Crisis] was blamed on the banks and the financial sector in general, leading to an increase in financial regulation (Dodd-Frank 2010).”).

⁵ See Eleni Tsingou, *Club Governance and the Making of Global Financial Rules*, 22 REV. INT’L POL. ECON. 225, 226, 227–30 (2015) (stating that transnational financial policy communities now write the rules of global finance).

⁶ *About BIS - overview*, BANK FOR INTERNATIONAL SETTLEMENTS, <https://www.bis.org/about/index.htm?m=1%7C1> [<https://perma.cc/8QL7-HJVG>] (last visited Sept. 26, 2019) (“Established in 1930, the BIS is owned by 60 central banks, representing countries from around the world that together account for about 95% of world GDP.”); *The Basel Committee – overview*, BANK FOR INTERNATIONAL SETTLEMENTS, <https://www.bis.org/bcbs/index.htm> [<https://perma.cc/6G3Y-W5UG>] (last visited Mar. 16, 2020); *About IOSCO*, INTERNATIONAL ORGANISATION OF SECURITIES COMMISSIONS, https://www.iosco.org/about/?subsection=about_iosco [<https://perma.cc/CX>]

the transnational regulatory frameworks.⁷ These frameworks form the basis for the regulation of globe-spanning banks and financial markets.⁸ In the wake of the global financial crisis of 2008, internationally coordinated regulatory initiatives have only gained in strength.⁹

Given the existence of these transnational rulemaking bodies, where national regulators come together to determine the regulatory frameworks, it is indeed tempting to approach financial rulemaking

5Z-UZ6T] (last visited Sept. 26, 2019) (“IOSCO was created in 1983, when 11 securities regulatory agencies from North and South America agreed to build their inter-American regional association into an international cooperative body. A year later, securities regulators from France, Indonesia, Korea and the United Kingdom become the first non-American agencies to join the new organization.”).

⁷ See BANK FOR INTERNATIONAL SETTLEMENTS, *supra* note 6 (“[The BCBS’s] mandate is to strengthen the regulation, supervision and practices of banks worldwide with the purpose of enhancing financial stability”); see also INTERNATIONAL ORGANISATION OF SECURITIES COMMISSIONS, *supra* note 6 (“IOSCO develops, implements and promotes adherence to internationally recognized standards for securities regulation.”).

⁸ See *Basel Committee Charter*, BANK FOR INTERNATIONAL SETTLEMENTS, <https://www.bis.org/bcbs/charter.htm> [<https://perma.cc/4TZQ-UUF9>] (last visited Sept. 26, 2019) (“The BCBS is the primary global standard setter for the prudential regulation of banks and provides a forum for cooperation on banking supervisory matters”); see also INTERNATIONAL ORGANISATION OF SECURITIES COMMISSIONS, *supra* note 6 (“The International Organization of Securities Commissions (IOSCO) is the international body that brings together the world’s securities regulators and is recognized as the global standard setter for the securities sector.”).

⁹ See JOHN ARMOUR ET AL., *PRINCIPLES OF FINANCIAL REGULATION* (2016) (“In the post-crisis period, despite the absence of new formal international law-making (treaty commitments, for example), a global financial regulatory order has emerged—rather remarkably—through the concerted action of states’ executive leadership, financial regulatory agencies, central banks, international institutions, and private actors. This new order can be characterized as a regime of ‘international financial regulatory coordination’ rather than ‘regulation’ because it is sustained through the determination to cooperate rather than the force of international law.”); Klaus J. Hopt, *Corporate Governance of Banks after the Financial Crisis* (European Corp. Governance Inst. Law Working Paper No. 207/2013, 2013), <http://ssrn.com/abstract=1918851> [<https://perma.cc/W5CY-A7DN>] (discussing the post-crisis trend of maximum harmonization in European regulations); William Poole, *Causes and Consequence of the Financial Crisis of 2007-2009*, 33 HARV. J. L. & PUB. POL’Y 421, 43840 (2010) (discussing proposed reforms to the financial system after the financial crisis).

from a “legal hyperglobalist position.”¹⁰ That is to say, there is a strong case to be made that financial regulation is becoming ever further harmonized, that legal uniformity is both the desired and achieved outcome, and that financial regulation is approaching some form of global rulebook.¹¹ Although this may not, in itself, be fundamentally incorrect, it is argued here that this is at least a simplistic and incomplete view. Instead, this paper contains a thorough analysis of the way transnational financial rulemaking is taking place, the way domestic actors play a role therein and how it is subsequently transposed into national law. Furthermore, in this paper it will be argued that, in light of how these rulemaking processes have moved from the national to the transnational, the lenses of global (or transnational) legal pluralism and comparative law are both needed to understand fully even a small area of financial regulation. In fact, global legal pluralism and comparative law can create or even share a common analytical framework, which is well suited to analyze transnational financial rulemaking.¹² This observation follows the arguments made by Berman: despite the divergence caused by the apparent focus by most comparatists on state-based law rather than normative systems, the fields of legal pluralism and comparative law should operate in concert and form a natural partnership.¹³

Regarding the comparative legal approach, in Legrand’s words, there is “much of the utmost relevance to a deep understanding of a legal order, of an experience of law, that is simply not to be found in legislative texts and in judicial decisions.”¹⁴ Any comparative legal study should include factors that influence the legal system, namely social, political, economic, or demographic history and changes.¹⁵

¹⁰ Peter Thomas Muchlinski, *Globalisation and Legal Research*, 37 INT’L LAW. 221, 239 (2003) (stating that a “legal hyperglobalist position” thinks that the law is “moving towards ever increasing harmony and uniformity”).

¹¹ *Id.* (stating that legal hyperglobalists will “show the way forward to some kind of new, mutually agreed cosmopolitan law”).

¹² Paul Schiff Berman, *A Brief Note on Legal Pluralism and Comparative Law*, 31 WINDSOR Y.B. OF ACCESS TO JUST. 219, 219 (2013) (“[L]egal pluralists and comparativists would seem to share a common analytical framework. . .”).

¹³ *See id.* at 219–21 (stating that even though legal pluralism and comparative law do not always operate “in concert,” the two fields “form a natural partnership”).

¹⁴ Pierre Legrand, *How to Compare Now*, 16 LEGAL STUD. 232, 235 (1996).

¹⁵ KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 10 (Tony Weir trans., Oxford Univ. Press 3d ed.1998) (stating that the

Why would the field of finance and financial regulation be any different?¹⁶ The history of finance is rooted in the history of each individual nation state.¹⁷ Different financial terminology and different coinages are basic elements that exemplify the varying history of finance of countries.¹⁸ What is, for example, meant exactly by a “security” in different jurisdictions?¹⁹ Within the U.S., based in economic reality, a security is virtually any financial instrument that constitutes an investment,²⁰ while the U.K. takes a listing approach in the Financial Conduct Authority’s Handbook.²¹ Each nation state has its own rich traditions and attitudes towards finance: from the use of derivatives in Ancient Mesopotamia to the loan sharks and banks of thirteenth century Northern Italy, from the Tulip Mania during the Dutch Golden Age to the establishment of the Bank of England in London in 1694.²² These different financial histories are part of each

sociology of law seeks to discover how law is affected by political, economic, psychological and demographic changes).

¹⁶ IRENE FINEL-HONIGMAN, *A CULTURE HISTORY OF FINANCE* 1–11 (2010) (discussing the influence of the economic and political spheres on financial development).

¹⁷ *Id.* (“From pre-capitalist societies to modern financial centers, psycho-historical determinants have influenced economic evolution, destruction and renewal in Europe, Russia and the Americas.”).

¹⁸ *Id.* at 11–42 (highlighting how various financial terminology and instruments were developed in different cultures).

¹⁹ *See generally* Guiliano G. Castellano, *Towards a General Framework for a Common Definition of “Securities”*: *Financial Markets Regulation in Multilingual Contexts*, 17 UNIF. L. REV. 449 (2012) (proposing that the term “securities” is not a straightforward legal concept).

²⁰ *See id.* at 462 (asserting that the definition of securities provided by the Securities Act of 1933 and the Exchange Act of 1934 is sufficiently broad to encompass financial instruments that constitute an investment); *see also* SEC v. W.J. Howey Co., 328 U.S. 293, 301 (1946) (“The test [of an investment contract within the Securities Act] is whether the scheme involves an investment of money . . .”).

²¹ *See* Castellano, *supra* note 19, at 467 (“The style adopted in the UK appears to follow the listing technique to define the various instruments that fall within the definition of the term ‘securities’”); *see also* FINANCIAL CONDUCT AUTHORITY, *FCA HANDBOOK, GLOSSARY, SECURITY* (2019), <https://www.handbook.fca.org.uk/handbook/glossary/G1061.html> [<https://perma.cc/9BJ4-XHWP>] (stating that list of instruments may be considered a “security”).

²² *See generally* NIALL FERGUSON, *THE ASCENT OF MONEY: A FINANCIAL HISTORY OF THE WORLD* (2009) (illuminating that lenders charged high interest rates and small elite group gained control of the banking system in

nation's wider history and culture, defining how the economy and society operates and how the relevant national laws and regulations have been shaped accordingly.²³

All these different nation states, with their own financial history, come together in organizations such as IOSCO and the BCBS to negotiate a common set of transnational rules, which will be implemented by each of these nation states.²⁴ What is observed here is the creation of overlapping legal or normative spaces, in which the nation state is no longer solely responsible for the creation of its own laws or norms.²⁵ Instead, one must understand how this new legal, or normative, hybridity drives financial rulemaking.²⁶ This is where the relatively recently developed theory of "global legal pluralism"²⁷

13th Century Northern Italy, as well as innovation of the Bank of England in 1664); ANNE GOLDFAR, *TULIPMANIA: MONEY, HORROR, AND KNOWLEDGE IN THE DUTCH GOLDEN AGE* (2007) (discussing that prices for tulips became extremely high during the Dutch Golden Age); EDWARD J. SWANN, *BUILDING THE GLOBAL MARKET: A 4000 YEAR HISTORY OF DERIVATIVES* (2000) (chronicling the development of derivative contracts in Ancient Mesopotamia).

²³ FINEL-HONIGMAN, *supra* note 16, at 11–42 (showcasing the influence different nations' culture has had on that nation's financial history and institutions).

²⁴ See Thomas Oatley & Robert Nabors, *Redistributive Cooperation: Market Failure, Wealth Transfers, and the Basle Accord*, 52 INT'L ORG. 35, 51 (describing that Japan was forced to negotiate with the U.S. and U.K. during the creation of the Basel Accord).

²⁵ SOL PICCIOTTO, *REGULATING GLOBAL CORPORATE CAPITALISM* 17 (2011) ("In networked governance, normative systems overlap and inter-penetrate each other, and the determination of the legitimacy of an activity under any one system of norms is rarely definitive. . . .").

²⁶ *Id.* ("Thus, international law now includes supranational law. . . .").

²⁷ See PAUL SCHIFF BERMAN, *GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS* 5 (2012) (arguing that "nation-states must work within a framework of multiple overlapping jurisdictional assertions by state, international, and even nonstate communities"); Peer Zumbansen, *Transnational Legal Pluralism*, 1 TRANSNAT'L LEGAL THEORY 141, 147 (2010) (proposing to consider legal pluralism in light of transnational perspective that "seeks to deconstruct the various law-state associations by understanding the evolution of law in relation and response to the development of 'world society,' a society understood as non-territorially confined, functionally differentiated and constituted by the co-evolution of conflicting societal rationalities"); Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1159 (2007) (asserting that today's global legal system is "an interlocking

becomes useful. The term itself and what is understood by it is certainly not unambiguous or without its critics.²⁸ This paper does not pretend to provide a thorough discussion on what the term or research field is meant to be. Instead, some of the underlying concepts and ideas will be used to facilitate the analysis of the transnational nature of financial rule-making.

The approach in this paper broadly takes the concept of globalization of law and adds legal pluralism, rather than taking the route of legal pluralism and adding globalization.²⁹ In doing so, one applies “a pluralist framework to the global arena.”³⁰ By viewing the whole world as hybrid legal spaces, it shifts the creation of law away from the different individual nation states toward transnational actors, particularly the transnational financial regulatory institutions.³¹ Additionally, one should consider international civil society, composed of various social spheres, which sets out norms or expectations on the activities, conduct, and behavior of transnational banks.³² These transnational actors will bring together many different national legal

web of jurisdictional assertions by state, international, and non-state normative communities” that creates a “potentially hybrid legal space”); Sally Engle Merry, *Global Legal Pluralism and the Temporality of Soft Law*, 46 J. LEGAL PLURALISM & UNOFFICIAL L. 108, 108–09 (2014) (“[T]he global legal field is constituted by a wide array of laws, guidelines, recommendations, practices, and standards which are enforced in multiple, overlapping, and sometimes inconsistent ways.”); Ralf Michaels, *Global Legal Pluralism*, 5 ANN. REV. L. & SOC. SCI. 243, 244–45 (2009) (describing global legal pluralism as the “interplay between legal pluralism and legal globalization” in two different approaches); Francis Snyder, *Governing Economic Globalisation: Global Legal Pluralism and European Law*, 5 EUR. L.J. 334, 342–43 (1999) (discussing that global legal pluralism “involves a variety of institutions, norms, and dispute resolution processes located, and produced, at different structured sites around the world”).

²⁸ See generally, William Twining, *Normative and Legal Pluralism: A Global Perspective*, 20 DUKE J. COMP. & INT’L L. 473 (2010) (discussing the ambiguities and issues regarding the concept of global legal pluralism).

²⁹ See Michaels, *supra* note 27, at 246 (describing the theory of global legal pluralism as the “[p]luralization” of legal globalization).

³⁰ Berman, *Global Legal Pluralism*, *supra* note 27, at 1159.

³¹ *Id.* (supporting the conceptualization that “the global legal system is an interlocking web of jurisdictional assertions” not only by states but also by international and non-state entities).

³² *Id.* at 1161–62 (observing “non-state legal (or quasi-legal) norms” that “add to the hybridity” such as the legal system developed by transnational bankers).

and normative orders to reach a new combined hybrid legal system.³³ In turn, this paper's analysis will use concepts from comparative legal theory to understand how such a new legal system is reached through harmonization. It can also help to understand how this new system will be received by the nations implementing it. Furthermore, the pluralist approach will inform the discussion on the interaction between different social spheres, the status of transnational financial rules and support the analysis of harmonization and implementation.

This paper proceeds as follows: the next section contains a background to the rationale for the aim of creating a common rulebook to regulate the financial industry and markets. The third section analyzes the international institutions which create this common rulebook, including both formal organizations, described as networks, as well as norms created by international civil society. The fourth section contains a discussion on if legal uniformity is reached, what the status is of the rulebook and the process of its implementation nationally. The final section concludes on the combination of comparative law and global legal pluralism applied in the present context.

II. Rationale for Transnational Financial Standards

From the brief analysis in the introduction, it is apparent that there are numerous financial service providers of such scale that they operate in all the major worldwide financial centers.³⁴ It is only natural that governments and financial services regulators started to cooperate in the development of their rulebooks, where international coordination formed a representation of knowledge and power.³⁵ One of the main reasons for regulatory cooperation is to prevent regulatory

³³ *Id.* at 1164 (acknowledging that “multiple communities may legitimately wish to assert their norms over a given act or actor, by seeking ways of reconciling competing norms, and by deferring to alternative approaches”).

³⁴ See Nicola Cetorelli & Linda S. Goldberg, *Banking Globalization and Monetary Transmission*, 67 J. FIN. 1811, 1811 (2012) (“As financial markets have become increasingly globalized, banks have expanded their global operations. . .”).

³⁵ Ethan B. Kapstein, *Resolving the Regulator's Dilemma: International Coordination of Banking Regulations*, 43 INT'L ORG. 323, 324 (1989) (“With the globalization of capital markets, public officials have been forced to make tradeoffs between domestic regulation on the one hand and international competitiveness on the other.”).

arbitrage.³⁶ This concept can be defined in various ways, depending on the extent and scope.³⁷ One could, within a single jurisdiction, attempt to game the financial regulations by making use of the inadequacies or lacuna in the financial regulation within this one jurisdiction.³⁸ A broader scope is needed for the international context: regulatory arbitrage provides some benefit enabled through cross-country differences in regulation.³⁹ Regulatory arbitrage, defined this way, can thus be reduced by way of international coordination.⁴⁰

Regulatory arbitrage results in banks transferring funds to countries with looser regulation.⁴¹ In other words, money would flow from heavily regulated financial markets and sectors to those with less regulation.⁴² The benefits of less regulation for the financial firms are clear: compliance with a regulatory regime incurs costs, and thus, evading regulations results in greater cost effectiveness.⁴³ It is, therefore, not surprising that firms will seek to influence the regulatory environment through lobbying in an attempt to create an environment

³⁶ Joel F. Houston, Chen Lin, & Yue Ma, *Regulatory Arbitrage and International Bank Flows*, 67 J. FIN. 1845, 1846 (2012) (explaining that regulators from different countries cooperate because they do not want to engage in a race to the bottom caused by regulatory arbitrage).

³⁷ *Id.* at 1848 n.7 (noting that other types of regulatory arbitrage activities exist).

³⁸ *Id.* (noting that banks gamed the financial regulation within a jurisdiction by exploiting credit transfer mechanisms and increasing their effective leverage).

³⁹ *Id.* at 1846 (“Given this environment, it is reasonable to presume that cross-country differences in banking regulations may encourage the flow of bank capital from markets that are heavily regulated to markets that are less regulated.”).

⁴⁰ *Id.* (reasoning that because banks tend to go from high regulation to low regulation countries, this arbitrage opportunity can be reduced by having countries coordinate their regulation to be similar).

⁴¹ *Id.* at 1846 (“In each case, we find evidence that capital tends to flow from more restrictive to less restrictive jurisdictions.”); Alan D. Morrison & Lucy White, *Level Playing Fields in International Financial Regulation*, 64 J. FIN. 1099, 1100 (2009) (“Consequently, when borders are opened and bank capital is mobile, an adverse cherry-picking externality is inflicted by the better regulator on the worse regulator.”).

⁴² Houston et al., *supra* note 36, at 1846 (“In each case, we find evidence that capital tends to flow from more restrictive to less restrictive jurisdictions.”).

⁴³ *Id.* (“In one respect, this cross-country regulatory competition may enable banks to effectively evade costly regulation, which improves capital market efficiency and enhances global economic growth.”).

more favorable to them.⁴⁴ An increase in financial market activities leads to more economic activities generally in the countries with less regulation or with less strict enforcement.⁴⁵ Thus, countries will benefit from reduced regulatory standards in terms of economic growth.⁴⁶ This can be regarded as regulatory competition, or in simple terms, a race to the bottom.⁴⁷ The objective is to reduce the risks associated with this race.⁴⁸

Over the last few years, another important reason for international cooperation on regulation has become apparent. The global financial crisis, as mentioned previously, has demonstrated that international cooperation and rulemaking is essential to restore orderly markets.⁴⁹ International cooperation is thus not only to ensure an

⁴⁴ See generally DORIS FUCHS, BUSINESS POWER IN GLOBAL GOVERNANCE 43–70 (2007) (examining recent scholarly literature on how businesses exert power in global governance, and concluding that “increased lobbying” is one tool that businesses can use to influence political outcomes); but see DALE D. MURPHY, THE STRUCTURE OF REGULATORY COMPETITION: CORPORATIONS AND PUBLIC POLICIES IN A GLOBAL ECONOMY 3–40 (2006) (arguing that “[a]lthough [the race to the bottom] has received more media attention . . . it is less common than critics suggest,” and that “[p]ublic interest concerns (for health or the environment) may be bolstered by powerful producers who modify regulations to their advantage and use them as a barrier to entry against competitors”).

⁴⁵ See Houston et al., *supra* note 36, at 1860 (explaining that empirical data “suggest that less stringent bank regulations in the recipient country induce more bank inflows”).

⁴⁶ See *id.* at 1846 (“In one respect, this cross-country regulatory competition may enable banks to effectively evade costly regulations, which improves capital market efficiency and enhances global economic growth.”).

⁴⁷ See *id.* at 1893 (explaining that recent studies have lent support to the theory that a “race to the bottom” is taking place, and that global capital is moving to the least-regulated environments).

⁴⁸ See *id.* at 1846 (observing that the 2008 financial crisis “has spurred widespread calls for increased regulation, and has led academics and practitioners alike to reaffirm the need for global coordination in bank regulation” in order to reduce systemic risk).

⁴⁹ See Randall S. Kroszner & Philip E. Strahan, *Financial Regulatory Reform: Challenges Ahead*, 101 AM. ECON. REV. 242, 242, 245 (2011) (arguing that “[r]egulators . . . had inadequate tools to deal with the 2008 crisis” and that “regulatory arbitrage” was a major contributing factor in the crisis, and concluding that financial regulatory reform should “improve the stability of [the] interconnected financial system by minimizing regulatory arbitrage and increasing transparency”).

absence of regulatory arbitrage, there is also a realization that some problems cannot be solved at a national level only.⁵⁰ For example, an increase in transparency is required to obtain a more complete view of the interconnectedness, or systemic risk, in financial markets.⁵¹ Measures to reduce systemic risk globally, including clearing requirements for derivatives, need to be coordinated.⁵² Dealing with the failure of a cross-border bank requires regulatory cooperation, while preparation for such an event requires coordinated planning by those same national regulators.⁵³ International coordination on the relevant rulebooks becomes an essential prerequisite for cooperation at this later stage.⁵⁴

III. *Pluralism in Transnational Financial Rules*

A. **International Organizations**

To understand fully the nature of transnational financial rulemaking, one must consider what is meant by an international institution.⁵⁵ Subsequently, one must understand how this concept of

⁵⁰ See *id.* (discussing the benefits of interconnected financial regulation to remove arbitrage-created risk and improve transparency).

⁵¹ See *id.* at 243 (arguing that the next round of financial regulatory reform “ought to improve market transparency to reduce the uncertainty of counterparty exposures and interlinkages between major players, thereby lowering contagion risk”).

⁵² See generally JON GREGORY, *CENTRAL COUNTERPARTIES: MANDATORY CLEARING AND BILATERAL MARGIN REQUIREMENTS FOR OTC DERIVATIVES* 10 (2014) (“[T]here is no question that [central counterparties] can be beneficial as one of a choice of potential risk-mitigating mechanism. . .”).

⁵³ Andrew Campbell & Paula Moffatt, *Large Scale Bank Insolvencies and the Challenges Ahead*, in *RESEARCH HANDBOOK ON CRISIS MANAGEMENT IN THE BANKING SECTOR* 61 (Matthias Haentjens & Bob Wessels eds., 2015) (“According to the 2010 IMF Report in relation to bank resolution ‘experience demonstrates that these (resolution) systems will not be effective unless progress is also made in developing a framework that applies on a cross-border basis. . .’”).

⁵⁴ See *id.* at 62 (“The BCBS Report recommended the introduction of effective national bank resolution powers and it also recognized the need for better coordination among national authorities in cross-border bank resolutions.”).

⁵⁵ John Duffield, *What Are International Institutions*, 9 INT’L STUD. REV. 1, 2 (2007) (“In order to remedy this unsatisfactory state of affairs, a broad definition of international institutions that incorporates the most important institutional forms is required.”).

an international institution translates to the financial regulatory context, i.e., an international institution which is developing financial rules.⁵⁶ Unfortunately, there does not appear to be a widely accepted definition of what constitutes an international institution.⁵⁷ Instead, there appear to be several different approaches.⁵⁸ One such approach equates international institutions with formal international organizations.⁵⁹ Examples of such institutions are the World Bank or the International Monetary Fund (IMF). Such an approach has its origins in the Fifties and Sixties, when several such organizations were formed.⁶⁰ It is readily translated to the financial regulatory context, as there are well-known transnational financial regulatory organizations which fall within the above category; examples include: the BCBS, which sets prudential rules for banks;⁶¹ IOSCO, which develops standards for securities regulation,⁶² and the Financial Action Task

⁵⁶ *Id.* (“To this end, international institutions are defined here as relatively stable sets of related constitutive, regulative, and procedural norms and rules that pertain to the international system, the actors in the system (including states as well as nonstate entities), and their activities.”).

⁵⁷ *Id.* at 1 (“Nevertheless, this scholarly literature lacks a widely accepted definition of international institutions, an absence that has had several unfortunate consequences.”).

⁵⁸ *Id.* at 1–2 (alluding to two such approaches, one in which international institutions are defined simply as intergovernmental organizations, and another in which authors in the field have failed to understand that such institutions can and do take on multiple forms, and yet only describe one form).

⁵⁹ *Id.* (“[T]he term is frequently used to refer to distinctly different empirical phenomena, such as intergovernmental organizations (IGOs), international regimes, and sets of norms.”).

⁶⁰ *See id.* at 3 (“The equation of organizations with institutions may have made a certain amount of sense in the 1950s and 1960s when international organizations were the principal subject of institutional inquiry by scholars.”).

⁶¹ Basel Committee on Banking Supervision (BCBS) Charter art. 1, para. 1 (June 5, 2018), <https://www.bis.org/bcbs/charter.htm> [<https://perma.cc/N2M4-2BUP>] (“The BCBS is the primary global standard setter for the prudential regulation of banks. . . .”).

⁶² Int'l Org. of Sec. Commissions (IOSCO), *Processes for Policy Development and Implementation Monitoring*, art. 1 (prioritizing “[i]mproving the international regulatory framework for securities markets by developing standards and guidance which are timely, responsive to market developments and internationally recognized.”).

Force (FATF), which sets out principles for combatting money laundering.⁶³

These institutions are well defined international organizations, with some form of constitution, a set of objectives, and defined membership.⁶⁴ Here, national regulators come together to realize joint gains in accordance with standard theories of international cooperation.⁶⁵ Formal international organizations, which develop financial rules, are typically not international supervisors or authorities themselves, nor do they hold such powers.⁶⁶ Instead, they are a composition of national authorities and supervisors which come together to negotiate common frameworks for financial rules.⁶⁷ As neofunctionalism explains, one of the reasons this concept works is because it offers

⁶³ Financial Action Task Force (FATF), *Mandate of the Financial Action Task Force (2012-2020)*, at 6 (Apr. 20, 2012) (“The FATF Recommendations set out a comprehensive and consistent framework of measures which countries should implement in order to combat money laundering and terrorist financing . . .”).

⁶⁴ See BCBS, *supra* note 61 (noting that the BCBS seeks to provide a “forum for cooperation” regarding bank supervision); see Financial Action Task Force, *supra* note 63 (setting forth principles of the organization, including combatting money laundering); see also IOSCO, *supra* note 62 (positing that the organization should seek to improve international securities regulation).

⁶⁵ See Oatley & Nabors, *supra* note 24 at 35 n.3 (1998) (positing that according to standard theories of international cooperation, “policymakers create international institutions to realize joint gains”)

⁶⁶ See Edward F. Greene & Joshua L. Boehm, *The Limits of Name-and-Shame in International Financial Regulation*, 97 CORNELL L. REV. 1083, 1086 (2012) (explaining that although the FSB and Basel Committee “formulate regulatory reforms, they can do nothing more than ‘name-and-shame’ states that fail to implement the agreed regulatory policies”); see also Douglas W. Arner & Michael W. Taylor, *The Global Financial Crisis and the Financial Stability Board: Hardening the Soft Law of International Financial Regulation*, 32 U.N.S.W. L.J. 488, 489 (2009) (observing that regulating bodies such as the Basel Committee, IOSCO, and others are limited to enforcing their regulations “through force of example and other forms of moral suasion, including the positive impact on sovereign credit ratings of adherence to these international standards”).

⁶⁷ Stavros Gadinis, *The Financial Stability Board: The New Politics of International Financial Regulation*, 48 TEX. INT’L L.J. 157, 159 (2013) (“[T]he FSB also includes domestic decision makers mostly from G20 countries: independent regulators, such as central bankers and securities commissioners, as well as representatives of elected politicians, such as finance ministers.”).

clear benefits and creates a drive for the national authorities and governments to cooperate internationally in narrowly-defined expert tasks.⁶⁸ Technical affairs of increasing importance can be solved in such a task-specific international organization.⁶⁹ Nation states, or state actors, thus participate in a pluralist framework, which Berman suggests allows for “the [study of] micro-interactions among different normative systems.”⁷⁰ The institution becomes a hybrid participation arrangement⁷¹ and its associated mechanisms and procedures provide ways to manage the different or overlapping legal and normative systems. The outcome of such an arrangement would be better than both the universalist approach and a nation state’s individual approach.⁷²

While the focus of this paper is on transnational rulemaking by states or state actors, there is also self-regulation by industry occurring at a transnational level.⁷³ Resulting transnational standards in areas including standardized contracts and dispute settlement systems have developed at a rapid pace.⁷⁴ Consider, for example, the standardization of financial contracts, both for loans and for more

⁶⁸ David Zaring, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*, 33 TEX. INT’L L.J. 281, 313(1998) (“Neofunctionalism predicts that international cooperation is likely to develop along task specific lines when prodded by domestic actors who expect to benefit from it.”).

⁶⁹ *Id.* at 316 (“Task-specific international organizations can achieve cooperation, especially when domestic groups pursue that cooperation.”).

⁷⁰ See Berman, *Global Legal Pluralism*, *supra* note 27, at 1168.

⁷¹ *Id.* at 1218 (pointing to mixed juries, in which members of different communities sat together to resolve disputes involving people from both communities as a traditional example of the proposition that “[s]ometimes hybridity can be addressed not so much through the relationships among multiple communities and their decision makers as by hybridizing the decision-making body or process itself”).

⁷² *Id.* at 1196 (arguing that mechanisms and institutions managing overlapping legal communities do not necessarily require painful compromises but rather can produce “solutions which, through their compromises, actually result in a better set of procedures for managing hybridity than if either sovereigntist territorialism or universalism had prevailed *in toto*”).

⁷³ *Id.* at 1201 (“[S]tates may incorporate or adapt standards of conduct that are part of accreditation schemes promulgated by NGOs or industry groups.”).

⁷⁴ A. Claire Cutler, *The Judicialization of Private Transnational Power and Authority*, 25 IND. J. GLOB. LEGAL STUD. 61, 81–83 (2018) (suggesting the International Swaps and Derivatives Association (ISDA) has taken on a stronger role in dispute resolution due to the global financial crisis).

complicated products such as derivatives.⁷⁵ The Loan Market Association⁷⁶ (LMA) has developed standardized documentation as well as best practice principles for the primary and secondary loan market, although mostly within Europe. The International Swap and Derivatives Association⁷⁷ (ISDA) has created standardized contracts for over-the-counter (OTC) derivatives contracts. The so-called ISDA Master Agreement is a standardized contract between market participants in which they agree their basic trading terms for all derivative transactions they engage in.⁷⁸ In particular the ISDA standards have been described as a transnational private regulation of the derivatives market, even before new rules were introduced post-financial crisis.⁷⁹ In the area of alternative dispute resolution, there are initiatives focused specifically on the financial markets, such as P.R.I.M.E. Finance which provides specialized arbitration.⁸⁰ More generally, these

⁷⁵ *Id.* at 83 (“The institutional structure developed by the ISDA standards, procedures, and committees provides states with a template for national legislation.”).

⁷⁶ See *About Us*, LOAN MKT. ASS’N, <https://www.lma.eu.com/about-us> [<https://perma.cc/K6NF-NL8F>] (last visited Sept. 13, 2019) (“The Loan Market Association (LMA) has as its key objective improving liquidity, efficiency and transparency in the primary and secondary syndicated loan markets in Europe . . .”).

⁷⁷ See *About ISDA*, INT’L SWAPS AND DERIVATIVES ASS’N, <https://www.isda.org/about-isda/> [<https://perma.cc/ED8B-JY6Q>] (last visited Sept. 13, 2019) (stating that in an effort to make the derivatives market “safer and more efficient,” the ISDA has created an “ISDA Master Agreement and a wide range of related documentation materials. . .”).

⁷⁸ INT’L SWAPS AND DERIVATIVES ASSOC., LEGAL GUIDELINES FOR SMART DERIVATIVES CONTRACTS: THE ISDA MASTER AGREEMENT 4 (2019) (“The ISDA Master Agreement is the standard contract used to govern all over-the-counter (OTC) derivatives transactions entered into between the parties.”).

⁷⁹ See Gabriel Rauterberg & Andrew Verstein, *Assessing Transnational Private Regulation of the OTC Derivatives Market: ISDA, the BBA, and the Future of Financial Reform*, 54 VA. J. INT’L L. 9, 20 (2013) (“Professor Biggins has echoed ISDA’s accomplishments in discussing its successful standardization of OTC derivatives contracts, which has ‘result[ed] in the creation and sustenance of a highly successful transnational private regulatory regime.’”).

⁸⁰ See *About us*, PANEL OF RECOGNISED INT’L MKT. EXPERTS IN FIN., <https://primefinancedisputes.org/page/about-us> [<https://perma.cc/W46B-KWUD>] (last visited Oct. 19, 2019) (“[P.R.I.M.E. Finance] was established to help resolve, and to assist judicial systems in the resolution of, disputes concerning complex financial transactions.”).

private transnational institutions could be regarded as performing tasks normally associated with states or state actors.⁸¹ In doing so, they are adding to an already complex hybridity of overlapping legal spheres.⁸² The prevalence of these transnational institutions implies that the nation state is no longer the sole rule maker, either by national regulation or by participation in the international legislative process, and that it is supplemented by legal orders emerging from other sources.⁸³

B. Organizations as Networks

The aforementioned international organizations take the form of networks.⁸⁴ The emergence of such organizations emphasizes the shift to networked international coordination.⁸⁵ In academic literature, networks between regulators are sometimes referred to as transnational regulatory networks or TRNs.⁸⁶ TRNs would solve what Anne-Marie Slaughter describes as the “globalization paradox” of solving interna-

⁸¹ See David Bach, *Varieties of cooperation: the domestic institutional roots of global governance*, 36 REV. INT’L STUD. 561, 566 (2010) (explaining that private transnational cooperation takes on many of the roles of state regulations, but with more flexibility); see also A. Claire Cutler, *The Judicialization of Private Transnational Power and Authority*, 25 IND. J. GLOBAL LEGAL STUD. 61, 61–62 (2018) (“Indeed the judicialization of private systems of rule is reconstituting the private and public spheres of by recasting common understandings of the appropriate roles of states and markets and of governments and business corporations.”).

⁸² PICCIOTTO, *supra* note 25, at 11–15 (“The new types of hybrid public-private regulatory networks. . .”).

⁸³ See BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW COMMON SENSE: LAW, SCIENCE AND POLITICS IN THE PARADIGMATIC TRANSITION 250–377 (1995). (“[T]he state monopoly of production of law is also questioned . . . because the national legal field is increasingly interpenetrated by transnational legal forms. . .”); see also Muchlinski, *supra* note 10, at 233–35 (“[G]lobalisation is creating a global proto-law that is to be found beyond the positive law of the nation-state. . .”).

⁸⁴ See Picciotto, *supra* note 25 at 17–24 (showing that the “network metaphor” is applicable to private transnational institutions because they share many similarities with “networked governance”).

⁸⁵ *Id.* at 17 (asserting that the fragmentation of the classical liberal state system involves “the shift towards networked international coordination”).

⁸⁶ Pierre-Hugues Verdier, *Transnational Regulatory Networks and Their Limits*, 34 YALE J. INT’L L. 113, 114 (2009) (“[S]cholars of global governance have devoted substantial attention to the promise and perils of these transnational (or transgovernmental) regulatory networks (TRNs).”).

tional problems without democratic deficit: these networks are, to a degree, informal networks, in the sense that they are not the states themselves conducting negotiations, but national regulators negotiating directly with their foreign counterparts.⁸⁷ Therefore, any agreement they reach is in a sense informal, as will be discussed later on in relation to the status of transnational financial rules,⁸⁸ but also potentially free of politics.⁸⁹ These are, after all, national regulators with expertise and competence in their fields.⁹⁰ It can be argued that TRNs are therefore able to provide solutions to transnational problems (such as financial rulemaking) where governments cannot—and, due to their composition as nationally accountable authorities, they do not—undermine democratic or legal order.⁹¹ If this was an absolute truth, then national regulators would be able to reach some technically optimal solution in designing international financial rules.⁹² Clearly, this is not the case.⁹³ Verdier suggests several reasons for this. First, their national accountability is strong enough to ensure that national regulators are not free to ignore domestic preferences.⁹⁴ Second, an optimal technical solution may not exist, and any negotiated solution will in

⁸⁷ *Id.* at 115 (explaining that TRNs, as decentralized, individual government agencies and actors, negotiate directly with foreign counterparts to reach informal understandings so as to “address global problems that state governments cannot tackle alone” without posing a threat to national sovereignty).

⁸⁸ *Id.* (“[I]ndividual government agencies and actors negotiate directly with their foreign counterparts and reach informal understandings relating to their areas of responsibility.”).

⁸⁹ *Contra id.* at 115–16 (contending that TRNs are ill equipped to resolve conflicts because doing so may involve “threats and other manifestations of relative power” which is “at odds with [their] supposed apolitical nature . . .”).

⁹⁰ See David Zaring, *Rulemaking and Adjudication in International Law*, 46 COLUM. J. TRANSNAT’L L. 563, 577, 584, 590 (exploring the decision-making process of experts in various transnational regulatory networks).

⁹¹ Anne-Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFF. 183, 186 (1997) (“Transgovernmentalism . . . leaves the control of government institutions in the hands of national citizens, who must hold their government as accountable for their transnational activities as for their domestic duties.”).

⁹² See Verdier, *supra* note 86 at 115–16 (noting that political pressures facing regulators are one possible limitation on transnational regulatory networks).

⁹³ See generally *id.* (discussing some limitations on transnational regulatory networks).

⁹⁴ See *id.* at 115 (“[N]ational regulators are tied to domestic constituencies by incentives and accountability structures that are much stronger than their links to any hypothetical global polity.”)

any event bring different costs and benefits to different national regimes and underlying economies.⁹⁵ Third, it is questionable whether the international organizations are always equipped to resolve conflicts driven by national interests, as they may simply be beyond their mandate.⁹⁶

Consider the BCBS, which designs the international framework for prudential regulation of banks and can be considered to be a TRN.⁹⁷ Historically, the creation of the BCBS and its mission to set out a framework for prudential regulation is said to emanate from the failure of the Herstatt Bank⁹⁸ in 1974, which was one of several bank failures that year.⁹⁹ Initially, the BCBS was composed of merely the G10.¹⁰⁰ Currently, it is composed of 45 members from 28 jurisdictions, plus nine organizations with observer status.¹⁰¹ The most important task for the BCBS is the design of the transnational regulatory framework for capital and liquidity requirements for banks.¹⁰² To this end, the

⁹⁵ See *id.* (“[I]nternational 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.”).

⁹⁶ See *id.* at 115-16 (“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.”).

⁹⁷ See BCBS Charter, *supra* note 61 (setting out the responsibilities of the BCBS).

⁹⁸ Emmanuel Mourlon-Druol, ‘Trust is good, control is better’: The 1974 Herstatt Bank Crisis and Its Implications for International Regulatory Reform, 57(2) BUS. HIST. 311, 311 (2015) (“It is often said, for instance, that Herstatt’s collapse led to the creation of the BCBS.”).

⁹⁹ Catherine R. Schenk, *Summer in the City: Banking Failures of 1974 and the Development of International Banking Supervision*, 129 ENG. HIST. REV. 1129, 1129 (2014) (examining “a series of bank failures” in 1974).

¹⁰⁰ BANK FOR INT’L SETTLEMENTS, *History of the Basel Committee*, <https://www.bis.org/bcbs/history.htm> [<https://perma.cc/223G-E2MZ>] (last visited Apr. 14, 2018) (“Since its inception, the Basel Committee has expanded its membership from the G10 to 45 institutions from 28 jurisdictions.”).

¹⁰¹ BANK FOR INT’L SETTLEMENTS, *Basel Committee Membership* (Dec. 30, 2016), <https://www.bis.org/bcbs/membership.htm> [<https://perma.cc/L3GF-2R76>] (listing Basel Committee membership as of December 30, 2016).

¹⁰² BCBS, BANK FOR INT’L SETTLEMENTS, *BASEL III: THE LIQUIDITY COVERAGE RATIO AND LIQUIDITY RISK MONITORING TOOLS 1* (Jan. 2013) (presenting the Liquidity Coverage Ratio, “one of the Basel Committee’s key reforms to develop a more resilient banking sector”); BCBS, BANK FOR INT’L SETTLEMENTS, *MINIMUM CAPITAL REQUIREMENTS FOR MARKET RISK 1* (Jan. 2019) (presenting the most current capital requirements for banks).

BCBS has published various reports known as the Basel Accords: Basel I in 1988,¹⁰³ Basel II in 2004,¹⁰⁴ and Basel III in 2011 following the Financial Crisis.¹⁰⁵ These reports contain the methodology for calculating the amount of capital a bank should hold in order to sustain a certain amount of losses on its assets.¹⁰⁶ Among others, they provide a harmonized way to calculate the weighted risk associated with the assets held by a bank.¹⁰⁷ This allows for the calculation of a capital ratio: the ratio between the capital and the risk weighted assets of a bank.¹⁰⁸ If this capital ratio falls below a certain fixed percentage, the bank has to either raise capital or reduce its assets.¹⁰⁹

The TRNs thus consist of national financial regulators directly negotiating with each other to set out these transnational rules.¹¹⁰ But, as stated previously, if they do not necessarily reach an optimal technical solution, either because it does not exist or is overridden by

¹⁰³ BCBS, BANK FOR INT'L SETTLEMENTS, INTERNATIONAL CONVERGENCE OF CAPITAL MEASUREMENT AND CAPITAL STANDARDS 1 (July 1988), <http://www.bis.org/publ/bcbs04a.pdf>.

¹⁰⁴ BCBS, BANK FOR INT'L SETTLEMENTS, INTERNATIONAL CONVERGENCE OF CAPITAL MEASUREMENT AND CAPITAL STANDARDS: A REVISED FRAMEWORK 1 (June 2004), <http://www.bis.org/publ/bcbs107.pdf>.

¹⁰⁵ BCBS, BANK FOR INT'L SETTLEMENTS, BASEL III: A GLOBAL REGULATORY FRAMEWORK FOR MORE RESILIENT BANKS AND BANKING SYSTEM 1 (June 2011), <http://www.bis.org/publ/bcbs189.pdf>; BCBS, BANK FOR INT'L SETTLEMENTS, BASEL III: INTERNATIONAL FRAMEWORK FOR LIQUIDITY RISK MANAGEMENT, STANDARDS AND MONITORING 1 (Dec 2010), <http://www.bis.org/publ/bcbs188.pdf> [<https://perma.cc/Z8CL-7LPF>] (presenting the Basel Committee's reforms around liquidity risk management after the financial crisis in 2007).

¹⁰⁶ See BCBS, MINIMUM CAPITAL REQUIREMENTS FOR MARKET RISK, *supra* note 102 at 1 (presenting the most current capital requirements for banks).

¹⁰⁷ *Id.* at 99 (detailing a "simplified standardized approach for calculating risk-weighted assets.").

¹⁰⁸ Leonardo Gambacorta & Sudipto Karmakar, *Leverage and Risk Weighted Capital Requirements* 1 (Bank for Int'l Settlements, Working Paper No. 586, Sept. 2016), <https://www.bis.org/publ/work586.pdf> [<https://perma.cc/V46N-2QKB>] (defining "risk-weighted bank capital ratios" [as] regulatory capital divided by risk-weighted assets).

¹⁰⁹ BCBS, *supra* note 61, at 55 (presenting a table of capital ratios below which banks are required to raise capital).

¹¹⁰ Verdier, *supra* note 86, at 114, 134 (describing the negotiation stage of Basel I specifically and the process of national regulators negotiating common standards generally).

national interest, what can be said about the actual end result?¹¹¹ Two factors add to a nation's influence at the table and determine the end result. First, if those nations with the largest internal markets can agree then the result is likely to be strong harmonization.¹¹² The great powers are essentially the US and the EU, simply because they hold the power to go it alone, if required.¹¹³ Even if these great powers are not able to agree and set transnational rules by way of harmonization, they will do so through regulatory competition leading to legal convergence.¹¹⁴ The second element which adds to a nation's influence, besides the size of its internal market, is the capability and power of the national regulator.¹¹⁵ In the context of financial regulation, this again affirms the dominance of the US and EU.¹¹⁶ That said, it would appear the EU is at its most powerful within international organizations if either there is a clear delegation of competencies from nations to EU level, or not at all, but in any event not some intermediary solution.¹¹⁷ As before, within the financial regulatory context, this is the case because national regulators and EU institutions as the European Central Bank have clear

¹¹¹ *Id.* at 115 (“[N]ational regulators acting in TRNs are not free to pursue optimal global public policy for its own sake... one should expect that their positions will be shaped by the preferences of domestic constituencies. . .”).

¹¹² Daniel W. Drezner, *Globalization, Harmonization, and Competition: The Different Pathways to Policy Convergence*, 12 J. EUR. PUB. POL'Y 841, 842 (2005) (arguing that when governments that possess large internal markets “act in concert, there will be effective policy harmonization.”).

¹¹³ Daniel W. Drezner, *Globalization, Harmonization, and Competition: The Different Pathways to Policy Convergence*, 12 J. EUR. PUB. POL'Y 841, 841-42 (2005) (arguing that cooperation between great state powers will lead to effective policy harmonization, but a failure to do so will lead to a strong policy convergence through competition).

¹¹⁴ *Id.* at 842 (contending that policy convergence “of a sort” will occur even when great powers disagree).

¹¹⁵ David Bach & Abraham L. Newman, *The European Regulatory State and Global Public Policy: Micro-Institutions, Macro-Influence*, 14 J. EUR. PUB. POL'Y 827 (2007) (arguing that a capable regulatory institution, coupled with a sizeable market, can determine regulatory influence).

¹¹⁶ *Id.* at 829-30, 837 (discussing how the US and EU dominate areas such as banking regulation and securities regulation).

¹¹⁷ Daniel Mügge, *The European Presence in Global Financial Governance: A Principal-Agent Perspective*, 18 J. EUR. PUB. POL'Y 383 (2011) (arguing that when Europe is given extensive delegation ability in global financial governance, the European stakeholders are well represented, but where the delegation is intermediate, the European presence is undermined).

mandates.¹¹⁸ The US and EU thus dominate the transnational financial rulemaking organizations, potentially at the expense of “smaller” countries, with the one who is ahead in domestic regulation generally sitting in the driving seat.¹¹⁹ The reason for that is simple: existing regulation will serve as a blueprint during the negotiations for the final result.¹²⁰

The BCBS, IOSCO, and FATF are quite clearly defined international organizations.¹²¹ The composition of the committee is well defined; it has staff located in a fixed location and support infrastructure.¹²² But, it should be noted that the TRN approach is not without recent criticism, even from its early advocates.¹²³ Because the Financial Crisis of 2008 occurred despite the Basel agreements on bank capital, and because TRNs did not take part in any immediate response, questions are raised about their usefulness.¹²⁴ Instead, national regulators managed the crisis at the G20 level, and the BCBS, IOSCO, and similar organizations played small roles.¹²⁵ Furthermore, it can be argued that none of the Basel Accords could have even prevented any of the preceding crises.¹²⁶ While there is no doubt force in

¹¹⁸ *Id.* at 390–91 (contending the lack of a clear mandate regulators are unable to decide much, which leaves many EU member nations with no room to unilaterally adopt regulations).

¹¹⁹ Lucia Quaglia, *The European Union, the USA and International Standard Setting by Regulatory Fora in Finance*, 19 NEW POL. ECON. 427 (2014) (discussing the influence of the EU in setting international regulatory standards).

¹²⁰ *Id.* at 427 (contending that parties that set the blueprint will enjoy “first-mover” advantage).

¹²¹ David Zaring, *International Institutional Performance in Crisis*, 10 CHI. J. INT’L L 475, 480–81 (2010) (describing generally the formation and function of the BCBS and the IOSCO).

¹²² Joseph J. Norton, *Banking Law Reform and Users-Consumers in Developing Economies: Creating an Accessible and Equitable Consumer Base From the “Excluded”*, 42 TEX. INT’L L.J. 789, 797 (2007) (arguing for a new financial regulatory framework that includes established international bodies such as the IMF, World Bank, OECD, IOSCO and the Basel Committee).

¹²³ See Zaring, *supra* note 121, at 484 (contending that these organizations have had little to say about the previous crisis).

¹²⁴ See Zaring, *supra* note 121, at 483 (“[T]he current crisis has raised real questions about their (and Basel’s) usefulness.”).

¹²⁵ *Id.* at 478–479 (acknowledging that the G20 is the “new institutional focus” of the global response to the financial crisis).

¹²⁶ See Christopher Kobrak & Michael Troege, *From Basel to bailouts: forty years of international attempts to bolster bank safety*, 22 FIN.HIST. REV. 133,

these arguments, it is perhaps harsh to accuse these organizations of not performing a role they were not designed to do. Compare this to the EU institutions, where the three European Supervisory Authorities (ESAs) develop policy, while the Single Resolution Board (SRB) is now tasked with responding to bank failures.¹²⁷ Policy making organizations could not realistically be expected to spend large amounts of public funds to bail out the industry, nor did they have a legal mandate to do so.¹²⁸ Other critics present several weaknesses, in particular that the outcomes are not necessarily welfare-enhancing, and that TRNs are responsible and more capable of most the transnational harmonization compared to the private sector.¹²⁹ Finally, it follows from the previous discussion that the TRNs are most effective when national interests are aligned.¹³⁰ In any event, despite the criticism, the fact remains that these international organizations remain responsible for the creation of much of the financial rulebook.¹³¹ Therefore, in order to understand financial regulation within a national jurisdiction, and especially to compare between several, it remains important to understand the workings of these organizations.

135 (2015) (“Neither the failures of the 1970s nor a meaningful part of the failures of the 1980s would have been avoided had the Basel rules defined in the 1988 Accord already been in place.”).

¹²⁷ See European Commission Press Release MEMO/19/1928, Capital Markets Union: Creating a stronger and more integrated European financial supervisory architecture, including on anti-money laundering (Apr. 1, 2019), https://europa.eu/rapid/press-release_MEMO-19-1928_en.htm [<https://perma.cc/Q92B-75Z4>] (describing the general functions of the ESAs and the SRB).

¹²⁸ See Zaring, *supra* note 121, at 492–93 (addressing the IMF’s lack of resources to deal with a global financial crisis).

¹²⁹ See Matthew C. Turk, *Reframing International Financial Regulation after the Global Financial Crisis: Regional States and Interdependence, Not Regulatory Networks and Soft Law*, 36 MICH. J. INT’L L. 59, 121–122 (2014) (introducing several substantive critiques of TRNs).

¹³⁰ Robert B. Ahdieh, *Coordination and Conflict: The Persistent Relevance of Networks in International Financial Regulation*, 78 LAW & CONTEMP. PROBS. 75, 76–77 (2015) (summarizing various arguments questioning effectiveness of transnational regulatory networks when countries’ interests do not align).

¹³¹ See also *id.* at 76 (exploring the “utility of transnational regulatory network in global governance”); see generally Turk, *supra* note 129 (discussing the development of transnational regulatory networks and how to approach them).

C. International Norms

The analysis of international financial rulemaking typically centers around international organizations or TRNs, as discussed previously. However, in the context of international relations scholarship, for example, international organizations are just one type of international institution.¹³² The notion of international institutions can be broadened to include forms which lack strong organizational features but are based around conceptions or practices.¹³³ In the present context, it is helpful to consider transnational norms which are created outside the formal institutions composed by state actors or by industry. Such norms are held by members of associated social spheres sharing these norms, varying in strength.¹³⁴ These norms may be a precursor to formal treaties or other legal measures.¹³⁵ By way of example from international relations scholarship, consider the general widely held norm that chemical weapons should not be used or produced, with the former resulting in the 1925 Geneva Protocol and the latter in the 1993 Chemical Weapons Convention.¹³⁶

Unless and until formalized, it can be difficult to determine what such norms are, and one may have to use surveys, interviews, or other experiments to determine what they are.¹³⁷ Another way in which such norms are expressed is through Non-Governmental Organizations (NGOs).¹³⁸ NGOs can be regarded as part of, or voices for, civil

¹³² Duffield, *supra* note 55 at 1 (“[I]nternational institutions of various types—treaties, organizations, regimes, conventions, and so on—have grown greatly in numbers and importance.”).

¹³³ *See id.* at 3 (asserting that the definition of international institutions is broad and falls under different categories).

¹³⁴ *See id.* at 6, 9 (highlighting that norms are usually defined as “socially shared expectation” and “varying in strength.”).

¹³⁵ *Id.* at 11 (“[A] norm may become more formalized.”).

¹³⁶ *Id.* at 9 (citing Richard Price, *A Genealogy of the Chemical Weapons Taboo*, 49 INT’L ORG., 73, 76, 102 (identifying the 1925 Geneva Protocol forbade the use of chemical weapons and the 1993 Chemical Weapons Convention forbade the production of chemical weapons)).

¹³⁷ *Id.* at 9 (“Nevertheless, nonbehavioral evidence for the existence of norms can be culled from a number of sources, including surveys, experiments, interviews, and participant observation.”).

¹³⁸ Holly Cullen & Karen Morrow, *International Civil Society in International Law: The Growth of NGO Participation*, 1 NON-ST. ACTORS & INT’L L. 7, 10 (2001) (“In so far as NGOs are able to act in concert with the groups and

society: the public realm which is not the state, in this context at the international level.¹³⁹ By pursuing interests of their society, or sphere, they add to the pluralism at the international plane.¹⁴⁰

The above concept of transnational norms can be applied to the current context. Some of the international norms for the world of finance became visible during and shortly after the global Financial Crisis of 2008 by way of large-scale organized public protests: Consider the Occupy movement,¹⁴¹ which had worldwide followers including Occupy Wall Street and Occupy London. Starting with the occupation of Zuccotti's Park in New York on September 17, 2011, it had found followers from over 900 cities worldwide.¹⁴² With such a large following, goals and objectives were not necessarily clearly defined.¹⁴³ It was reported that "[t]hey sought to have banking-industry regulations tightened, high-frequency trading banned, [and] all the 'financial

individuals that are less visible, they act to the benefit of civil society as a whole.").

¹³⁹ *Id.* ("Some NGOs go so far as to assert that the development of international civil society will help to democratise international law.").

¹⁴⁰ *See id.* ("International civil society demonstrates the socialisation of international law, and a move towards pluralism."); *see also* Leon Gordenker & Thomas G Weiss, *Pluralising Global Governance: Analytical Approaches and Dimensions*, 16 *THIRD WORLD QUARTERLY* 357 (1995) ("The former term connotes authentic collaboration and mutual respect, and it accepts the autonomy and pluralism of NGOs.").

¹⁴¹ *See generally* Jacquelin van Stekelenburg, *THE 99% MOVEMENT* (2011) (describing the eponymous movement that began in Zuccotti Park and spread to other cities in the US); *see also* Uri Friedman, *The World's 99 Percent: A Visual Tour of an Occupy Wall Street Slogan Gone Global*, *FOREIGN POLICY* (Oct. 18, 2011), https://web.archive.org/web/20111022005829/http://www.foreignpolicy.com/articles/2011/10/18/occupy_wall_street_99_percent (providing images of Occupy protestors from around the globe).

¹⁴² Karla Adam, *Occupy Wall Street Protests Go Global*, *WASH. POST* (Oct. 15, 2011), https://www.washingtonpost.com/world/europe/occupy-wall-street-protests-go-global/2011/10/15/gIQA7kimL_story.html ("Rallies were held in more than 900 cities in Europe, Africa and Asia, as well as in the United States, with some of the largest occurring in Europe.").

¹⁴³ Mattathias Schwartz, *Pre-Occupied: The Origins and Future of Occupy Wall Street*, *NEW YORKER* (Nov. 28, 2011), <https://www.newyorker.com/magazine/2011/11/28/pre-occupied> ("Consensus—the agreed-upon method of decision-making—wasn't easy among hundreds of self-identified ninety-nine-percenters, whose politics ranged from 'Daily Show' liberalism to insurrectionary anarchism.").

fraudsters' responsible for the 2008 crash arrested"¹⁴⁴ These protests did not stand alone.¹⁴⁵ Previously, on April 1, 2009, there were large-scale protests in London triggered by the G20 summit held there at the time.¹⁴⁶ The day was dubbed "financial fools' day," against the background of the on-going financial crisis.¹⁴⁷ The focuses of the protests, among others, were the bankers' remuneration and anger at the banking system in general.¹⁴⁸

There are a variety of international norms emerging from these examples.¹⁴⁹ It is not possible to identify all the underlying issues raised, but part of the anger flows from the combination of the apparent inequality emerging from the capitalist approach and the austerity measures in the aftermath of the crisis.¹⁵⁰ It resulted in, among others, a demand for accountability of banking executives as well as improved ethical standards and sound remuneration for bank employees.¹⁵¹ Although it is not in all cases immediately clear what the

¹⁴⁴ *Id.*

¹⁴⁵ *Beating the System, More Gently*, ECONOMIST (Apr. 2, 2009), <https://www.economist.com/news/2009/04/02/beating-the-system-more-gently> (describing protest of the financial section held in London in 2009).

¹⁴⁶ *Id.* (noting that the protests had been set for the first day of the G20 summit).

¹⁴⁷ *Id.* ("An estimated 35,000 people took part in a march some days earlier, but only 4,000 protesters descended on the city's financial center on 'financial fools' day'").

¹⁴⁸ Sam Jones, Jenny Percival & Paul Lewis, *G20 Protests: Riot Police Clash with Demonstrators*, THE GUARDIAN (Apr. 1, 2009, 3:58 p.m.), <https://www.theguardian.com/world/2009/apr/01/g20-summit-protests> [perma.cc/4ZN5-82U6] (quoting an angry protestor, who was "protesting for the small individuals in Britain who have been left . . . as the government bails out the banks for billions of dollars.").

¹⁴⁹ Manfred B. Steger & Paul James, *Levels of Subjective Globalization: Ideologies, Imaginaries, Ontologies*, 12 PERSP. ON GLOBAL DEV. AND TECH. 20 (2013) (explaining that, over time, a certain place's common ideologies develop into modern norms specific to that place).

¹⁵⁰ van Stekelenburg, *supra* note 141, at 226 (identifying a sense of shared anger, resentment, and frustration as one of four main motives for individuals to participate in a protest); *see also* Adam, *supra* note 142 ("[T]ens of thousands of people around the world took to the streets Saturday to reiterate their anger at the global financial system, corporate greed and governmental cutbacks.").

¹⁵¹ *See* Schwartz, *supra* note 143 (stating that goals of the Occupy Wall Street movement were tighter regulations on banking and arrests of the "frauds" responsible for the financial crisis); *see also* Jones, et al., *supra* note 148

norm should be, the standard has been crossed. The Occupy movement plays a role in expressing the ideology and the norms as defined by international civil society and should be included in the analysis.¹⁵² It adds more social spheres to those provided by states and state actors affecting transnational laws and norms.¹⁵³ In other words, in the current context, it adds to the pluralism in the creation of transnational financial rules, just as lobbying by business does.¹⁵⁴

The transnational organizations, such as the BCBS or IOSCO, are influenced by these transnational norms.¹⁵⁵ In a clear example of this, Mr. Haldane, a senior executive of the Bank of England and a member of its Financial Policy Committee at the time, stated that “Occupy has been successful in its efforts to popularize the problems of the global financial system for one very simple reason; they are right.”¹⁵⁶ He added in his speech titled “Socially Useful Banking” that protesters had helped to bring about a change in the way banks were regulated: “If I am right and a new leaf is being turned, then Occupy will have played a key role in this fledgling financial reformation.”¹⁵⁷ Again, it shows that policy makers will be influenced by civil society and societal norms.¹⁵⁸ As Mr. Haldane’s statement demonstrates, such norms need to be included in the analysis of financial regulation

(describing the riotous scene outside the Bank of England and Royal Bank of Scotland during an Occupy movement protest).

¹⁵² Steger & James, *supra* note 149, at 25 (proposing that Occupy activists are bound to their ontologies and, thus, “confined to the dominant frameworks of the world they criticize”).

¹⁵³ *Id.* at 31 (explaining that dynamics of modern society can be broken into various spheres: the public sphere, the private sphere, and into the “sovereignty of the people,” a combination of both spheres).

¹⁵⁴ Gordenker & Weiss, *supra* note 140, at 370 (explaining the multiplicity of forms that a relationship between a government and a non-government organization can take).

¹⁵⁵ *Id.* at 374 (explaining that governments are ultimately comprised of individuals, possessing their own social norms, and transnational organizations are constantly exposed to these social norms).

¹⁵⁶ James Kirkup, *Occupy Protesters Were Right, Says Bank of England Official*, DAILY TELEGRAPH (Oct. 29, 2012) <https://www.telegraph.co.uk/finance/newsbysector/banksandfinance/9641806/Occupy-protesters-were-right-says-Bank-of-England-official.html>.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* (arguing that Occupy movement has helped stir early financial reform).

because they are an essential part of the normative hybridity in which transnational financial rules are formed.¹⁵⁹

IV. Harmonization and Transplantation

A. Aiming for Uniformity

Reconsider for a moment the objective of reducing regulatory arbitrage between jurisdictions and preventing regulatory competition, or a race to the bottom.¹⁶⁰ Creating a transnational level playing field in financial regulation implies that the international institutions, as discussed above, pursue the objective of creating legal uniformity in financial rulemaking, that this uniformity is desirable and can be achieved.¹⁶¹ Unfortunately, legal uniformity itself is a problematic term, but in context of this article, it can be defined as “different specific instruments, regardless of form or origin, having the same goal or objective, to deliberately achieve the same (legal) results.”¹⁶² There are various ways of seeking to achieve legal uniformity, of which harmonization is the most useful in the present context.¹⁶³ However, because seeking uniformity through universal harmonization approaches the idea of creating some form of “global proto-law,” there are natural obstacles to achieving it.¹⁶⁴ Most obviously, such approach will seek to erase the normative differences which exist between the

¹⁵⁹ *Id.* (“Occupy’s voice has been both loud and persuasive and policymakers have listened and are acting.”).

¹⁶⁰ Joel F. Houston et al., *Regulatory Arbitrage and International Bank Flows*, 67 J. FIN. 1845, 1846 (2012) (elaborating race to the bottom promotes circumvention of prudent regulations and excessive risk-taking).

¹⁶¹ Alan D. Morrison & Lucy White, *Level Playing Fields in International Financial Regulation*, 64 J. FIN. 1099, 1099 (2009) (stating proponents believe level playing field regulation improves global welfare and allows for competition on equal footing).

¹⁶² See Camilla Baasch Andersen, *Defining Uniformity in Law*, 12 UNIF. L. REV. 5, 17 (2007) (examining and refining the meaning of “uniform” with respect to the globalized law).

¹⁶³ *Id.* at 31 (“The intention is to demonstrate that there are a multitude of differing techniques to create laws or legal phenomena which are labelled as “uniform” and they exist in many different forms.”).

¹⁶⁴ See Berman, *supra* note 27, at 1191 (commenting on some of the inherent difficulties in achieving universalism stemming from “many differences both in substantive values and attitudes about law arise from fundamentally different histories, philosophies, and worldviews”).

nation states represented at the international organizations.¹⁶⁵ In turn, this negating of pluralism may make acceptance by nation states of the eventual outcome difficult as they no longer recognize themselves in the uniform solutions, prohibiting an effective national implementation.¹⁶⁶ One may simply not be willing to make changes to a financial system or to enforce them properly.¹⁶⁷ In other words, the outcome may be harmonized but not hegemonic.¹⁶⁸

International organizations would be the obvious place to devise universal harmonization, by way of developing principles and frameworks, with the aim of “managing” the normative hybridity.¹⁶⁹ The BCBS is an international organization where regulators come together to try and realize joint gains by way of harmonized rules, in accordance with the idea of aiming for uniformity and reduction of regulatory arbitrage as outlined above.¹⁷⁰ However, as the pluralist approach suggests, that is not the complete story, as state actors do not always share the same norms or objectives.¹⁷¹ Starting with Basel I, there were disagreements between regulators who saw the need for harmonized capital requirements and those who did not.¹⁷² For

¹⁶⁵ *Id.* at 1189–90 (suggesting that a homogenous global law might lead to a homogenous global community).

¹⁶⁶ *Id.* at 1190 (“[I]f we think of ourselves solely as citizens of the world, we might tend to dissolve the multirootedness of community affiliation into one global community.”).

¹⁶⁷ *Id.* (“People are therefore likely to be either unable or unwilling to trade in their perspectives for the sake of universal harmony.”).

¹⁶⁸ *Contra id.* at 1189, 1190 (“Thus, the presumed universal may also be the hegemonic [I]t is difficult to believe that, as a practical matter, harmonization processes will ever fully bridge the significant differences that exist among states”).

¹⁶⁹ *Id.* at 1189 n.152 (postulating that a uniform global law focused on procedure and mechanics could be designed to manage homogenizing pressures).

¹⁷⁰ BCBS, *Basel Committee Charter*, (June 5, 2018), <https://www.bis.org/bcbs/charter.htm> [<https://perma.cc/GQT9-JNPG>] (“[The BCBS’s] mandate is to strengthen the regulation, supervision and practices of banks worldwide with the purpose of enhancing financial stability.”).

¹⁷¹ Oatley & Nabors, *supra* note 24, at 46 (pointing to the divergence in capital-assets ratios between U.S. and Japanese banks and the political importance of that divergence).

¹⁷² Verdier, *supra* note 86, at 135 (contrasting the U.S. need for internationally stricter regulatory capital standards against Japan and Germany’s desire to maintain strong markets with low capital requirements); *see also* Oatley &

example, both Germany and Japan were very much against the idea, while the UK and the US were very much in favor.¹⁷³ The commercial banks in the US were, at the time, just hit by the Latin American debt crisis of the early 1980s, but at the same time, the US politicians did not want to openly use public funds to resolve the matter.¹⁷⁴ Instead, more stringent capital requirements would lead to raising equity and thus strengthening the US commercial banks.¹⁷⁵ The only problem was that these same US banks were losing ground rapidly to their Japanese competitors.¹⁷⁶ Increasing capital requirements unilaterally would further hamper their competitive position; therefore, raising these requirements at the international level rather than just domestically became a national priority for the US.¹⁷⁷ Furthermore, the UK and US banks already had a much higher capital ratio than their Japanese counterparts,¹⁷⁸ while being far more exposed to loans to developing countries.¹⁷⁹

The solution of harmonizing capital ratios would thus create an international competitive advantage for the US and UK, because Japanese (and European) banks would need to raise capital, even though a national solution of reducing particular exposure would be perfectly viable though a politically less attractive alternative.¹⁸⁰ As a

Nabors, *supra* note 24 at 35–56 (noting Ethan Kapstein’s theories of international cooperation to acquire gains).

¹⁷³ Oatley & Nabors, *supra* note 24, at 48 (highlighting concerns over harmonized capital requirements through the resulting increase in Japanese banks’ tax payments and Germany’s incompatible banking system).

¹⁷⁴ *Id.* at 42–43 (describing the U.S. politician and voter opposition to use public funds because of the concurrent recession and rising unemployment rates).

¹⁷⁵ *Id.* at 43–44 (explaining capital regulation would solve the weak U.S. bank position resulting from the debt crisis and not force costs on voters).

¹⁷⁶ *Id.* at 44 (“On the one hand, U.S. commercial banks were facing increasing competition from foreign, particularly Japanese, commercial banks.”).

¹⁷⁷ *Id.* at 45 (illuminating Congress’ move towards international standards because unilateral “capital adequacy standards . . . would further weaken their competitive position”).

¹⁷⁸ *Id.* at 48 tbl.2 (Reporting U.S. and U.K. banks had the highest mean capital to asset ratios while Japanese banks had the lowest).

¹⁷⁹ *Id.* at 47 tbl.1 (indicating U.S. banks exposed at almost 200% of their capital and Japanese banks exposed at less than 55% of their capital).

¹⁸⁰ *Id.* at 45–46 (explaining how international capital regulation would reduce the advantage that foreign banks would achieve in comparison to a regulation that is only domestically enforced).

consequence, slow progress was made at the BCBS until the UK and US forced the matter by agreeing bilaterally to a set of prudential rules, while simultaneously agreeing to closing their markets—which include London and New York—for any foreign banks that do not comply.¹⁸¹ The softer multilateral approach was far preferable to the other participating countries than the stricter bilateral UK-US agreement, hence the other countries, including Japan, yielded.¹⁸² It is a clear early example that the BCBS is not a TRN reaching some sort of optimal harmonized technical solution, but instead, under the pluralism approach, is much open to the influence of domestic and international politics and interests.¹⁸³

The negotiations of Basel II were even more difficult, with no country having a particular framework to push in the way the UK and US had for Basel I.¹⁸⁴ The development of Basel II, unlike its predecessor, was not driven by a crisis, but by the development of: (i) arbitrage through securitization; and (ii) the use of more advanced credit risk models at large banks.¹⁸⁵ Furthermore, there was hesitation about revising Basel I in the belief among regulators that capital requirements should go up further and certainly not down.¹⁸⁶ This last belief was further strengthened due to the Asian and Russian financial crises

¹⁸¹ *Id.* at 49–52 (explaining how the United States forged a bilateral accord with the British government which placed heavy regulatory restrictions on foreign banks in an attempt to force G-10 countries to negotiate a multilateral agreement).

¹⁸² *See id.* at 52–52 (describing how the burdens placed on Japanese banks by the bilateral agreement, and failed attempts to mitigate the effects of it, left Japan little choice but to enter into the multilateral accord).

¹⁸³ *See id.* at 52–53 (contending that the UK-US bilateral agreement used to bring about the Basle Accords suggests that “joint gains are not necessary” to create TRNs, rather TRNs can come about from domestic policymakers’ interests in expanding support coalitions.)

¹⁸⁴ DANIEL K. TARULLO, *BANKING ON BASEL: THE FUTURE OF INTERNATIONAL FINANCIAL REGULATION* 89–137 (2008) (illuminating the lack of goals and framework at the outset of Basel II negotiations, and how it created difficulty throughout the negotiation process).

¹⁸⁵ *Id.* at 91–92 (discussing McDonough’s rationale for Basel II as concern over developing arbitrage strategies and their undermining effect on Basel I, and concern over the adequacy of banks’ risk assessment methods).

¹⁸⁶ *Id.* at 92 (expressing regulators’ belief that capital requirements should go up in certain areas to better match capital regulation with risk).

in the late 1990s.¹⁸⁷ However, although negotiations first seemed to head for the use of external rating-based assessments, there was much opposition from rating agencies themselves.¹⁸⁸ Another approach, the advanced internal rating approach, was in turn added, where banks would be allowed to use their own credit assessments subject to regulatory approval.¹⁸⁹ Additionally, there were strong domestic influences preventing swift agreement.¹⁹⁰ In Germany, the fear of impact on the small and medium enterprises (SMEs) led to (then) Chancellor Schröder announcing he would not be supportive of implementing Basel II.¹⁹¹ In the US, there were fears about competition, as smaller banks would not have the same capacity as large international banks to develop an advanced internal rating-based approach.¹⁹² This would result in more stringent capital requirements for smaller banks on the same activities, leading the US to declare that Basel II would only apply to the largest banks.¹⁹³ For these reasons, and due to the many rounds of public consultation, allowing banks to give their view and creating a platform of acceptance, the Basel II negotiations took several years to complete.¹⁹⁴ The mood was different during the negotiation of Basel III, as it was drafted in the aftermath of the global

¹⁸⁷ *Id.* at 92 (suggesting that the financial crises in Asia and Russia created “a less propitious time to suggest that banks could safely hold lower levels of capital”).

¹⁸⁸ *Id.* at 98 (“Arguably the most serious blow to the committee’s proposal came from the rating agencies themselves.”).

¹⁸⁹ *Id.* at 105–07 (“Under the A-IRB [Advanced Internal-Ratings Based] approach, banks would also be able to use their own estimates of their exposure in the event of default, loss if default occurred, and maturity of the exposure.”).

¹⁹⁰ Verdier, *supra* note 86, at 141 (indicating that “domestic pressures . . . stalled” the process “for months.”).

¹⁹¹ *Id.* at 141 (stating that, given its impact on small and medium enterprises, Chancellor Schröder “would not support EU implementation” of Basel II).

¹⁹² TARULLO, *supra* note 184, at 182–83 (stating that smaller banks “became increasingly concerned that they would be disadvantaged relative to” larger banks that were “using an IRB [internal rating-based] approach”).

¹⁹³ Verdier, *supra* note 86, at 142 (stating that in 2007, U.S. regulators “announced that the advanced Basel II approaches would apply to large, international ‘core’ banks.”).

¹⁹⁴ TARULLO, *supra* note 184, at 113–44 (explaining that over “three-and-a-half years” the Basel II committee “engaged in more or less constant negotiations, frequent revisions of its proposals, and nearly continuous dialogue with the banking industry”).

financial crisis.¹⁹⁵ However, the frequent consultation with the private sector showed that, despite appreciating the need for reform, the sector clearly opposed new regulation, resulting in a slow cycle of ever diminishing reformatory potential, toning down, and an emphasis on local implementation.¹⁹⁶ In summary then, none of the three accords provides an optimal technical solution.¹⁹⁷ In all three cases, there have been changes caused by national interests, some cost-benefit analysis, or outside influence.¹⁹⁸ Therefore, the TRNs should not blindly be considered as some technocratic forum reaching an optimal and harmonized consensus solution, or even providing some global rulebook which can be accepted blindly.¹⁹⁹ To understand how national financial rulebooks are established, it is necessary to understand fully the developments and interaction at transnational level by different actors, or, in other words, the effects of pluralism which have contributed to the establishment of the underlying transnational principles.²⁰⁰

B. Status of Transnational Financial Rules

Having discussed the nature of the relevant international institutions and how they may reach transnational rules, the next question concerns the status of the rules thus created.²⁰¹ The resulting

¹⁹⁵ BASEL COMMITTEE ON BANKING SUPERVISION, BASEL III: GLOBAL REGULATORY FRAMEWORK, *supra* note 105, at 3 (stating that in response to risk management-related “shortcomings” that precipitated the 2007 financial crisis, “the Committee in July 2009 completed a number of critical reforms to the Basel II framework”).

¹⁹⁶ Sine Nørholm Just, *The Negotiation of Basel III*, 8 J. OF CULTURAL ECON. 25, 37 (2015) (arguing that the financial sector seeks to maintain autonomy by dominating the regulatory process, which in turn affects Basel III’s regulatory scope and effectiveness).

¹⁹⁷ *See id.* at 28 (summarizing arguments that Basel I and II were unsuccessful after regulatory failures and market actors gaming the system); *see also id.* at 38 (concluding that Basel III falls short of resolving issues from Basel I and II).

¹⁹⁸ *Id.* at 28, 38 (asserting the various factors affecting Basel I, II, and III’s effectiveness).

¹⁹⁹ *See id.* at 38 (concluding that Basel III’s inability to overcome the shortcomings of Basel I and II could lead to “further disenchantment” and not to radical change).

²⁰⁰ *See id.* at 37 (observing that critiques of Basel III negotiations have been correct to focus on individual actors’ actions when assessing efficacy).

²⁰¹ *See id.* at 30 (discussing the Basel Accords’ effect on the relationship between actors and regulations).

rules may include non-binding or voluntary resolutions, codes of conduct drafted and agreed at the transnational level, or statements made by non-government bodies, but which intend to create transnational principles.²⁰² The aim of setting out such “instruments” is of course to change the behavior of states by ensuring that enshrined codes or principles are adopted.²⁰³ One way to approach the legal status is to use the traditional division into hard law and soft law.²⁰⁴ The transnational frameworks could be regarded as some form of soft law, but how should one exactly approach this type of international soft law?²⁰⁵ Perhaps it is less problematic to start with what can be regarded as its opposite: international hard law. An example of this would be a formal treaty containing specific and clearly defined obligations.²⁰⁶ Once established, this form of international law will provide clear legal recourse and remedies.²⁰⁷ International soft law may then be regarded as everything that does not qualify as this hard law.²⁰⁸

This is rather unsatisfactory. When considering the principles and recommendations laid out by the international organizations discussed previously, a more careful consideration is required. The

²⁰² C.M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT'L & COMP. L.Q. 850, 851 (1989) (identifying various instruments that impose soft obligations).

²⁰³ *Id.* at 865 (explaining that soft law instruments form values and expectations that states will strive to adopt and impose).

²⁰⁴ *See id.* at 851 (distinguishing soft law, which “include[s] only soft obligations” from hard law, which “must be precisely worded and specify the exact obligations undertaken or the rights granted”).

²⁰⁵ For a wider discussion on soft-law, *see generally* R. R. Baxter, *International Law in "Her Infinite Variety"*, 29 INT'L & COMP. L.Q. 549 (1980) (describing the infinite variety of intensities in which international agreements can be made); Chinkin, *supra* note 202 at 851–53 (explaining the conflicting claims and challenges soft-law presents in the context of international economic law); Tadensz Gruchalla-Wesierski, *A Framework for Understanding "Soft Law,"* 30 MCGILL L.J. 37 (1984) (considering how soft law norms have been or may be applied).

²⁰⁶ Baxter, *supra* note 205, at 549–50 (distinguishing soft-law from hard-law such as specific treaty rules that states expect to be complied with).

²⁰⁷ *See* David Sloss, *When Do Treaties Create Individually Enforceable Rights—the Supreme Court Ducks the Issue in Hamdan and Sanchez-Llamas*, 45 COLUM. J. TRANSNAT'L L. 20, 34 (2006) (“Treaties can be invoked both offensively by plaintiffs and defensively by civil or criminal defendants.”).

²⁰⁸ *See* Chinkin, *supra* note 202, at 851–52 (explaining soft-law, unlike hard-law, includes a broad range of instruments that do not specifically identify obligations undertaken or the rights granted).

“global governance” structure which is emerging appears unsuited to describe only in terms of interdependent states, operating through international law on the global plane.²⁰⁹ The hybrid nature of private and public law, of national and international legal norms, blur the distinctions between the forms of norms and redefines who sets the norms.²¹⁰ It may well follow that the distinction between hard law and soft law has become outdated,²¹¹ or at least within the present context. A more useful approach would be to borrow from legal pluralism, where it is more common to leave behind the positivist definition of law.²¹² Instead, in the global arena, consider legal norms, which in absence of formal enforcement mechanisms may simply be considered “up in the air.”²¹³ There is, instead, a legal consciousness which triggers adherence.²¹⁴ In practice, this means that economic and political interests, strategy, or even morality may drive nation states to adherence and implementation.²¹⁵

Notwithstanding the analysis above, transnational financial frameworks and principles typically have no binding legal force and there is no actual legal commitment from the states.²¹⁶ For example, in

²⁰⁹ See PICCIOTTO, *supra* note 25, at 9–17 (2011) (explaining the emerging global governance is no longer international in character but rather supranational, subnational, and reflective of the hybrid of state and private nature).

²¹⁰ *Id.* at 9–17 (explaining the emerging global governance is no longer international in character but rather supranational, subnational, and reflective of the hybrid of state and private nature).

²¹¹ Andersen, *supra* note 162, at 15–17 (“[T]hese hard/soft/softer labels of traditional international law do not lend themselves to the hybrid of uniform law in a globalised context . . .”).

²¹² Paul Schiff Berman, *Global Legal Pluralism as a Normative Project*, 8 U.C. IRVINE L. REV. 149, 155 (2018) (explaining that Pluralists’ deemphasis on the positivists definition of law is particularly significant in the global arena where statements of legal norms may be highly effective regardless of formal enforcement power).

²¹³ *See id.* (describing legal norms that may be “in the air” at any moment).

²¹⁴ *Id.* (explaining that because of legal consciousness we adhere to legal norms even where they are not literally enforceable).

²¹⁵ *Id.* (“[O]nly by thinking more broadly about changes in legal consciousness and the complicated social, political, and psychological factors that enter into the conceptualization of state interests can we begin to understand how non-state law operates.”).

²¹⁶ *See* Gruchalla-Wesierski, *supra* note 205, at 39 (describing international economic relations as characterized by soft-law through which states retain

the Charter of the BCBS, it is written under article three that it does not have any formal supranational authority, and that its decisions do not have legal force.²¹⁷ Instead, under article five, it relies on the commitment of its members towards, among others: working together to achieve the mandate of the BCBS; implementing it in a timely fashion and applying the BCBS standards; and undergoing BCBS reviews to assess whether domestic rules and practices are in line with the BCBS standards.²¹⁸ Likewise, IOSCO does not have the legal means necessary to enforce its standards or recommendations.²¹⁹ Instead, it relies upon its members to appreciate the necessity of avoiding regulatory arbitrage and for convergence towards principles developed based on mutual consent.²²⁰ Lastly, FATF sets out recommendations without legal means to enforce them.²²¹

Even though these transnational frameworks for financial regulation are not legally binding, it can certainly be argued there is ample pressure on the participating nation-states to implement them.²²²

discretion over obligations or avoid legal obligations altogether to avoid enforceability).

²¹⁷ See Basel Comm. on Banking Supervision, *Basel Committee Charter art. 3*, BANK FOR INT'L SETTLEMENTS (June 5, 2018), <https://www.bis.org/bcbs/charter.htm> [<https://perma.cc/N2M4-2BUP> (outlining how the BCBS depends on a Governance committee to approve of all BCBS actions).]

²¹⁸ *Id.* at art. 5 (“The Committee expects standards to be incorporated into local legal frameworks through each jurisdiction's rule-making process within the pre-defined timeframe established by the Committee.”).

²¹⁹ Int'l Org. of Sec. Commissions, *IOSCO Processes for Policy Development and Implementation Monitoring art. 6*, <https://www.iosco.org/about/pdf/IOSCO-Policy-and-Implementation-Monitoring-Processes.pdf> [<https://perma.cc/LKW2-P8QZ>] (“Like other international standard setting bodies in the financial sector, IOSCO does not have legal authority to enforce its standards or recommendations and jurisdictions are not legally bound by such international standards.”).

²²⁰ *Id.* (“Given the global nature of markets, it is important to avoid regulatory arbitrage and to converge implementation of standards that are developed consensually to the maximum extent possible.”).

²²¹ Financial Action Task Force, *Mandate of the Financial Action Task Force (2012-2020) art. 4* (Apr. 20, 2012), <http://www.fatfgafi.org/publications/fatfgeneral/documents/ministersrenewthemandateofthefinancialactiontaskforceuntil2020.html> [<https://perma.cc/3FT9-PB3W>] (“This mandate is not intended to create any legal rights or obligations”).

²²² Lawrence L.C. Lee, *The Basel Accords as Soft Law: Strengthening International Banking Supervision*, 39 VA. J. INT'L L. 1, 8 (1998) (suggesting

Consider for example the IMF, which as a bank of last resort can provide loan agreements and bail-out packages to countries in financial difficulty.²²³ As part of such assistance, the IMF can in turn, among others, demand improvements in banking supervision and regulation along the lines set out by the BCBS.²²⁴ In this way, the IMF is able to ensure compliance with the Basel Accords.²²⁵ Furthermore, international organizations actively monitor compliance with their principles and recommendations.²²⁶ FATF published reports on compliance of individual countries,²²⁷ as well as more generic overviews which include a long list of countries and their adherence to individual principles and recommendations.²²⁸ The IMF published similar reviews in countries' compliance with IOSCO principles, such as the recent reviews of the US²²⁹ and the Russian Federation.²³⁰ There is of course

that past financial crises have pushed international monetary and banking organizations to comply with and increase regulation).

²²³ *Id.* (The IMF serves as the world's central bank of last resort and as a fiscal reform school for wayward economies).

²²⁴ *Id.* at 36-39 ("Through continuous dialogue with members and surveillance of member's economic developments, in addition to making suggestions for economic development, the IMF can both encourage and monitor adherence to international banking supervisory and prudential guidelines.").

²²⁵ *Id.* ("By emphasizing the implementation of the Basle Accords, the International Monetary Fund will facilitate the expansion of influence of the Basle Accords to strengthen the framework for international financial stability.").

²²⁶ FATF, *Consolidated Assessment Ratings*, <https://www.fatf-gafi.org/publications/mutualevaluations/documents/assessment-ratings.html>, [<https://perma.cc/326L-R4DC>] (explaining that the "FATF and FSRBs conduct peer reviews on an ongoing basis to assess how effectively their respective members' AML/CFT measures work in practice, and how well they have implemented the technical requirements of the FATF Recommendations.").

²²⁷ FATF, *Topic: Mutual Evaluations*, [http://www.fatf-gafi.org/publications/mutualevaluations/?hf=10&b=0&s=desc\(fatf_releasedate\)](http://www.fatf-gafi.org/publications/mutualevaluations/?hf=10&b=0&s=desc(fatf_releasedate)) [<https://perma.cc/F9VQ-QZ8G>] ("The FATF conducts peer reviews of each member on an ongoing basis to assess levels of implementation of the FATF Recommendations, providing an in-depth description and analysis of each country's system for preventing criminal abuse of the financial system.").

²²⁸ FATF, *4th Round Ratings*, (Sept. 19, 2019), <http://www.fatf-gafi.org/media/fatf/documents/4th-Round-Ratings.pdf> (surveying the effectiveness and compliance of 85 countries).

²²⁹ IMF, *United States: Fin. Sector Assessment Program-Detailed Assessment of Implementation on the IOSCO Objectives and Principles of Sec. Reg.*, (Apr. 2, 2015), <https://www.imf.org/~media/Websites/IMF/imported-full-text->

quite some force in publicly “naming and shaming” those countries that do not comply.²³¹

Departing even further from a positivist definition of law, one arrives at the aforementioned alternative reasons for implementation, including economic, political, and strategic interests.²³² Consider for example the composition of the organizations: the top of many of the world’s financial regulators are members and present at the meetings.²³³ It is difficult to conceive a membership that would carry more weight and persuasive force in the regulatory world.²³⁴ International political organizations, such as the G20, endorse the standards developed²³⁵ and are informed of the progress of implementation by individual countries.²³⁶ The lengthy negotiation of, for example, the

pdf/external/pubs/ft/scr/2015/_cr1591.ashx (detailing the “assessment of the level of implementation of the IOSCO Objectives. . . [that] was conducted in the United States from October 27 to November 19, 2014.”).

²³⁰ IMF, *Russian Federation: Fin. Assessment Program: Detailed Assessment of Implementation: IOSCO Objectives and Principles of Sec. Reg.*, (Sept. 22, 2016), https://www.imf.org/~media/Websites/IMF/imported-full-text-pdf/external/pubs/ft/scr/2016/_cr16304.ashx (providing a report on the Central Bank of the Russian Federation’s compliance as well as relevant regulatory changes).

²³¹ Marcus P. L. Gustafsson, *Compliance and Membership Value in Int’l Econ. L.*, 48 GEO. J. INT’L L. 1201, 1233 (2017) (explaining how “‘naming and shaming’ can be an effective way to draw attention to defectors . . . and to ensure that reputational losses are fully felt by those directors.”).

²³² Oscar Schachter, *Toward a Theory of Int’l Obligation*, 8 VA. J. INT’L L. 300, 301–02 (1968) (outlining various theories as the “foundation of obligation” between international players, including various social, economic and political reasons).

²³³ Nicholas W. Turner, *Dodd-Frank and Int’l Reg. Convergence: The Case for Mutual Recognition*, 57 N.Y. L. SCH. L. REV. 391, 396–98 (2012) (describing the composition, actions and role of G-20 members in fighting arbitrage).

²³⁴ *Id.* at 410 (highlighting the initiatives of the G-20 and its relationship with various regulatory organizations).

²³⁵ G20, *The Seoul Summit Document*, ¶¶ 35, 27–47 (2010), <http://www.oecd.org/g20/summits/seoul/Seoul-Summit-Document.pdf> (reaffirming the G20’s commitment to remedy the errors of the past world recession through actions and implementation set forth by the BCBS, IOSCO, and other organizations).

²³⁶ Bank for International Settlements, *Implementation of Basel Standards: A Report to G20 Leaders on Implementation of the Basel III Regulatory Reforms* (July 2017), <https://www.bis.org/bcbs/publ/d412.pdf> (elaborating on

Basel II Accord demonstrates the enormous complexity and importance of resulting framework, taking up a timeframe of similar size as a legally binding treaty.²³⁷ All these factors combined imply that it becomes in the interest of nation-states to adhere to the resulting frameworks.²³⁸

C. Implementation into National Law

The national implementation of transnational regulatory frameworks and principles falls within the well-developed comparative legal field of legal transplants.²³⁹ Teubner suggests leaving behind the term “transplant,” which he argues creates the impression of surgically transferred material playing its old role in a new organism.²⁴⁰ The

each G20 member’s progress on implementing the Basel III regulatory reforms within the previous year).

²³⁷ See Pierre-Hugues Verdier, *Transnational Regulatory Networks and Their Limits*, 34 YALE J. INT’L L. 113, 128, 140–43 (2009) (recounting the complexity and “years of contentious negotiations” between 1998 to 2004 to finalize the Basel II Accord); see also Young B. Cho, *Why do Countries Implement Basel II?* (Jan. 2013) (unpublished Ph.D. dissertation, London School of Economics and Political Science) (on file with author) (“The Basel Committee decided to undertake a thorough revision of Basel I in 1998, and after six years of intense negotiations, Basel II was published in June 2004.”).

²³⁸ See Peter M. Haas, *Compliance Theories Choosing to Comply: Theorizing from International Relations and Comparative Politics*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (Dinah Shelton ed., 2003) (providing an overview of compliance theory in international agreement by examining several elements which may influence a state’s decision to comply with international non-binding agreements, including international pressure and benefits).

²³⁹ See Loukas A. Mistelis, *Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform—Some Fundamental Observations*, 34 INT’L L. 1055, 1065–67 (2000) (observing legal theories concerning the viability of legal transplants and reception of foreign law and its relevancy as states enable political and economic changes, implicating their legal system); see also Nick Foster, *Transmigration and Transferability of Commercial Law in a Globalized World*, in COMPARATIVE LAW IN THE 21ST CENTURY 58–60 (Andrew Harding & Esin Örüçü eds., 2002) (describing the differences in legal transplant theories and their effects on strategy of the implementation of commercial law into a society).

²⁴⁰ Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences*, 61 MOD. L. REV. 11, 12 (1998) (utilizing the example of “good faith” in British Law as it is implemented in

outcome of such surgical operation would be binary: acceptance or rejection.²⁴¹ Instead, the suggestion is to approach the foreign legal element as an irritant to the existing body of law.²⁴² It moves the question towards the changes or reaction caused by the irritation in the national body of law.²⁴³ In present context, the question should become what happens to the meaning of the transnational principles and reports, once they are placed into a national legal framework.²⁴⁴

It is relatively easy to perform a binary check whether an international legal principle or report has been transposed into national law.²⁴⁵ Some of the implementation reports concerning the IOSCO or FATF principles, as discussed previously, do exactly that.²⁴⁶ Likewise, the BCBS reports on whether countries are compliant or not with the major elements of the Basel III Accord.²⁴⁷ In country or jurisdiction specific reports, more detail is provided, such as the assessment of the EU's implementation²⁴⁸ and the US's implementation.²⁴⁹ However, the reports typically list paragraphs, or combined paragraphs, from the Basel III Accord and note whether the corresponding implementation

principles of European contract law and the transformation of the term in its new usage).

²⁴¹ *See id.* at 12 (describing the possibilities as “repulsion” or “integration”).

²⁴² *Id.* (contending that legal irritants force the existing body of law to reconstruct its existing rules).

²⁴³ *Id.* (noting that legal irritants “unleash an evolutionary dynamic” in which the external rule is reconstructed).

²⁴⁴ *Id.* (describing how the external rule's meaning will be reconstructed as a result of this interaction).

²⁴⁵ *See generally* Bank for International Settlements, *supra* note 236 (discussing the implementation of Basel III standards).

²⁴⁶ *See id.* at 4 (finding that implementation of capital and liquidity standards has “generally been timely,” but some jurisdictions have reported problems implemented revised standards).

²⁴⁷ *See id.*, at 14 tbl. 2 (reporting on the Committee's Regulatory Consistency Assessment Programme (RCAP) findings of national implementation of Basel III standards 2012-2017).

²⁴⁸ BCBS, BANK FOR INT'L SETTLEMENTS, REGULATORY CONSISTENCY ASSESSMENT PROGRAMME (RCAP) ASSESSMENT OF BASEL III REGULATIONS – EUROPEAN UNION 2 (2014), <https://www.bis.org/bcbs/publ/d300.pdf> (assessing European Union compliance with various Basel III regulations).

²⁴⁹ BCBS, BANK FOR INT'L SETTLEMENTS, REGULATORY CONSISTENCY ASSESSMENT PROGRAMME (RCAP) ASSESSMENT OF BASEL III REGULATIONS – UNITED STATES OF AMERICA 3 (2014), <https://www.bis.org/bcbs/publ/d301.pdf> (assessing United States compliance with various Basel III regulations).

is “compliant,” “largely compliant,” “materially non-compliant,” or “non-compliant.”²⁵⁰ It does so by describing the technical details of whether a scaling factor or risk weight might be calculated slightly differently.²⁵¹ Although this is more than the binary acceptance or rejection, it appears to suffer from the shortcoming Teubner warned against.²⁵² It is an examination of technocratic copying of rules only.²⁵³ Furthermore, it appears to suggest that when comparing two different jurisdictions which are “largely compliant,” these two jurisdictions, in this aspect, would be equivalent regardless of any other national laws which may affect it.²⁵⁴ These type of implementation assessments fall short of examining the underlying economic, social, or political reasons as to why implementation is different, why it may cause irritation, whether it is effective and why it has changed in the national legal framework.²⁵⁵

Ignoring these dimensions may lead to unsatisfying conclusions.²⁵⁶ There may well be good generic reasons for resisting a full and swift implementation of Basel III.²⁵⁷ For example, it is costly for an industry already hit hard by the crisis and its new standards would be further restrictive on lending in an economically depressed

²⁵⁰ See BCBS, BANK FOR INT’L SETTLEMENTS, REGULATORY CONSISTENCY ASSESSMENT PROGRAMME (RCAP) HANDBOOK FOR JURISDICTIONAL ASSESSMENTS 10, 16, 18 (2016) (explaining RCAP compliance grading scales for various components of Basel III standards).

²⁵¹ See BCBS, BANK FOR INT’L SETTLEMENTS, REGULATORY CONSISTENCY ASSESSMENT PROGRAMME (RCAP) HANDBOOK FOR JURISDICTIONAL ASSESSMENTS 10–21 (2016) (explaining RCAP assessment methodology in jurisdictional reports.)

²⁵² See Teubner, *supra* note 240, at 12 (suggesting the binary framework for understanding transplanted foreign legal doctrines neglects the nuanced way in which those frameworks “irritate” a domestic culture).

²⁵³ See BCBS, BANK FOR INT’L SETTLEMENTS, REGULATORY CONSISTENCY ASSESSMENT PROGRAMME (RCAP) HANDBOOK FOR JURISDICTIONAL ASSESSMENTS 10–21 (2016) (explaining RCAP assessment methodology in jurisdictional reports).

²⁵⁴ See *id.* at 5 (categorizing jurisdictions on general compliance status without further exploration of inter-jurisdictional variance within categories).

²⁵⁵ See generally Narissa Lyngen, *Basel III: Dynamics of State Implementation*, 53 HARV INT’L L.J. 519 (2012) (establishing a “theoretical and historical context for understanding Basel III and the mixed response it has received from the international community”).

²⁵⁶ See generally *id.* (exploring reasons why jurisdictions have varying levels of compliance with Basel III).

²⁵⁷ See generally *id.* (outlining critiques of Basel I, II, and III).

environment.²⁵⁸ In the case of the US's implementation of Basel III, it is merely noted that the implementation in its totality only applies to the "core" banks and does not affect any level of compliance.²⁵⁹ It means the US implementation is only applicable to its large, internationally active banks, rather than its many domestic banks which still use the old Basel I Accord.²⁶⁰ The reason why it is not affecting compliance is because the Accords need only apply to internationally active banks.²⁶¹ Although that is technically correct, it certainly does not tell the whole story. As per the discussion on the negotiation of Basel II, the US had serious reservations about the inclusion and consequences of the advanced internal rating-based approach for fear of unfair competition.²⁶² After the agreement on Basel II this discussion continued in the US into the national implementation phase.²⁶³ Returning to the implementation of Basel III, in the case of the EU, it is noted that the treatment of SMEs and sovereigns fall under a different ratings-based approach.²⁶⁴ This could be linked to the earlier

²⁵⁸ See Lyngen, *supra* note 255, at 520 ("[T]he current depressed global economic environment and related financial uncertainty has exacerbated resistance to the new standards, which are expensive in both the short and long term.").

²⁵⁹ See BCBS, *supra* note 249, at 8 (2014) ("The US agencies have generally chosen to implement the advanced approaches of the Basel framework only for their "core banks.").

²⁶⁰ See *id.* (finding of the 15 core banks currently in existence, "eight have been designated as global systematically important banks (G-SIBs)").

²⁶¹ BCBS, *supra* note 102, at 7 ("This Framework will be applied on a consolidated basis to internationally active banks.").

²⁶² THE BANKER, *Comment: Basel II Agreement – The Final Cut? – Despite Pronouncements of Consensus, US Regulators May Yet Reject Basel II Causing the US to Take Unilateral Action Thereby Creating Problems for Banks Elsewhere* (June 1, 2004) (observing US regulators apprehensive that reduction of capital to certain areas would significantly privilege certain banks).

²⁶³ Michele Heller & Todd Davenport, *Congressional Pressure for Consensus on Basel II*, AM. BANKER (March 15, 2005) ("US regulators . . . are very sensitive to the competitive implications of having two sets of rules for the banking industry."); Steven Sloan, *Dodd, Shelby Urge Basel II Consensus*, AM. BANKER (July 19, 2007) ("[F]ormer regulators echoed the concerns of many large banks, warning regulators that the advanced approach is too complicated.").

²⁶⁴ BCBS, *Basel III: Finalising post-crisis reforms* (December 2017), at 4, 64 (finding different risk weights applicable to exposures to sovereigns and to SME borrowers).

discussion regarding the importance of SMEs in Germany and former Chancellor Schröder's comments.²⁶⁵ Considering this wider context would be more valuable than what appears to be almost a box-ticking exercise.

As covered in the discussion on the status of international principles, both FATF and the IMF for IOSCO publish assessments of the implementation of their principles and recommendations.²⁶⁶ FATF publishes an enormous table, listing countries against the numbered principles and recommendations, and with the table elements containing the level of compliance on the same scale-of-four used by the BCBS.²⁶⁷ But, stepping away from the US and EU who dominate the rulemaking process, consider the example of asset and money laundering in cocaine producing South American countries.²⁶⁸ The difficulty is that these countries have a large informal economy, which is considered normal by the population.²⁶⁹ As anti-money laundering (AML) regulations—such as those developed by FATF—are designed for the regular economy focused on the financial sector, they have little effect on an informal economy.²⁷⁰ It is a clear example where a harmonized transnational rulebook sitting as a legal transplant in a

²⁶⁵ See Verdier, *supra* note 86, at 141 (“German concerns about the effect of Basel II on small and medium enterprises escalated to the point where Chancellor Schroder himself announced in 2001 that he would not support EU implementation of the proposal.”).

²⁶⁶ Fin. Action Task Force, *Mutual Evaluations*, <http://www.fatf-gafi.org/faq/mutualevaluations/#d.en.448461> [<https://perma.cc/RU79-T2FN>] (detailing recommendations for combating money laundering and the financing of terrorism and proliferations of weapons of mass destruction); IOSCO, *supra* note 219 (describing assessments for implementation of securities regulation principles).

²⁶⁷ FATF, *supra* note 228 (highlighting various countries' compliance with FATF recommendations).

²⁶⁸ Francisco E. Thoumi & Marcela Anzola, *Asset and money laundering in Bolivia, Colombia and Peru: a legal transplant in vulnerable environments?*, 53 CRIME L. SOC. CHANGE 437, 439 (2010) (“Money laundering in the Andean countries, as in other developing countries, transcends the financial sector; it is complex and involves the real sector to a greater extent than what is implied in the literature and in the legal transplants.”).

²⁶⁹ *Id.* (“Many economic activities that take place outside the law are considered normal and acceptable by a large share of the population.”).

²⁷⁰ *Id.* at 445 (determining that due to large informal economy, “policy implementation is very ineffective.”).

national legal system has not created an effective domestic regime.²⁷¹ In the binary approach to examining legal transplants, it could be regarded as an example of where the harmonized legal transplant has been rejected by the receiving national legal system.²⁷² Going beyond this observation, it is questionable whether there might be general prerequisites, necessary but not sufficient, for legal transplants to be accepted. Based on this specific example, it is likely to depend on the level of the “rule of law,” and on any possible conflicts with national (private) law.²⁷³

The emerging theme is that an individual nation state does not have full control over the design of the transnational financial rules, which in turn may create a conflict in the application of those rules within the boundaries of the nation-state.²⁷⁴ The underlying reason is that the complex hybridity of norms caused by pluralism does not automatically give rise to a uniform solution, pitching different actors against each other.²⁷⁵ There are two directly opposite ways for a nation-state to deal with these differences.²⁷⁶ The first is to seek universal harmonization, creating some sort of global proto-law.²⁷⁷ This would reduce the differences among outside influences as well as ensuring the ensuing global proto-law is acceptable.²⁷⁸ The international organization discussed would provide ways to reach such

²⁷¹ *Id.* at 455 (explaining that in many cases, as here, legal transplants are rejected when inserted into hostile environments).

²⁷² *Id.* (“However, it is also important to point out that in many cases a legal transplant into a hostile environment tends to be rejected. These have been the cases of AML initiatives in Bolivia, Colombia and Peru.”).

²⁷³ *Id.* (stating that policy and lawmakers must consider potential conflicts that legislation may have on current environment).

²⁷⁴ Berman, *supra* note 27, at 1162 (“These spheres of complex overlapping legal authority are, not surprisingly, sites of conflict and confusion.”).

²⁷⁵ *Id.* at 1192 (“[A] pluralist framework recognizes that normative conflict is unavoidable and so, instead of trying to erase conflict, seeks to manage it through procedural mechanisms, institutions, and practices that might at least draw the participants to the conflict into a shared social space.”).

²⁷⁶ Berman, *supra* note 27, at 1162 (explaining the conflict between territorial-based legal authority and universal legal harmonization).

²⁷⁷ *Id.* (explaining the concept global legal harmonization).

²⁷⁸ *Id.* at 1189–90 (highlighting recent convergence of legal regimes in many nations).

harmonization.²⁷⁹ Non-compliance would imply that this process has not been successful.²⁸⁰ The other approach is for a nation-state to reimpose its supremacy and reject the outside influences altogether.²⁸¹ However, given the previously discussed status of transnational financial rules and the economic and strategic interests involved, this approach may not be practicable.²⁸²

As a final example, consider the case of the Dubai International Financial Centre (DIFC),²⁸³ which shows a third way of dealing with the complexity of outside norms. Instead of importing financial rules directly into the domestic legislative framework, the DIFC has its own regulations, common law framework, and tax regime independent of the rest of the country. The DIFC is a special economic zone in Dubai, created in 2004 with the aim of becoming the region's main financial or commercial center.²⁸⁴ It is situated in a geographically separate district with its own residential and entertainment amenities.²⁸⁵ To make the center even more attractive, a common law

²⁷⁹ *Id.* (postulating that harmonization could be more achievable through mutual recognitions regimes); Turk, *supra* note 129, at 82 (recognizing the success of model international laws resulting from global cooperation).

²⁸⁰ *See* Berman, *supra* note 27, at 1190–91 (recognizing the array of challenges posed by historical, cultural, and philosophical differences between nations).

²⁸¹ *Id.* at 1180 (recognizing notions of territorial sovereignty and nation-states' hesitancy to follow non-state legal norms).

²⁸² *Id.* at 1188 (explaining the barriers to participation in global markets for a nation that does not recognize and follow global norms in trade and finance).

²⁸³ Michael Hwang, Deputy Chief Justice, DIFC Cts., *The Courts of the Dubai International Financial Centre – A Common Law Island in a Civil Law Ocean*, (Nov. 1, 2008), <http://difccourts.ae/the-courts-of-the-dubai-international-finance-centre-a-common-law-island-in-a-civil-law-ocean/> [<https://perma.cc/CUE4-TC6K>] (“The DIFC is an autonomous financial free zone operating on its own unique three-fold legal system consisting of its own legislation, the laws that parties have freely chosen to apply and, when applicable, the commercial laws of England and Wales.”).

²⁸⁴ *Id.* (“Federal legislation of the United Arab Emirates . . . authorised the seven Emirates to create the legal structures necessary for international financial centres to be established and Dubai was ready with a carefully drafted scheme.”).

²⁸⁵ *Id.* (“The geographical jurisdiction of the DIFC courts is limited to the geographical area of the DIFC (which was about 110 acres and has recently been expanded to include additional plots of land and office space in Dubai.)” and “The DIFC development project includes more than 40 major buildings.

framework was established as the relevant legal system for business related matters, independent from the national legal system but recognized by, and established under, the national constitution.²⁸⁶ Other areas, such as criminal law, remain under the national legal system.²⁸⁷ The law applicable to the DIFC continues to develop and is regularly updated.²⁸⁸ Instead of treating this as an implementation in a national jurisdiction, it is in practice the creation of a legal system segregated from the one operated by the state for all other matters. In this view, it would fall within the traditional approach of legal pluralism,²⁸⁹ namely the existence of several legal systems within one social field or one state. Businesses operating within the DIFC are largely subject to a different commercial law and financial regulatory regime than the rest of the country.²⁹⁰ At the same time, in other areas of law they are

By 2009, the DIFC will house a resident and working population of more than 40,000 and is more than halfway towards completion.”)

²⁸⁶ *Id.* (“The DIFC Courts have exclusive jurisdiction over most civil and commercial matters occurring within the DIFC . This means that, where DIFC Courts have jurisdiction, such jurisdiction will exclude the jurisdiction of the Dubai Courts.” and “The idea that an inviting oasis of opportunity could spring forth from the desert sands of Dubai, providing global investors and issuers of capital with a regional capital market set in an international environment they could be comfortable with.”).

²⁸⁷ *Id.* (“The criminal jurisdiction of the Dubai Courts remains effective throughout the Centre, as it does in the whole of Dubai. The DIFC Courts have no jurisdiction over criminal matters and all criminal matters are referred to the Dubai Police. The DIFC Courts also have no jurisdiction over matrimonial matters.”).

²⁸⁸ Paolo Panico, *The DIFC Foundations Law 2017*, 23 TR. & TR. 1051 (2017) (mentioning the revamping of the DIFC’s Companies Law and Trusts Law as well as the 2017 enactment of its Foundations Law, inspired by both common law and German civil law traditions, as examples of new updates to the law of the jurisdiction that make it special).

²⁸⁹ John Griffiths, *Legal Pluralism* in *International Encyclopedia of the Social & Behavioural Sciences* (2nd ed., Elsevier 2015) 757–61 (asserting that “legal pluralism” is “the coexistence of more than one regulatory order in a society” and charting the history of the concept); ANDREA BIANCHI, *Legal Pluralism, in INTERNATIONAL LAW THEORIES: AN INQUIRY INTO DIFFERENT WAYS OF THINKING* (2016) (defining legal pluralism, citing Gunther Teubner, ‘The Two Faces of Janus: Rethinking Legal Pluralism’ (1992) 13 *Cardozo Law Review* 1443) [ES: updated author, title using Rule 15.5.1(b)]

²⁹⁰ *See* Panico, *supra* note 288, at 1061 (“[M]atters . . . [s]hall be determined in accordance with the laws of the DIFC without reference to the laws of any

subject to the “standard” national jurisdiction, which may well create conflicting expectations and obligations.²⁹¹ It presents a different way of dealing with the tensions created by outside influences on the supremacy of the nation state in creating the national laws.

V. *Conclusion*

The transnational nature of financial rulemaking is far from straightforward. By now, it will be clear that a Westphalian approach, in which each nation state has sovereignty over its national affairs and public international law governs the interstate relations, is far from adequate in this field.²⁹² Likewise, a global financial rulebook in the universalist sense is at best a simplified description of a far more complex reality.²⁹³ Instead, this paper has sought to offer a different approach based on the combination of (global) legal pluralism and comparative law. Accordingly, financial rulemaking is described by a process driven by normative hybridity and by members of many different social spheres, nationally and transnationally, exerting their influence along the way. In analyzing the status of transnational financial rules, our analysis departed from a positivist definition of law, removing the need to discuss, for example, formal enforcement mechanisms, instead examining other reasons for implementation, such as economic, political, and strategic interests.

As stated before, global legal pluralism and comparative law have proven to be a useful partnership.²⁹⁴ These approaches raise important questions, for example, concerning the internal heteronomy

other jurisdictions with which the Foundation or disposition ay [sic] be connected.”).

²⁹¹ *Id.* (implying that matters exist that are not determined in accordance with the laws of the DIFC).

²⁹² PICCIOTTO, *supra* note 25, at 10 (“Trying to deal with . . . differences [in diverse national and local regulations] has generated an exponential growth of networks of regulatory cooperation, coordination and harmonization. These are no longer primarily of an international character, but also supranational and infranational, frequently bypassing central government.”)

²⁹³ *See generally* Muchlinski, *supra* note 10 (posing questions that remain unanswered given various cited theories).

²⁹⁴ Berman, *supra* note 12, at 221 (“[T]he fields of comparative law and legal pluralism form a natural partnership.”).

of legal or normative systems.²⁹⁵ The traditional idea of mixing legal systems, e.g., within non-Western laws, is being broadened to the global sphere, creating large scale diffusion of a wide variety of legal systems.²⁹⁶ The diffusion transpires in various ways, similar to those described in the discussion on achieving legal uniformity: convergence, diffusion, and harmonization.²⁹⁷ Although the first two are certainly not uncommon in financial regulation, harmonization by way of international organizations is the dominant form.²⁹⁸ To understand how these processes work and what the transnational regulatory rulebook looks like, one cannot focus on merely one legal or normative domestic system; one has to understand the whole range of significant players, as well as their domestic background, political constraints, and financial history. In other words, one has to appreciate the phenomenon of legal pluralism to understand fully the resulting regulation.²⁹⁹ The relation between a nation and the creation of law, or at least financial regulation, is thus changing fundamentally; the state, or the regulator, transforms from a domestic creator into an actor on the transnational field; but, nonetheless, there is a relation and its influences need to be understood.³⁰⁰ For the same reasons, the reception of transnational rules in the domestic legal system, or the transplantation of a

²⁹⁵ See *id.*, at 220 (“[N]on-state lawmaking systems may be a source of examples of procedural or substantive norms that expand the possibilities of comparative analysis.”).

²⁹⁶ See Andersen, *supra* note 162, at 5 (“In our world of globalization . . . we have seen the diffusion of laws.”).

²⁹⁷ See *id.*, at 12–15 (discussing convergence, diffusion, and harmonization as “possibilities to understand globalisation and uniformity”).

²⁹⁸ See *id.* at 15 (“[H]armonisation . . . is often wielded as a collective descriptor in legal disciplines for all attempts to bring about some form of legal similarity, including uniformity.”).

²⁹⁹ William Twining, *Globalization and Comparative Law*, 6 MAASTRICHT J. EUR. & COMP. L. 217, 221 (1999) (“[N]o one can understand their local law by focusing solely on municipal domestic law of a single jurisdiction or nation state; that the range of significant actors and processes has been extended; and that the phenomenon of legal pluralism is central to understanding law in today’s world.”).

³⁰⁰ See *id.* (“[T]he significance of national boundaries is changing, but this does not mean the end of the nation state as the most significant political unit for the foreseeable future.”).

possible irritant,³⁰¹ requires the understanding of both the domestic as well as the transnational context.³⁰²

Unfortunately, due to vast amount of new regulatory measures, especially since the crisis, analyzing even a subfield of financial regulation has become a tremendous amount of work for practicing lawyers and legal scholars.³⁰³ Each element of regulation, from a liquidity ratio to insider trading, from the definition of a benchmark to restraints on remuneration, and from a transparency rule for a derivative instrument to the operational risk for a trading platform, each one will consist of numerous international reports, regional or EU laws and national laws with corresponding case law.³⁰⁴ Not surprisingly, an approach often taken by practitioners and scholars in order to understand a subfield of financial regulation (or law in general) is what can be described as a black-letter-law approach: the law is seen as an axiom, already shaped and formed, in a way the judiciary might view the law.³⁰⁵ The domestic lawyer or legal scholar may well feel that, in a very narrow issue of financial regulation, this approach may be useful. One may not feel the need to go beyond what is written in the domestic rulebook. If this lawyer or scholar acknowledges the fact that the domestic law may have been arrived at by way of some transnational process, then the implicit assumption is likely to be that the global law is in some way completely mutually agreed and created as a fully uniform framework, implemented and accepted without difficulty in domestic law.

³⁰¹ Teubner, *supra* note 240, at 12 (suggesting “‘legal irritant’ expresses things better than ‘legal transplant’ . . . [and] when a foreign rule is imposed on a domestic culture . . . it works as a fundamental irritation which triggers a whole series of new and unexpected events”).

³⁰² Legrand, *supra* note 14, at 235 (proposing “there is much of the utmost relevance to a deep understanding of a legal order, of an experience of law, that is simply not to be found in legislative text and in judicial decisions.”).

³⁰³ See generally Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (exemplifying the complexity of new regulatory statutes passed during and after the crisis).

³⁰⁴ Cf. Bach & Newman, *supra* note 115, at 828 (suggesting “Europe’s influence over international market rules has grown markedly in recent years, something acknowledged by both scholars and practitioners”).

³⁰⁵ Geoffrey Samuel, *Can Legal Reasoning Be Demystified*, 29 LEGAL STUD. 181, 184–85 (2009) (suggesting “[l]egal reasoning, according to the authoritative sources, is a matter of deductive logic . . . [and] propositions (“laws” or “axioms”) from already acquired, or posited, information”).

This paper has sought to argue the exact opposite. Even, generally speaking, including a social sciences approach when tackling legal questions can enrich the analysis,³⁰⁶ as it extends the analysis beyond a mere rule-based approach. The way the international financial rulebook is created, by way of international institutions and norms, makes it even more important.³⁰⁷ Due to the concepts of international rulemaking and domestic implementation, or more broadly because in respect of financial regulation, no nation is autonomous or self-contained—legal pluralism and comparative law have become inseparable necessities in the analysis of financial regulation. As Twining observes: “we are all comparatists now.”³⁰⁸

³⁰⁶ *Id.* at 192–96 ([T]he importance of Berthelot’s work in the social sciences is that it permits lawyers to appreciate how the law relates to facts and vice versa.”).

³⁰⁷ See Zaring, *supra* note 68, at 282 (examining rulemaking in international financial organizations, such as the Basel Committee and the IOSCO).

³⁰⁸ Twining, *supra* note 299, at 242.