

## Promises and Perils of New Global Governance: A Case of the G20

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### Abstract

*In the wake of the 2008 financial crisis, a new global governance structure emerged. During and subsequent to the crisis, the G20 emerged as a coordinating executive among international governance institutions. It set policy agendas and prioritized initiatives. Working through the Financial Stability Board, the G20 coordinated with other governance institutions and networks to set standards, monitor enforcement and compliance, and aid recovery. Its partners included the International Monetary Fund, the Basel Committee on Banking Supervision, the Organisation for Economic Cooperation and Development, the World Trade Organization, the International Association of Insurance Supervisors and the International Organization of Securities Commissions. Its authority cuts across regimes and creates collaborative linkages between economic law and social issues such as food security and the environment. Its leadership role, born out of exigency, now continues to evolve as part of the new international order of economic laws.*

*The G20's coordination of institutions and networks exemplifies a new form of global governance. Network coordination offers an opportunity to confront complex problems with a*

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*needed comprehensive approach. The institutions and networks engage in an ongoing dialectical process that propels standard setters toward convergence on a number of fronts. The actors in this process employ a variety of tools to forge consensus and the G20 leverages this consensus-creating process to achieve its goals. Unpacking these tools can help scholars tackle intricate questions that arise from the G20's coordination role. In particular, we focus on concerns regarding the effectiveness and legitimacy of the G20's coordination of multiple networks and institutions.*

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## I. INTRODUCTION

An unprecedented challenge calls for an unprecedented response. The financial crisis in 2008, which precipitated the worst global recession since the Great Depression in the 1930s, created an exigency that forced major global economies to develop a new type of collective regulatory response, which was largely unfathomable under traditional international cooperation mechanisms such as diplomacy or treaty-making. The leaders of twenty major economies—the G20 Leaders—promptly assumed the unprecedented role of an executive coordinator over pre-existing transgovernmental regulatory networks (TRNs).<sup>1</sup> In doing so, the G20 harnessed these sector-specific TRNs,<sup>2</sup> comprised of professional regulatory agencies from different economies, and set itself at the helm as an executive coordinator. It promised the spontaneity and efficacy necessary to respond to the financial crisis. This Article scrutinizes this phenomenon of coordinated networks, which, until now, has been largely unaddressed.

One of the greatest challenges globalization has brought to international law is that it has irreversibly altered the traditional notions of time and space in which scholars used to grapple with international law.<sup>3</sup> The end of the Cold War and the spectacular advancement of technologies have molded a multi-faceted phenomenon of globalization: integration, interdependence, spontaneity, and synchrony. At an unprecedented pace, more goods, more services, more people, and more money circulate all over the world.<sup>4</sup> Nevertheless, the global financial crisis of 2008 has proven a sobering lesson that globalization remains a mixed

<sup>1</sup> See, for example, Andrew F. Cooper, *The G20 as an Improvised Crisis Committee and/or a Contested ‘Steering Committee’ for the World*, 86 *Intl Aff* 741, 741–42, 746 (2010) (characterizing the G20 as a “steering committee” or a “crisis committee” to deliver specific regulatory deliverables).

<sup>2</sup> See generally Anne-Marie Slaughter, *A New World Order* (Princeton 2004) (presenting one of the most comprehensive narratives on nascent government networks and their norm-generating effects). See also David Zaring, *Rulemaking and Adjudication in International Law*, 46 *Colum J Transnatl L* 563, 576 (2008) (arguing that “networks are the rulemakers of international administrative law”).

<sup>3</sup> See, for example, John Gerard Ruggie, *Territoriality and Beyond: Problematizing Modernity in International Relations*, 47 *Intl Org* 139, 172 (1993) (observing the emergence of a “decentered yet integrated space-of-flows, operating in real time, which exists alongside the spaces-of-places that we call national economies”).

<sup>4</sup> Philip H. Gordon, *Europe’s Cautious Globalization*, in Janet Laible and Henri J. Barkey, eds, *European Responses to Globalization: Resistance, Adaptation and Alternatives* 1, 3 (Elsevier 2006) (“[C]learly the degree, intensity, speed, volume, and geographic reach of economic globalization today far exceed anything that has come before.”); Dinah Shelton, *Protecting Human Rights in a Globalized World*, 25 *BC Intl & Comp L Rev* 273, 276 (2002) (“[I]nformation and communications technology has emerged as a dominant force in the global system of production, while trade in goods, services, and financial instruments are more prevalent than any time in history.”).

blessing. A globalized financial and trade system has forced national economies to share not only prosperity but also risks. This dark side of globalization tends to present daunting challenges to regulators—both domestic and international.<sup>5</sup> First, the effects of domestic regulations may become limited as domestic systems become highly sensitive to external forces. Second, as is seen in the climate change debate, certain regulatory problems are *inter-national* per se. Domestic regulatory efforts alone are insufficient to address such problems. Third, international regulations, if any, may not come as quickly as the urgency of the problems would demand.

At its inception and throughout the 2008 financial crisis, society saw national governments struggle to muster up stimulus packages, fight off protectionism, and save at-risk financial and corporate entities. Notably, society also saw an international effort to facilitate these national efforts. The G20 Leaders initiated this international effort and managed to save twenty-one million jobs in 2009 and 2010.<sup>6</sup> Ironically, however, the unprecedented success of this global policy coordination led the public to perceive the G20 as a rather superficial, that is to say, mainly “political” entity. In other words, the public remains largely uninformed of the behind-the-scenes intensive regulatory interactions among professional regulatory agencies at a *micro-operational* level. The bottom line is that the G20 and the resources that it brought to bear on the global economy did not spring out of nothing; they were, in fact, an outcome of decades-long policy networks between and among like-minded government officials communicating inside and outside of relevant international organizations. Without the unique density and frequency of their interactions on those critical issue areas (such as international finance and securities), the G20 could not have proved so successful: it would have probably been yet another empty political initiative delivering no practical impacts. However, the G20’s coordination of these TRNs to confront the crisis clearly revealed a whole far greater than the sum of its parts.

Admittedly, its success needs to be examined rigorously. Empirical confirmations are still limited and any attempt to quantify these successes may suffer from a selection bias. Nonetheless, the coordinated TRN phenomenon is not a mere anecdote: it is a new trend that challenges our conventional understanding of global governance. We must probe closely the new TRN phenomenon, and in particular the coordination of networks, to verify whether

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<sup>5</sup> Slaughter characterizes the dilemma of needing more government yet fearing it as a “globalization paradox.” Slaughter, *A New World Order* at 8 (cited in note 2).

<sup>6</sup> Jonathan Lynn, *G20 Saves 21 Mln Jobs with Crisis Measures - UN* (Reuters Apr 19, 2010), online at <http://www.reuters.com/article/2010/04/19/financial-jobs-idUSLDE63I24Q20100419> (visited Oct 14, 2011).

it brings truly beneficial changes and, if so, at what costs. And the mere fact that a TRN successfully creates standards does not necessarily mean that it was as successful as it could have been. Inherently, focusing on the standards that have been developed will not address those instances where the TRN sought to, or should have sought to, develop standards but failed.

In this regard, we propose to examine the work of the web of TRNs involved in the G20's efforts to navigate through the financial crisis by dissecting the G20's coordination through the use of regulatory blueprints or frameworks, the means by which the TRNs arrive at decisions (dynamics), and the decisions they reach (end products). Much has already been written about TRNs,<sup>7</sup> but one piece that has been missing is how the TRNs actually do their work, in particular under a political coordinative mechanism, such as the G20.

Additionally, we identify a taxonomy of various moves (tools) made within TRNs that we call the “intra-network dynamics.” We make no judgment about the value of any particular tool, although readers may quickly realize that some tools are more palatable than others when one thinks about TRNs as a form of global governance. While these social tools have already been extant in each network, it was the rise of the G20 that awakened their genuine regulatory potential in an unprecedented endeavor to deliver desperate regulatory effects to avert the financial crisis.

We also consider the end products of these TRNs and identify their characteristics as well as their utility. Again, we do not make any value judgment about any particular end product. Instead, we hope that by revealing and deconstructing the G20's coordination, the intra-network dynamics, and the end products we can offer an analytical lens through which we better understand this emerging paradigm of global governance. In our view, this lens will reveal complex questions concerning efficacy and legitimacy.

The G20's executive coordination role represents a new paradigm of global regulation, one that leverages the work of previously existing TRNs. Our thesis on the G20 as a new paradigm of global governance unfolds in the following sequence: Section II provides a working definition of a TRN. After providing an intellectual pedigree and theoretical underpinnings behind the government network theory, this Section highlights the TRN's various characteristics, such as the expert, informal, and incremental nature of participants' dialogue and eventual norm-generating operations. Section III offers a theory of network coordination by explaining the use of frameworks or blueprints that take advantage of preexisting network dynamics resulting in specific end products or

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<sup>7</sup> Pierre-Hugues Verdier, *Transnational Regulatory Networks and Their Limits*, 34 Yale J Int'l L 113, 114 (2009) (“In recent years, scholars of global governance have devoted substantial attention to the promise and perils of . . . regulatory networks (TRNs).”).

regulatory prototypes. Section IV applies the theoretical construction of coordinated TRNs to the case of the G20. This case study describes both empirical confirmations for and mismatches with the TRN model. Section V evaluates the coordinated TRN model in accordance with two major criteria: efficacy and legitimacy.

Finally, a caveat on this Article is in order. Due to its inevitable political nature as a global executive coordinator, the G20 tends to draw various critiques on its performance.<sup>8</sup> In particular, it has been faulted for being an “ineffective talk shop.”<sup>9</sup> Some question whether the G20 Leaders Summit will have any influence once the crisis subsides.<sup>10</sup> This criticism may be aggravated by heightened expectations given the G20’s initial successes.<sup>11</sup> Yet our main focus in this Article is the uncelebrated, workmanlike aspects of the G20 operation. We aim to demonstrate, without any ideological bias, the G20’s internal, operational micro-dynamics, as well as certain conditions under which such operations tend to work best.

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<sup>8</sup> See, for example, Peter Apps, *Eurasia Chief Sees Leaderless “G-zero” World* (Reuters Jan 5, 2011), online at <http://www.reuters.com/article/2011/01/05/us-eurasia-interview-idUSTRE70422220110105> (visited Oct 14, 2011).

<sup>9</sup> See Christopher Malcolm, *And Then There Was One—An Overview of the Fifth Summit of the Americas*, 16 L & Bus Rev Am 11, 16 (2010) (“There were still many others, however, that were skeptical and had expected that it would be no more than a talk shop.”); *It Cuts Both Ways, Uncle Sam* (Econ Times Oct 20, 2010), online at [http://articles.economictimes.indiatimes.com/2010-10-19/news/27626561\\_1\\_global-imbalances-global-reserve-currency-numero-uno](http://articles.economictimes.indiatimes.com/2010-10-19/news/27626561_1_global-imbalances-global-reserve-currency-numero-uno) (visited Oct 14, 2011) (“[T]he G20, a group that is mostly seen as a toothless body, a talk shop . . .”).

<sup>10</sup> Colin I. Bradford and Wonhyuk Lim, *Introduction: Toward the Consolidation of the G20: From Crisis Committee to Global Steering Committee*, in Colin I. Bradford and Wonhyuk Lim, eds, *Global Leadership in Transition: Making the G20 More Effective and Responsive* 1, 1–2 (Brookings 2011) (“There is great concern, expressed by Il SaKong . . . the G20 may fade away as a significant forum for global leadership as the global financial crisis subsides and the current focus on financial and macroeconomic issues increasingly shifts to technical matters unsuitable for discussion at the leadership level.”).

<sup>11</sup> See, for example, Gabriele Steinhauser and Greg Keller, *Fuzzy Compromise Threatens Relevance of G-20* (AP Feb 17, 2011), online at <http://abcnews.go.com/Business/wireStory?id=12942693> (visited Oct 14, 2011). High expectations on the role of the G20 seem to have formed already among global trade investors. In the most recent incidence of global market volatility, investors immediately turned to the G20 for a prompt collective response. See Se Young Lee, *G20 Ministers Hold Call* (Wall St J Aug 7, 2011) online at <http://online.wsj.com/article/SB1000142405311904140604576493472356478928.html> (visited Oct 14, 2011); Isabel Versiani, *G20 Deputies to Hold Crisis Call Saturday: Brazil* (Reuters Aug 6, 2011), online at <http://www.reuters.com/article/2011/08/06/us-crisis-g20-call-idUSTRE77522A20110806> (visited Oct 14, 2011).

## II. AN EMERGING GOVERNANCE MODEL: TRANS-GOVERNMENTAL REGULATORY NETWORKS

The recent prominence of the G20 has demonstrated a new possibility in tackling those challenges brought by globalization. TRNs offer a flexible and pragmatic alternative to the treaty process. The TRN process is dialogical, norm-generating, and incremental.

TRNs represent a relatively recent, but increasingly prevalent, center of international law-making. Traditionally international rules were negotiated and concluded by a formal treaty-making process. However, barring some exceptions, such as the EU, most international law-making now occurs in a highly de-centralized structure, which militates against a domestic analogy. Even with the existence of a well-operating international regulatory organization, such as the World Trade Organization (WTO), any formal legislative outcome tends to be limited, often minimal, for several reasons.<sup>12</sup>

First of all, a treaty-making process requires an enormous amount of diplomatic and political effort in order to reach both consensus and compromise among the parties concerned. Lobbies from interested and affected constituencies are legion.<sup>13</sup> Naturally, it is not only a painstaking but also a treacherous process. Often, the process loses its initial passion or momentum as it develops.<sup>14</sup> Moreover, a treaty's legally "binding" nature tends to make

<sup>12</sup> See, for example, John H. Jackson, *International Economic Law in Times That Are Interesting*, 3 J Intl Econ L 3, 8 (2000) (observing that "[t]reaties are often an awkward albeit necessary method of designing institutions needed in today's interdependent world, but they do not solve many problems"). Compare Charles Lipson, *Why Are Some International Agreements Informal?*, 45 Intl Org 495, 537–38 (1991) (summarizing the benefits of informal agreements vis-à-vis formal agreements (treaties)).

<sup>13</sup> See, for example, John H. Cushman, Jr, *Intense Lobbying Against Global Warming Treaty* (NY Times Dec 7, 1997) online at <http://www.nytimes.com/1997/12/07/us/intense-lobbying-against-global-warming-treaty.html?src=pm> (visited Oct 14, 2011); Anup Shah, *COP3—Kyoto Protocol Climate Conference* (Global Issues Feb 15, 2002), online at <http://www.globalissues.org/article/183/cop3-kyoto-protocol-climate-conference> (visited Oct 14, 2011); *Urging the Oil and Auto Industries to Support the Kyoto Protocol* (Greenpeace Apr 5, 2001), online at <http://www.greenpeace.org/usa/en/news-and-blogs/news/urging-the-oil-and-auto-indust/> (visited Oct 14, 2011); Andrew C. Revkin, *On Climate Issue, Industry Ignored Its Scientists*, NY Times A1 (Apr 24, 2009).

<sup>14</sup> See, for example, William J. Clinton, *Excerpt from Remarks by the President, March 25, 1998*, in Philip Auerswald, Christian Duttweiler, and John Garofano, eds, *Clinton's Foreign Policy: A Documentary Record* 218, 221 ("Internationally, as we meet here, talks are underway at the United Nations to establish a permanent international criminal court. Rwanda and the difficulties we have had with this special tribunal underscores the need for such a court. And the United States will work to see that it is created."); American Non-Governmental Organization Coalition for the International Criminal Court, *Chronology of US Actions Related to the International Criminal Court* (2011), online at [www.amicc.org/docs/US%20Chronology.pdf](http://www.amicc.org/docs/US%20Chronology.pdf) (visited Oct 14, 2011) ("The US votes against the

negotiating parties reluctant to nail down any definite texts, because they want to leave themselves enough flexibility for future contingencies.<sup>15</sup> Likewise, treaties are often accompanied by reservations, understandings, and declarations that practically qualify their initial legal effects.<sup>16</sup> Finally, just as a treaty-making process is tortuous, so is its amending process.<sup>17</sup> Therefore, a regulatory treaty, once fixed, is hard to keep abreast of the subsequently changing regulatory environment.

These shortcomings of treaties often lead to limited, or failed, international cooperation. This cooperative failure in turn causes countries to adhere to their own domestic regulations in a unilateral fashion. This regulatory failure is especially problematic in the face of contemporary economic interdependence, particularly in times of crisis. Global business betrays its frustration in the face of this lack of regulatory coordination that is continuously fragmenting the global marketplace against the wave of globalization.<sup>18</sup> Diverging regulatory standards in different states or regions tend to complicate, often prohibitively, optimal global sourcing and the operation of global supply chains.<sup>19</sup>

As a response to these challenges, new attempts have emerged to overcome the problems of the conventional treaty-making process. Throughout the world, regulators experiencing the same regulatory problems convene frequently, meeting and talking with each other in order to enlighten and be enlightened. They establish various kinds of relationships, from formal to informal. Occasionally, international organizations like the International Monetary Fund (IMF), the WTO or the Organization for Economic Cooperation and Development (OECD) even provide like-minded regulators with a number of forums in which to interact. Over time, relationships become solidified and tend to evolve into systematized networks.<sup>20</sup> These TRNs

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adoption of the treaty out of concern that the ICC could accuse US nationals of crimes for political reasons."); Henry T. King and Theodore C. Theofrastous, *From Nuremberg to Rome: A Step Backward for U.S. Foreign Policy*, 31 Case W Res J Intl L 47, 50 (1999) ("[T]he US identified ideological and political differences with the Statute.").

<sup>15</sup> Sungjoon Cho, *The WTO's Gemeinschaft*, 56 Ala L Rev 483, 526 (2004). But see Oona A. Hathaway, *The Cost of Commitment*, 55 Stan L Rev 1821, 1822–23 (2003) (explaining reasons why states may wish to sign onto treaties).

<sup>16</sup> See, for example, *US Reservations, Declarations, and Understandings to Human Rights Treaties* (University of Minnesota Human Rights Library), online at <http://www1.umn.edu/humanrts/usdocs/usres.html> (visited Oct 14, 2011).

<sup>17</sup> Anthony Arnulf, *Me and My Shadow: The European Court of Justice and the Disintegration of European Union Law*, 31 Fordham Intl L J 1174, 1187 (2008) (discussing the difficulty of amending treaties).

<sup>18</sup> See Sungjoon Cho, *Defragmenting World Trade*, 27 Nw J Intl L & Bus 39, 67–68 (2006).

<sup>19</sup> See, for example, Sungjoon Cho, *Change Distorted Rules*, Natl L J 27 (May 7, 2007).

<sup>20</sup> See notably Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 Eur J Intl L 503, 535 (1995); Anne-Marie Slaughter, *The Real New World Order*, 76 Foreign Aff 183, 184 (Sept–Oct

invariably produce certain regulatory norms.<sup>21</sup> The recent experience of the G20 in response to a global financial crisis offers a propitious pathway toward such a new paradigm of global lawmaking and global governance.<sup>22</sup>

<sup>1997); Anne-Marie Slaughter, *Governing the Global Economy through Government Networks*, in Michael Byers, ed., *The Role of Law in International Politics: Essays in International Relations and International Law* 177, 178 (Oxford 2000).</sup>

<sup>21</sup> Zaring, 46 Colum J Transnatl L at 576–79 (cited in note 2) (explaining some of the benefits to international norm creation through networks).

<sup>22</sup> In fact, the origin of TRNs dates back to the early seventies with the proliferation of UN agencies such as the United Nations Children's Fund (UNICEF) and the United Nations Educational, Scientific and Cultural Organization (UNESCO). See generally UNICEF, *About UNICEF*, online at <http://www.unicef.org/uwwide/> (visited Oct 14, 2011); UNESCO, *About Us*, online at <http://www.unesco.org/new/en/unesco/about-us/> (visited Oct 14, 2011). See also Sungjoon Cho, *Rethinking APEC: A New Experiment for a Post-Modern Institutional Arrangement*, in Mitsuo Matsushita and Dukgeun Ahn, eds, *WTO and East Asia: New Perspectives* 381, 401 (Cameron May 2004) (“These professional agencies flourished under the auspices of the UN as many government officials or agencies convened, exchanged views and undertook joint actions in their sector-specific fora.”). In this context, it can be said that few purely “domestic” issues remain in an era of globalization and interdependence. Organisation for Economic Co-operation and Development (OECD), *Globalisation: What Challenges and Opportunities for Governments?* \*4 (1996), online at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=OCDE/GD\(96\)64&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=OCDE/GD(96)64&docLanguage=En) (visited Oct 14, 2011). Likewise, in the US, non-foreign affairs agencies, such as the Department of Justice and the Department of Treasury, accounted for a dramatic increase (from 1,578 to 2,265: 44 percent) in the levels of US direct hires overseas over the decade from 1984 to 1994, which mainly reflected the increasing “globalization” of US national policy. US Government Accountability Office, *Overseas Presence: Staffing at US Diplomatic Posts*, Report to the Chairman, Legislation and National Security Subcommittee, Committee on Government Operations, House of Representatives, GAO/NSIAD-95-50FS 18–21 (Dec 1994). Keohane and Nye depicted this phenomenon as “societal interdependence” which engenders “policy interdependence.” Robert O. Keohane and Joseph S. Nye, *Transgovernmental Relations and International Organizations*, 27 World Pol 39, 61 (1974). In the same vein, Hopkins also observed that “increased interdependence” elicited many important questions, for example: “[H]ow should the world’s food, energy and natural resources be shared among the world’s peoples?” Raymond F. Hopkins, *Global Management Networks: The Internationalization of Domestic Bureaucracies*, 30 Intl Soc Sci J 31, 31 (1978). Future international transactions including imports and exports would be hampered by potential regulatory gaps between domestic and international arenas. As a prescription for “global market failure,” Professor Jackson has emphasized the necessity of “human institutions” that help markets to function successfully. Jackson, 3 J Intl Econ L at 4–5 (cited in note 12). TRNs, discussed in this paper, can be said to fall within the rubric of such human institutions at large. In addition, technological innovation such as the Internet has since contributed significantly to the ability to respond to the various transgovernmental regulatory needs brought about by globalization. Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 Va J Intl L 1, 12 (2002) (observing that “the rise of . . . the Internet has progressively made long-distance communication, and thus networks, far easier . . . ”). See also discussion in note 3. Endogenously, government officials have become more professional and *expert* in the face of the aforementioned complicated and turbulent regulatory challenges. See also, for example, Jane Perlez, *As Diplomacy Loses Luster, Stars Flee State Dept.*, NY Times A10 (Sep 5, 2000) (quoting Mark L. von Hagen, Director of the

TRNs have several key characteristics. First, TRNs are “transgovernmental,” rather than “international.”<sup>23</sup> Existing national agencies are *trans-linked* to each other. They do not assume an international space of their own.<sup>24</sup> As *trans-national*, TRNs mainly consist of players from the public sector, that is, of the working-level government officials. For example, the main banking network, the Basel Committee of Banking Supervision (BCBS) is comprised of the central bank governors from twenty-seven countries.<sup>25</sup> Although Non-Governmental Organizations (NGOs) may play an important role in the operation of TRNs, they are not the primary actors.<sup>26</sup>

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<sup>23</sup> Harriman Institute at Columbia University, stating that “smart graduates who want to join government are heading for the Departments of the Treasury or Commerce”).

<sup>24</sup> See Keohane and Nye, 27 *World Pol* at 41 (cited in note 22). They limited the term “transnational” to nongovernmental actors, and the term “transgovernmental” to define sub-units of governments on those occasions when they act relatively *autonomously* from high politics.

<sup>25</sup> Cho, *Rethinking APEC* at 402 (cited in note 22).

<sup>26</sup> Bank for International Settlements (BIS), *About the Basel Committee*, online at <http://www.bis.org/bcbs/about.htm> (visited Oct 14, 2011).

<sup>26</sup> In some cases, a (private) transnational network plays a cooperative and complementary, but sometimes competitive, role vis-à-vis a (public) government network. For instance, a private network under the aegis of the International Federation of Stock Exchanges (FIBV)—a trade organization for regulated securities and derivative markets world-wide—is regarded as a counterpart to a public network under the auspice of the International Organization of Securities Commissions (IOSCO), which represents the world’s governmental agencies involved with the supervision of financial markets. The FIBV name has changed to the World Federation of Exchanges (WFE). WFE, *About WFE*, online at <http://www.world-exchanges.org/about-wfe> (visited Oct 14, 2011). See also WFE, *Our Mission*, online at <http://www.world-exchanges.org/about-wfe/our-mission> (visited Oct 14, 2011); IOSCO, *IOSCO Historical Background*, online at <http://www.iosco.org/about/index.cfm?section=background> (visited Oct 18, 2011). One of its basic roles is “to act as the central reference point for the industry by offering members guidance in the process of international harmonization of business practices,” which is quite complementary to the IOSCO’s regulatory role considering that it is composed of “regulates.” See WFE, *What We Do*, online at <http://www.world-exchanges.org/about-wfe/what-we-do> (visited Oct 18, 2011). However, some of the FIBV’s (WFE’s) goals—for example, “to maintain a platform for securities markets professionals to discuss issues of common interest”—may overlap with those of the IOSCO, in which sense the relationship between these two networks can be depicted as “competitive.” See id. Meanwhile, it is worth highlighting that the two networks *interact* (network) with each other, for instance, by participating in the other’s meetings. WFE, *WFE Becomes Affiliate Member of IOSCO*, online at <http://www.world-exchanges.org/news-views/news/wfe-becomes-affiliate-member-iosco> (visited Oct 18, 2011). Another example of such interaction between a transnational (private) network and a transgovernmental (public) regulatory network can be found in the relationship between the International Finance and Commodities Institute (IFCI), the BIS, and the IOSCO. The IFCI, a non-profit organization nesting a network among the world’s major derivatives exchanges and financial firms, web-posts a quarterly updated library of approximately one hundred official documents contributed by major international regulatory organizations such as the BIS and the IOSCO. See IOSCO, *IOSCO Library of Public Documents*, online at <http://www.iosco.org/library/index.cfm?whereami=pubdocs> (visited Oct 18, 2011). Despite

Second, a TRN is “regulatory” in nature, which means it deals with particular regulatory issues or problems.<sup>27</sup> Thus, TRNs differ from “trans-judicial networks,” which involve judges from different jurisdictions exchanging views.<sup>28</sup> For example, the major insurance network, the International Association of Insurance Supervisors (IAIS), sets standards meant to guide national insurance regulators in their regulation of insurers.<sup>29</sup>

Third, a TRN is a “network.” Although the network concept can cover a range of gatherings, its most important feature is that it represents not an entity but a *process*.<sup>30</sup> The process allows a TRN to be positioned in a symbiotic relationship with conventional international organizations. In other words, networking as a process can take place in an international organization *qua* entity. The process capitalizes on a “common ‘belief’ or ‘faith’ . . . to better regulatory outcomes” among networkers.<sup>31</sup> This common belief tends to originate from common knowledge and experience shared by participants of the network, in other words, professional working-level government officials.<sup>32</sup>

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these rich interactions between transnational (private) networks and transgovernmental (public) regulatory networks, such transnational (private) networks should be understood as complementary to the transgovernmental (public) network in terms of *regulatory* function. Although the “new medievalists” proclaim the end of the nation-state thanks to the “information technology revolution,” “private power is still no substitute for state power,” and “[a] gain in power by nonstate actors does not necessarily translate into a loss of power for the state.” Slaughter, 76 Foreign Aff at 183–84 (cited in note 20). Likewise, Sol Picciotto also acknowledges the validity of states themselves, though he observes a new trend of disintegration within them. Sol Picciotto, *Networks in International Economic Integration: Fragmented States and the Dilemmas of Neoliberalism*, 17 Nw J Intl L & Bus 1014, 1015–22 (1996–97). Professor Freeman conceptualizes “public governance” in a novel way as a “set of negotiated relationships between the public and the private.” Jody Freeman, *The Private Role in Public Governance*, 75 NYU L Rev 543, 548 (2000). According to this view, the regulatory decision-making process tends to be decentralized, since “public and private actors negotiate over policy making, implementation, and enforcement.” Id. As a result, a more cooperative or “aggregate” notion of accountability is offered as an alternative to “formal and hierarchical” accountability that dominates conventional administrative law. Id at 549.

<sup>27</sup> Cho, *Rethinking APEC* at 402 (cited in note 22).

<sup>28</sup> See generally Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U Richmond L Rev 99 (1994) (exploring the commonalities among, and consequences of, several instances of transjudicial communication); Cho, *Rethinking APEC* at 402 (cited in note 22).

<sup>29</sup> IAIS, *Insurance Core Principles, Standards, Guidance and Assessment* (2011) online at [http://www.iaisweb.org/\\_temp/Insurance\\_Core\\_Principles\\_Standards\\_Guidance\\_and\\_Assessment\\_Methodology\\_October\\_2011.pdf](http://www.iaisweb.org/_temp/Insurance_Core_Principles_Standards_Guidance_and_Assessment_Methodology_October_2011.pdf) (visited Nov 21, 2011).

<sup>30</sup> Cho, *Rethinking APEC* at 402 (cited in note 22).

<sup>31</sup> Id.

<sup>32</sup> In the context of Western social and philosophical traditions, one may attribute a theoretical root of this TRN to the notion of “social epistemes,” connoting both the German tradition of viewing society as “comprising webs of meaning and signification” and the French tradition of exploring “mentalités collectives.” Ruggie, 47 Intl Org at 157 (cited in note 3).

International organizations often provide government networkers with physical forums while some TRNs may even mirror the operational format of international organizations.<sup>33</sup> Therefore, any physical body or even a more fluid relationship may fall under this category once it meets certain requirements characterizing it as a network.<sup>34</sup> For example, the banking network, which includes the BCBS, can operate within the IMF.

Already in the early seventies, Robert Keohane and Joseph Nye observed this phenomenon among like-minded government officials and labeled it “transgovernmental coalition building.”<sup>35</sup> They highlighted a “sense of collegiality” developed and reinforced by their membership in a common profession, which may be analogous to the “epistemic community,” as Peter Haas famously dubbed it.<sup>36</sup> Likewise, Eugene A. Ludwig, then US Comptroller of the Currency, submitted in 1996 that “I am convinced that all regulators today share a common concern that spans geographical boundaries and transcends cultural barriers. All of us speak the shared language of safety and soundness.”<sup>37</sup> Naturally, it is this shared professional or expert culture that tends to secure a high level of compliance with what a TRN produces as a normative output.<sup>38</sup> Perhaps this fidelity to network-generated norms can be said to result from a bureaucratic habit or bureaucratic culture that is analogous to the “law habit.”<sup>39</sup>

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<sup>33</sup> See Raustiala, 43 Va J Intl L at 6, 87–88 (cited in note 22) (identifying a “synergistic” relationship between treaties and networks due to the former’s political and institutional contributions to the latter).

<sup>34</sup> Cho, *Rethinking APEC* at 402 (cited in note 22).

<sup>35</sup> Keohane and Nye, 27 World Pol at 44 (cited in note 22).

<sup>36</sup> Id at 45; Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 Intl Org 1, 2 (1992).

<sup>37</sup> John E. Shockley, *Bank Regulatory Examination and Enforcement after Barings and Daiwa*, in *Financial Services Litigation*, 935 Corp L & Practice Course Handbook 681, 708 (Practicing Law Institute 1996).

<sup>38</sup> Here, the meaning of compliance is mostly limited to a soft dimension in the absence of any technically binding force. If the concept of compliance involves a hard (political) dimension, such as national legislation, as it often does in public international law, it invites a whole range of different issues, such as the depth of compliance and the measurement.

<sup>39</sup> David Zaring, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*, 33 Tex Intl L J 281, 303 n 189 (1998); R.R. Baxter, *International Law in “Her Infinite Variety,”* 29 Intl & Comp L Q 549, 556 (1980). In building up such common belief and faith, another psychological element, namely “trust,” serves as an important catalyst. See Scott H. Jacobs, *Why Governments Must Work Together*, 186 OECD Observer 13, 14–15 (Feb–Mar 1994). Therefore, government officials may have to invest more time in communicating better among each other as well as familiarizing themselves with one another’s administrative style for the sake of successful networking. Id. See also Les Metcalfe, *The Weakest Links: Building Organisational Networks for Multi-Level Regulation*, in *Regulatory Co-Operation for an Interdependent World* 49, 57 (OECD

TRNs involve an ongoing dialogue, although the forums for that dialogue may change.<sup>40</sup> Early in the seventies, Keohane and Nye, in their pioneering work, developed a notion of “complex interdependence,” an ideal type of international relations that correlated with reluctance to resort to the use of force among a group of states with “multiple channels of contact connect[ing] societies.”<sup>41</sup> A subset of their notion of complex interdependence is the phenomenon of “transgovernmental communication,” the existence of “informal ties between government elites,” and direct meetings and communications between bureaucrats from different countries, which coexist with formal foreign office arrangements.<sup>42</sup> Raymond Hopkins also highlights this dialogical process in developing working relationships through “[t]elephone calls, correspondence, regular meetings and . . . pre-meeting agenda sessions.”<sup>43</sup>

TRNs work incrementally through day-to-day interactions. These quotidian interactions are un-dramatic, if not mundane, but they can have an enormous effect on the eventual shape of regulation.<sup>44</sup> For example, a joint report by the BCBS and the Technical Committee of the International Organization of Securities Commissions (IOSCO), which was issued to the public in September 1998, was a revised version of an earlier, similar report jointly published in May 1995 by the same TRNs to assess the derivatives activities of banks and securities firms.<sup>45</sup> This revision represents ongoing and cumulative efforts by the BCBS and IOSCO with a view to keeping pace with an ever-changing regulatory environment in this area, namely, “financial innovation and progress in risk management field for trading and derivatives activities, in particular with regard to market risk.”<sup>46</sup> It reflects earlier work of the two TRNs, including the 1994 *Joint Release of Guidelines* for improving risk management of derivatives activities

1994) (arguing that the establishment of “trust and confidence” among the organizations participating in a regulatory system has an important bearing on the reliability of an inter-organizational network). But see Jeffery Atik, *Science and International Regulatory Convergence*, 17 Nw J Intl L & Bus 736, 758 (1996–97) (questioning the possibility of expert consensus by arguing that “scientific consensus is geographically distributed and flows from centers of influence”).

<sup>40</sup> Cho, *Rethinking APEC* at 403 (cited in note 22).

<sup>41</sup> Robert O. Keohane and Joseph S. Nye, *Power and Interdependence* 24–25 (Little, Brown 1977); Robert O. Keohane and Joseph S. Nye, Jr., *Power and Interdependence Revisited*, 41 Intl Org 725, 731 (1987). See also Slaughter, 6 Eur J Intl L at 512–13 (cited in note 20).

<sup>42</sup> Keohane and Nye, *Power and Interdependence* at 25–26 (cited in note 41); Slaughter, 6 Eur J Intl L at 513 (cited in note 20).

<sup>43</sup> Hopkins, 30 Intl Soc Sci J at 36 (cited in note 22).

<sup>44</sup> Cho, *Rethinking APEC* at 403 (cited in note 22).

<sup>45</sup> Basel Comm on Banking Supervision and the Technical Comm of the IOSCO, *Framework for Supervisory Information about Derivatives and Trading Activities*, Joint Report \*i (Sept 1998), online at <http://www.bis.org/publ/bcbs39.pdf> (visited Oct 15 2011).

<sup>46</sup> Id.

and subsequent risk management guidance as well as the 1995 *Joint Recommendations for Enhancing Public Disclosure*.<sup>47</sup>

Thus, we see the products of TRNs undergo evolution. This evolutionary nature ensures streamlined and updated regulatory guidelines so that policy measures reflect the ever-changing regulatory environment. The Asian Pacific Economic Cooperation (APEC) Forum provides another apt example. APEC houses a variety of TRNs. It works through everyday communications among sector-specific actors (government officials and businessmen). Various kinds of Working Groups produce concrete action plans or programs in those functional areas, such as energy, telecommunication, or transportation.<sup>48</sup> The APEC Food System (AFS) illustrates an evolution of a regulatory prototype. In 1999 the APEC leaders adopted the AFS upon the recommendation by the APEC Business Advisory Council in order to “efficiently link together food production, food processing and consumption to meet the food needs of our people as an essential part of achieving sustainable growth, equitable development and stability in the APEC region.”<sup>49</sup> The AFS generated many recommendations concerning “efficiency in agricultural production, supply and trade, including the importance of technology, adding value to agricultural production and improving infrastructure.”<sup>50</sup> The Agricultural Technical Cooperation Working Group (ATCWG) is a key implementer of these AFS recommendations. These recommendations took a more concrete and targeted form (regulatory prototype) when APEC Senior Officials, under the auspices of the AFS/ATCWG network, launched the “APEC Food Security Work Plan,” in response to the surge in regional food prices in 2008.<sup>51</sup>

Therefore, a myriad of regulatory dialogues among working-level officials, not ministers and politicians, within TRNs tend to generate varying types of normative references with different titles, such as framework, recommendation, and work plan, which we collectively define as “regulatory prototypes.”<sup>52</sup> Although they largely remain “soft”—technically non-binding—unlike hard law

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<sup>47</sup> Id.

<sup>48</sup> Cho, *Rethinking APEC* at 410, 416 (cited in note 22). See also Martin Rudner, *Institutional Approaches to Regional Trade and Cooperation in the Asia Pacific Area*, 4 *Transnatl L & Contemp Probs* 159, 173–75 (1994) (“Consequently, unlike other formal international organizations, APEC retains a strong potential that regulatory challenges are duly ‘managed,’ rather than ‘solved.’”).

<sup>49</sup> APEC, *APEC Food System*, online at <http://www.apec.org/Groups/Other-Groups/APEC-Food-System.aspx> (visited Oct 15, 2011).

<sup>50</sup> APEC, *2006 APEC Food System Report to the Ministers* \*2, online at [http://www.apec.org/Groups/Other-Groups/~/media/Files/Groups/AFS/06\\_csom\\_005\\_AFS.ashx](http://www.apec.org/Groups/Other-Groups/~/media/Files/Groups/AFS/06_csom_005_AFS.ashx) (visited Oct 15, 2011).

<sup>51</sup> APEC, *APEC Food System* (cited in note 49).

<sup>52</sup> Cho, *Rethinking APEC* at 403 (cited in note 22).

(treaty), they can still play an important role in shaping and coordinating professional (regulatory) behaviors of networkers.

In conclusion, TRNs have been around for some time. They have arisen in part in response to the weaknesses in the treaty system with regard to tackling the pressing needs of globalization. They are also the function of professional expert communities that share understandings and a desire to find solutions to common problems. The means by which they find these solutions involves a process. This process may or may not be situated within a number of institutional forums. The power of these networks results from the intra-network dynamics they foster and the end products that they develop.

### III. A THEORY OF NETWORK COORDINATION: PRE-EXISTING NETWORKS, REGULATORY PRODUCTS, AND OPERATIVE FRAMEWORKS

States can address complex problems through coordination of TRNs. By constructing frameworks (or blueprints) that chart goals for various TRNs, states can tackle complex systemic regulatory challenges. These frameworks instruct TRNs to work towards specific goals. TRNs are well-suited for the tasks assigned to them because of pre-existing relationships and network dynamics of the network participants. These dynamics allow TRNs to develop specific end products called “regulatory prototypes” that can be absorbed into domestic structures through a variety of strategies to fulfill the goals of the blueprint or framework. This coordination of TRNs can lead to complex regulatory responses to global problems that are well-suited for adoption at the national level. We probe examples of this phenomenon in Section IV. We discuss whether these responses are desirable from a legitimacy and efficacy standpoint in Section V.

#### A. Theory of TRN Coordination

TRN coordination involves governmental coalitions organizing multifaceted responses to global regulatory challenges by leveraging the work of pre-existing networks to develop specific regulatory products meant to be nationalized. Government groupings (such as the G7, G8, or G20) have coordinated responses to political challenges or crises.<sup>53</sup> Using action plans, called frameworks or blueprints, these groupings can instruct multiple actors,

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<sup>53</sup> Robert P. Delonis, Note, *International Financial Standards and Codes: Mandatory Regulation without Representation*, 36 NYU J Intl L & Pol 563, 586–91 (2004). See generally Mario Giovanoli, *The Reform of International Financial Architecture after the Global Crisis*, 42 NYU J Intl L & Pol 81 (2009).

and in particular TRNs, to take action simultaneously and in pursuit of a common objective.

To tackle cross-border, cross-sector problems, states sometimes develop frameworks or blueprints, which embody basic agendas or action plans, rather than specific standards. A coordinating coalition builds these agendas and tasks various actors with the production of more specific regulatory prototypes. These plans form in part out of a common understanding of the problem and the need for a coordinated response. International regulators, and even leaders, share a belief in the necessity of these plans; they understand and agree that some regulations require not only cross-border coordination but *cross-network* coordination.

Frameworks emerged long before the 2008 crisis.<sup>54</sup> For example, in 1999 the G20 Finance Ministers created the Joint Forum, a blueprint for collaboration amongst the BCBS, IOSCO and the IAIS. The Joint Forum is characterized by technical efforts from each of the parent organizations, and its blueprint requires that it focus on particular subjects of interest to each of the parent entities, including risk assessment, capital adequacy, and the regulation of financial conglomerates.<sup>55</sup> In short, the blueprint for the Joint Forum recognized the need for a cross-sector approach to regulating financial conglomerates. The blueprint involves all three entities in an action plan that focuses primarily on two lines of inquiry (capital risk and conglomerate supervision).<sup>56</sup>

Frameworks are generally unambiguous since they set out specific tasks for corresponding networks. Nonetheless, they lack the level of technical precision required in the case of “regulatory prototypes.”<sup>57</sup> While these blueprints assign each particular network a specific task, they may still be silent regarding exactly how such tasks will be operationalized. Initially, though, the blueprint sets a plan

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<sup>54</sup> As seen in the G7 or G8 experiences, major economies had tried to coordinate their financial and macroeconomic policies in the past. See, for example, John Kirton and Antara Haldar, *G7/8 Summit Remit Mandates, 1975–2003* (Toronto 2003), online at [http://www.g7.utoronto.ca/evaluations/factsheet/factsheet\\_remits.html](http://www.g7.utoronto.ca/evaluations/factsheet/factsheet_remits.html) (visited Oct 15, 2011) (listing mandates including: “At our next Summit, we will review progress on the implementation of the *G8 Africa Action Plan* on the basis of a final report from our Personal Representatives for Africa”; “Our goal for the next Summit is to develop an international financing plan for plutonium management and disposition based on a detailed project plan, and a multilateral framework to co-ordinate this co-operation”; “We are determined to speed up the implementation of our national plans called for under the Rio Climate Treaty and we will each report what we have achieved at next year’s Summit”).

<sup>55</sup> See BIS, *Mandate of the Joint Forum*, online at <http://www.bis.org/bcbs/jfmandate.htm> (visited Oct 15, 2011).

<sup>56</sup> Id.

<sup>57</sup> See notes 68–89 and accompanying text.

at the network-coordination level. Thus, it is the first step in a multi-layered process of cross-networking.

Since a framework or blueprint denotes a long-term plan, its actualization necessarily involves several incremental steps on different levels, such as working-level officials, deputy ministers, ministers, and leaders of the various TRNs. Notably, these several incremental processes may proceed simultaneously through rounds of dialogue and communication among the network actors. It is in this sense that a blueprint plants seeds for subsequent networking and consequent regulatory prototype-building.

The individual TRNs gain strength and legitimacy from being part of the overall plan in the same way that the overall plan legitimizes itself through the use of the pre-existing networks. By infusing a large dose of political capital in largely uncoordinated pre-existing sector-specific government TRNs, states legitimize these networks while at the same time leveraging their capital and legitimacy. TRNs' capital results from their prior workings and in particular results from complex intra-network dynamics.

## B. Intra-Network Dynamism

TRN coordination takes advantage of the pre-existing intra-network dynamics that exist among networkers. These varying internal social dynamics represent different operationalizing forces in each network. They are the main engines of networks that the executive coordinator maneuvers. While these dynamics were already present in each network, it was the advent of the G20 that awakened their genuine regulatory potential in an unprecedented endeavor to deliver regulations desperately needed to avert the financial crisis.

While TRN participants share mutual trust distilled from similar expertise, their knowledge-base or experiences may vary. Several dynamics are at play as they work through these differences; we label them: (1) persuasion, (2) negotiation, (3) strategic co-optation, (4) willing marginalization, (5) responsive engagement and (6) expert sympathization.<sup>58</sup> These features fall neatly into a constructivist toolbox. Constructivist scholars have long posited that institutions shape the preferences of participants.<sup>59</sup> By identifying the dynamics, tools,

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<sup>58</sup> Regarding an earlier attempt to identify similar patterns of intra-network dynamics (interactions) according to the density of communication, see Sungjoon Cho, *GATT Non-Violation Issues in the WTO Framework: Are They the Achilles' Heel of the WTO Dispute Settlement Process?*, 39 Harv Intl L J 311, 346 n 188 (1998).

<sup>59</sup> See John Gerard Ruggie, *What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge*, 52 Intl Org 855, 856, 870 (1998); Alexander Wendt, *Collective Identity Formation and the International State*, 88 Am Pol Sci Rev 384, 385–87 (1994); Claire R. Kelly, *The Value Vacuum: Self-Enforcing Regimes and the Dilution of the Normative Feedback Loop*, 22 Mich J Intl L 673, 678 (2001).

dialogues, and discourses that network players use to influence each other we hope to reveal how preferences may change—or appear to change. Coordinated TRNs take advantage of these dynamics to pursue specific regulatory end products that are part of a planned coordinated response to a global problem. Unpacking the dynamics at work is important for the later task of assessing the efficacy and legitimacy of the ultimate response.

### 1. Persuasion.

Participants in TRNs may simply influence (“persuade”) each other to change each other’s regulatory behavior. Suppose that A is a specific regulatory agency of Country X, and B is a corresponding agency in Country Y. By providing various incentives, such as better regulatory information or more highly developed technology, A can persuade B to adjust the latter’s original policy stance. This type of interaction often leads to a diffusive and osmotic mode of regulatory change, rather than a commandeering mode.<sup>60</sup> Here, for example, it is entirely conceivable that a developed-country member may provide certain technical assistance or advice to a developing-country member in order to reinforce the former’s persuasive power. In this way, a network model can explain more subtle dynamics than mere legislation in regulatory agencies’ behavioral change.<sup>61</sup> To capture fully the intra-network dynamics behind this regulatory persuasion, one needs to recall one of the defining characteristics of a TRN discussed above, that is, a *social* bond among sector-specific government agencies or officials (networkers). This endogenous nature of social interaction among networkers enables us to account for the “normative self-understanding of the ends held by the social groups in question” in our theory.<sup>62</sup> This is why constructivism may provide a richer account than conventional international relations theories, such as realism, of the “sticky”<sup>63</sup> bond among social actors (here, networkers).<sup>64</sup>

Ryan Goodman and Derek Jinks present perhaps the strongest version of persuasion. Adopting a sociological concept of “acculturation,” they raise the possibility of social actors’ assimilation of the “beliefs and behavioral patterns of

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<sup>60</sup> Raustiala, 43 VaJ Intl L at 51 (cited in note 22).

<sup>61</sup> Id at 54 (observing that networks “touch on issues such as the structure of enforcement and the training of personnel”).

<sup>62</sup> Ruggie, 52 Intl Org at 860 (cited in note 59). See generally Max Weber, *The Methodology of the Social Sciences* (Free 1949) (Edward A. Shils and Henry A. Finch, eds and trans).

<sup>63</sup> See Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 Yale L J 2599, 2602–03, 2655 (1997).

<sup>64</sup> This normative intersubjectivity generates “critical self-reflection,” which “gives us perspective on our social environment and helps us to overcome any false sense of determinism.” Alexander Wendt, *Social Theory of International Politics* 375 (Cambridge 1999).

the surrounding culture.”<sup>65</sup> Interestingly, this acculturation results more from a structural cognitive pressure to assimilate within the group than from the “merits” of a particular model.<sup>66</sup> Under this circumstance, however, networking is prone to two types of criticism. First, any behavioral change in this situation might be ostensible conformity, rather than a genuine modification of an earlier position.<sup>67</sup> Second, less politically powerful members of the group might be pressured into accepting certain regulatory models prescribed by powerful members without due consideration of the actual merits of such models.<sup>68</sup>

## 2. Negotiation.

Second, in some cases, A and B can negotiate over certain issues of mutual interest and produce a settlement on the basis of reciprocity. This may occur in a “Record of Understanding” or a “Memorandum of Understanding (MOU).” While this mode of interaction inevitably involves some type of bargain, it should not necessarily be equated with a political, strategic give-and-take process that is often seen in the conventional international treaty negotiation. Importantly, an intra-network negotiation need not be zero-sum. It involves the participants’ of the TRN continuously adjusting their different interpretations and eventually expanding their shared ground. In this regard, an intra-network negotiation may be understood as a “cross-persuasion”: one party’s persuasion is contingent on that of the other party. The dynamic outcome of such negotiation as a cross-persuasion is likely to be positive-sum, which is capable of generating regulatory convergence. For example, the US might accept the EU’s position in favor of stricter credit rating agency (CRA) regulation in exchange for the latter’s adoption of a variant of the former’s Volcker rule.<sup>69</sup>

## 3. Strategic co-optation.

Third, a strategic co-optation may transpire among network participants. “Strategic co-optation,” as described by Philip Selznick, is the “process of absorbing new elements into the leadership of the policy-determining structure

<sup>65</sup> Ryan Goodman and Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 Duke L.J. 621, 626 (2004).

<sup>66</sup> Id at 643.

<sup>67</sup> Id.

<sup>68</sup> See Section IV.B.

<sup>69</sup> We owe Pierre-Hugues Verdier for this point. The Volcker rule, named after former Federal Reserve Chairman Paul Volcker, “prohibits any bank or bank affiliate from engaging in proprietary trading or investing in or sponsoring a hedge fund or private equity fund, subject to certain exceptions.” Charles K. Whitehead, *Regulating for the Next Financial Crisis*, 37 Cornell L.F. 20, 23 (2011).

of an organization to avert threats to its stability or existence.”<sup>70</sup> For example, one network actor might invite another to serve as a “policy advisor” for a regulatory project, perhaps because the first networker lacks the necessary capacity to act alone.<sup>71</sup> This self-invoking nature distinguishes co-optation from other modes of intra-network dynamics, such as persuasion or negotiation, in which case the pressure for regulatory behavioral change comes from outside.

#### 4. Willing marginalization.

Fourth, network members may engage in “willing marginalization.” Willing marginalization happens when network members agree to participate knowing that they will have limited influence. Members may be motivated by the hope that even a reserved mode of participation now will lead to greater future participation. Thus, suppose that network member A supports position X, which is generally disfavored by network member B. Suppose further that B has very little influence. Here, B might still welcome an invitation by A to collaborate. A may be engaging in a persuasion leading to the willing marginalization of B. Lastly, network members may face the real possibility that their choice is simply to remain in the network, with limited influence, or to be out of the network. Being in the network may be the better alternative not only because they may hope for greater influence in the future but because membership may signal acceptance or other important values to other constituencies.<sup>72</sup>

#### 5. Responsive engagement.

Fifth, “responsive engagement” involves a rich set of regulatory dialogues that could potentially result in a certain level of compromise even though the negotiation is not completely successful. Although responsive engagement reaches less than the desired outcome, the process of engaging itself moves the network forward. It signals that the parties are willing to cooperate, at least on some issues, even if they are unsuccessful on others for the time being. Given that network operation is a dynamic and incremental process, responsive engagement is critical in maintaining a stable level of sociological momentum regardless of any regulatory deal. In other words, the network process is not a binary (on/off) communication, but a thread of self-reinforcing engagement.

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<sup>70</sup> See Ronald S. Burt, *Corporate Profits and Cooptation: Networks of Market Constraints and Directorate Ties in the American Economy* 5 (Academic 1983).

<sup>71</sup> Cho, 39 Harv Intl LJ at 346 n 188 (cited in note 58).

<sup>72</sup> See Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U Chi L Rev 469, 504 (2005) (arguing that one of the collateral consequences of international organization membership, and commitment to its attendant obligations, shapes the way other actors, states, NGOs, and domestic individuals view the state).

When this interaction reaches a critical point, a regulatory product, be it an MOU or a policy guideline, tends to materialize.

#### 6. Expert sympathization.

Finally, a preliminary regulatory product molded initially by a bilateral dialogue between A and B may spill over and be multilateralized through like-minded regulators from other jurisdictions. This “expert sympathization” is a necessary step in formulating any common regulatory guidelines or principles within a government network. This type of intra-network dynamics can be found in most networks, such as the BCBS or the International Civil Aviation Organization (ICAO), that produce policy guidelines or recommendations on a regular basis.

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Importantly, these six types of intra-network dynamics offer useful analytical lenses through which one can understand how a TRN functions in an incremental, dialogical, and norm-generating manner. These tools are inherently incremental—some modes are intermediary steps in others. For example, persuasion might lead to willing marginalization. Responsive engagement is a step in negotiation. These dynamics comprise the very dialogue of the TRNs. They are the substance of conferences, informal talks, and telephone calls. They are the constituent parts of both the substantive outcomes and the process of bringing the networks together. Eventually, these dynamics facilitate the norm-generating process. They result in normative end products.

### C. End Products: Regulatory Prototypes

TRNs create end products, which we label “regulatory prototypes.”<sup>73</sup> They generate rules, norms, or standards to deal with specific problems they face. The

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<sup>73</sup> Other scholars have employed different terms. See, for example, Zaring, 33 Tex Intl L J at 303 n 188 (cited in note 39), citing Hal S. Scott, *The Competitive Implications of the Basle Capital Accord*, 39 SLU L J 885, 885 (1995) (referring to the Basel Accord as a “gentlemen’s agreement among central banks”); Joseph Jude Norton, *Devising International Bank Supervisory Standards* 176–77, 255–62 (Martinus Nijhoff 1995); Zaring, 33 Tex Intl at 303 n 189 (cited in note 39) (“international soft law”). For another perspective, see Linda M. Harasim, *Global Networks: An Introduction*, in Linda M. Harasim, ed., *Global Networks: Computers and International Communication* 3, 13–14 (MIT 1993) (introducing chapter nineteen of the book, written by Shumpei Kumon and Izumi Aizu). Kumon and Aizu propose “co-emulation” as a strategy for developing a global hypernetwork society of the future. To them, co-emulation is a “response to the information age whereby nations can learn from one another to produce a prototype socio-economic model that each country can mold to fit its unique history and culture,” and it encourages nations to “move beyond competitive relationships into more consensual . . . relationships” to address a variety of socio-economic challenges of the twenty-first century. Id. See also Eibe Riedel, *Standards and Sources: Farewell to the Exclusivity of the Sources Triad in International Law?*, 2 Eur J Intl L 58, 79 (1991).

regulatory prototype often comes in the form of a guideline or recommendation, which are typical features of international “soft law.” These end products logically flow from the network operation that is dialogical, incremental, and norm-generating.<sup>74</sup> They fulfill the goals of the framework or blueprint established by the coordinating states.

A regulatory prototype, such as a guideline or a policy recommendation, tends to represent a converging output of networking results. Considering the networking’s incremental nature, any hasty attempt to accomplish quick regulatory outcome will be futile, or even counterproductive.<sup>75</sup> Yet this circumspection does not necessarily mean that a TRN always deters participants from voluntarily adopting a regulatory position that is more advanced than the TRN’s initial regulatory prototype.<sup>76</sup> As discussed above, a variety of intra-network dynamics, such as persuasion and responsive engagement, encourage network participants to espouse “best practices,” “regulatory benchmarks,” or “regulatory checklists,” which may even exceed the least common denominators, so as speedily to achieve necessary regulatory goals.<sup>77</sup> While the regulatory prototype is nonbinding,<sup>78</sup> it also tends to be technical and precise.<sup>79</sup>

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(discussing “new economic standards” with the proliferation of international economic transactions).

<sup>74</sup> This process can also be viewed as “dialectical” in the sense that this process illustrates how prototypes can eventually be transformed into more acceptable—and in a sense more legitimate—norms than ones found in a conventional treaty. This dialectical process represents the whole life cycle of a regulatory prototype throughout the sequence of its creation, nationalization (where necessary), enforcement, surveillance, feedback, and establishment of a new prototype.

<sup>75</sup> Cho, *Rethinking APEC* at 403 (cited in note 22). For instance, the *OECD Recommendation Concerning Effective Action Against Hard Core’ Cartels* represents a minimum common denominator (“hard core” cartels) in the competition policy area that results from a long-standing networking in this regulatory field centering on the OECD Committee on Competition Law and Policy, which brings together the leaders of the world’s major competition, or antitrust, authorities and provides the chief international forum for the regular exchange of views on important competition policy issues. OECD Directorate for Financial and Enterprise Affairs, *Competition Law and Policy: About*, online at [http://www.oecd.org/about/0,3347,en\\_2649\\_34685\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/about/0,3347,en_2649_34685_1_1_1_1_1,00.html) (visited Oct 15, 2011). See also OECD Directorate for Financial and Enterprise Affairs, *Recommendation Concerning Effective Action against Hard Core Cartels*, online at [http://www.oecd.org/document/19/0,3746,en\\_2649\\_40381615\\_44942291\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/19/0,3746,en_2649_40381615_44942291_1_1_1_1,00.html) (visited Oct 15, 2011).

<sup>76</sup> Cho, *Rethinking APEC* at 404 (cited in note 22).

<sup>77</sup> OECD, *The OECD Reference Checklist for Regulatory Decision-Making*, online at <http://www.oecd.org/dataoecd/20/10/35220214.pdf> (visited Oct 15, 2011). However, such “best practices” are not necessarily made either for the sake of harmonization or to generate regulatory competition that would create a higher level of regulatory quality (a “race-to-the-top” scenario). Best practices are just used as an example or a reference for a future design of a regulation. It should be noted that under some circumstances, “regulatory diversity” would be a better option than harmonization or any other type of regulatory cooperation since the diversity

Empirical confirmations of regulatory prototypes are legion. For example, the *Basel Core Principles for Effective Banking Supervision*, released by the BCBS on September 22, 1997, were intended to “serve as a basic reference” for banking authorities throughout the world in supervising and regulating banks and banking activities within their jurisdictions.<sup>80</sup> Likewise, principles included in the *Resolution on the Supervision of Financial Conglomerates* designed by IOSCO in October 1992 “form the basis for the risk assessment of financial conglomerates” and should “guide the development of regulatory practice . . . in the area of financial conglomerates.”<sup>81</sup> The APEC network serves as another example. One of the most representative sectors in the APEC in which such guidelines and principles proliferate is the “standards and conformances” sector. The Sub-Committee on Standards and Conformance<sup>82</sup> completed *Guidelines for the Preparation, Adoption and Review of Technical Regulations and APEC Food MRA (Mutual Recognition Arrangement) Supplementary Material* in 1997.<sup>83</sup> Regardless of its

of preference, such as the degree of risk-taking, is sometimes irreconcilable. Scott H. Jacobs, *Regulatory Co-Operation for an Interdependent World: Issues for Government*, in *Regulatory Co-Operation* 15, 33 (cited in note 39). For another perspective, see David Vogel, *Trading Up: Consumer and Environmental Regulation in a Global Economy* 6 (Harvard 1995) (discussing the so-called “California effect,” which means an upward regulatory competition in the environmental policies among trading states in the US).

<sup>78</sup> See OECD Working Party of the Trade Committee, *Regulatory Reform and International Standardisation* \*\*28–32 (1999), online at <http://www.oecd.org/dataoecd/33/19/1955309.pdf> (visited Oct 15, 2011) (discussing “regulators as players in standardisation”).

<sup>79</sup> Cho, *Rethinking APEC* at 403 (cited in note 22).

<sup>80</sup> BIS, *Core Principles for Effective Banking Supervision* (Sept 22, 1997), online at <http://www.bis.org/press/p970922.htm> (visited Oct 15, 2011).

<sup>81</sup> IOSCO, *A Resolution on the Supervision of Financial Conglomerates* (1992), online at <http://www.iosco.org/library/resolutions/pdf/IOSCORES7.pdf> (visited Oct 15, 2011). More recently, the IOSCO documented a comprehensive set of thirty principles of securities regulations, which are based on three fundamental objectives of securities regulation: the protection of investors; ensuring that markets are fair, efficient, and transparent; and the reduction of systemic risk. IOSCO, *Objectives and Principles of Securities Regulation* \*i (2003), online at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD154.pdf> (visited Oct 15, 2011). These thirty principles—grouped into eight categories (principles relating to the regulator, principles for self-regulations, principles for the enforcement of securities regulation, principles for cooperation in regulation, principles for issuers, principles for collective investment schemes, principles for market intermediaries, principles for the secondary market)—are to be nationalized in due forms considering domestic legal structure and other circumstances. Id at \*\*i–iii.

<sup>82</sup> The Sub-Committee on Standards and Conformance (SCSC) was established under the APEC Committee on Trade and Investment (CTI), among other things, to encourage alignment of members’ standards with international standards and to achieve mutual recognition among APEC economies of conformity assessment in regulated and voluntary sectors. See APEC, *Sub-Committee on Standards and Conformance*, online at <http://www.apec.org/Groups/Committee-on-Trade-and-Investment/Sub-Committee-on-Standards-and-Conformance.aspx> (visited Oct 15, 2011).

<sup>83</sup> Id.

technical format, the normative value of this prototype can be advanced by the very fact that expert participants of the network, sharing a common belief, have worked out this prototype via various modes of dynamics.<sup>84</sup>

Guidelines or recommendation prototypes are designed to be nationalized.<sup>85</sup> Under certain circumstances, a soft law prototype may be rendered into hard law as a part (or a whole) of a statute in the domestic legal system.<sup>86</sup> Notably, certain TRNs provide a variety of strategies to encourage

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<sup>84</sup> See also Slaughter, *Governing the Global Economy* at 181–84 (cited in note 20) (arguing for effectiveness of the Basel Committee’s system of enforcement despite its informality). In this sense, one might reasonably speculate that such a prototype (soft law) would form a new pattern of “custom” in terms of public international law since the requirements of both established practice and *opinio juris* would be met because transgovernmental regulators regularly refer to those prototypes with a strong normative attitude regardless of the fact that it is technically non-binding. See Stephen Zamora, *Is There Customary International Economic Law?*, 32 German YB Intl L 9, 34–35 (1989) (discussing the “soft law” nature of customary international economic law). As a matter of fact, this regulatory prototype corresponds to the current reality of harmonization as seen, for example, in the EU context. Contemporary regulatory harmonization is conducted not in light of “specification” standards, but in light of “performance” standards. Giandomenico Majone, *Comparing Strategies of Regulatory Rapprochement*, in *Regulatory Co-Operation* 155, 163–65 (cited in note 39). In other words, instead of attempting to universalize regulatory standards based on detailed specifications, certain “essential requirements” based on functions or performances are highlighted. Id. Regarding the “New Approach” to technical harmonization and standardization, see generally European Commission, *Guide to the Implementation of Directives Based on the New Approach and the Global Approach* (2000), online at [http://ec.europa.eu/enterprise/policies/single-market-goods/files/blue-guide/guidepublic\\_en.pdf](http://ec.europa.eu/enterprise/policies/single-market-goods/files/blue-guide/guidepublic_en.pdf) (visited Oct 15, 2011). In turn, this approach, focusing on essential requirements, provides ample room for regulatory maneuvering in the implementation stage on a case-by-case basis. Id at 7. Accordingly, the concept of “equivalency” becomes critical in assessing regulations of different jurisdictions and in determining whether a certain regulation is compatible with a harmonized standard. See, for example, Agreement on the Application of Sanitary and Phytosanitary Measures, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round vol 1, Annex 1A, 1867 UN Treaty Ser 493, Arts 4–6 (1994). This determination is called a “conformity assessment” process. See European Commission, *Guide* at 8 (cited in note 84) (regarding the “Global Approach” to certification and testing related to conformity assessment). Therefore, regulatory prototypes symbolize the current harmonization practices in the sense that they represent essential regulatory requirements as principles or guidelines and implementation details are left to each domestic authority. Zaring, 46 Colum J Transnat L at 580–87 (cited in note 2).

<sup>85</sup> Slaughter submits that this “nationalization of international law” is an important dimension of effectiveness of government networks. She argues that “[t]he result is an international rule-making process that directly engages national officials and national promulgation and enforcement mechanisms, without formal translation and implementation mechanisms from the international to the national.” Slaughter, *Governing the Global Economy* at 189 (cited in note 20). See also Roberta S. Karmel and Claire R. Kelly, *The Hardening of Soft Law in Securities Regulation*, 34 Brooklyn J Intl L 883, 919–24 (2009).

<sup>86</sup> Malloy emphasized the importance of such “hardening” process’s crystallizing into implementation and enforcement. Regarding the BIS capital adequacy guidelines and the Second Banking Directive in the EC, he argues that successful implementation and enforcement of these

participants to implement and enforce these prototypes domestically. For example, they request participants to perform self-evaluations to monitor their compliance with those prototypes.<sup>87</sup>

Interestingly, these soft prototypes can also become hard law through the subsequent treaty-making process. As Kal Raustiala aptly observes, “Soft law is often seen as a stepping-stone to hard . . . law, permitting states to begin cooperation informally when they fear the impact of a fully legally binding commitment.”<sup>88</sup> This soft-law-turned-treaty phenomenon makes sense considering the fact that treaties often support the formation of networks by supplying them with political support (in terms of acceptance or acquiescence of network phenomena) as well as institutional support (in terms of personnel and budget).<sup>89</sup>

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two initiatives may provide the basis for the future development of a “strong force” converged pattern of regulation. Michael P. Malloy, *Bumper Cars: Themes of Convergence in International Regulation*, 60 Fordham L Rev S1, S19–21 (1992). However, the hardening process may be hard in a constitutional matter because many supervisory authorities, for example, central banks, may not have legislative competence to convert those guidelines or principles into a hard statute. BIS, *Core Principles for Effective Banking Supervision* (cited in note 80). Nonetheless, the Basel Committee keeps on monitoring the application of such principles “in all material aspects” and indirectly presses domestic legislators to harden such soft laws. Id.

<sup>87</sup> See, for example, IOSCO, *Report on the Self-Evaluation Conducted by IOSCO Members Pursuant to the 1994 IOSCO Resolution on ‘Commitment to Basic IOSCO Principles of High Regulatory Standards and Mutual Cooperation and Assistance’* (Nov 1997), online at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD76.pdf> (visited Oct 15, 2011).

<sup>88</sup> Raustiala, 43 Va J Intl L at 86 (cited in note 22). See also Karmel and Kelly, 34 Brooklyn J Intl L at 920–24 (cited in note 85).

<sup>89</sup> Raustiala, 43 Va J Intl L at 88 (cited in note 22). In sum, two dominant courses may encapsulate the soft norm-generating mechanism within a government network. First, a contextualized rule (a rule that depends on the circumstance, such as a particular national regulation) may get decontextualized as its core precepts (general principles) are abstracted. As an initial normative reference, those contextualized norms are often labeled “best practices” or “templates.” Second, network participants discuss and debate these de-contextualized rules (principles) and establish a regulatory prototype. This prototype is a “model” for future application—for example, maybe a model law on cross-border insolvency. This prototype can then be re-contextualized or nationalized later in each jurisdiction through various transmission mechanisms. For example, it can be transformed into a domestic statute (from soft to hard) or a domestic administrative guideline (from soft to soft). See R.Y. Jennings, *The Progress of International Law: An Inaugural Lecture* 48 (Cambridge 1960) (stating that “[d]evelopment of the law may indeed at first seem to make the law less rather than more certain for it is not unlike metal being tempered for a new purpose, and may have to be softened before it can be reshaped and hardened”). For another perspective, see Jonathan I. Charney, *Universal International Law*, 87 Am J Intl L 529, 551 (1993) (arguing that “[t]he augmented role of multilateral forums in devising, launching, refining and promoting general international law has provided the international community with a more formal lawmaking process that is used often”). Of course, after this re-contextualization, feedback can also help shape the original prototype to further improve.

#### IV. COORDINATING NETWORKS: THE G20 AS A CASE STUDY

The G20 Leaders evolved from a rather mundane network of finance ministers into a unique group of leaders functioning as an executive coordinator of a response to the financial crisis of 2008.<sup>90</sup> The G20 Leaders coordinate the activities of the banking and finance ministers, the securities commissioners, the insurance network, and the trade network. Chronicling the G20's development as a TRN coordinator, and reviewing its coordination of these various issue-specific networks, allows us to view examples of intra-network dynamics and raise questions concerning the implications of these dynamics. What is *new* to us concerns the unique "executive" role self-imposed by the G20 to steer this largely discrete set of sector-specific TRNs in a coherent fashion under a long-term time-horizon. We explore the implications of this coordination in light of the network dynamics at play in the TRNs in this Section.

##### A. The Evolution of the G20 Into a Coordinating Executive

For some time, groups of countries have coordinated both economic and foreign affairs policies using periodic meetings of high level officials. These "G" (for Group) meetings started in the 1970s with the G5 (France, Germany, Japan, the UK, and the US), and involved heads of state discussing financial and economic matters.<sup>91</sup> This group expanded to the G7 in the 1980s by adding Canada and Italy. Russia joined the group, leading to the G8 in 1998, at least for economic matters.<sup>92</sup> In 1999, partially in response to the Asian financial crisis,

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<sup>90</sup> The Group of 20 or G20 refers to a group of finance ministers and central bank governors from nineteen countries and the EU that was established in 1999. The G20 is an informal forum that promotes open and constructive discussion between systemically important industrial and emerging-market countries on key issues involving global economic stability. The G20 represents around 90 percent of global gross national product; this economic weight, along with its broad membership, gives the G20 legitimacy and influence in the management of the global financial system and economy. The G20 has no permanent staff but has rotating chairs. The chairs rotate between members each year and establish a temporary secretariat, which coordinates the group's work and meetings. G20, *What is the G-20*, online at [http://www.g20.org/about\\_what\\_is\\_g20.aspx](http://www.g20.org/about_what_is_g20.aspx) (visited Oct 15, 2011).

<sup>91</sup> Peter I. Hajnal, *The G8 System and the G20: Evolution, Role and Documentation* 12 (Ashgate 2007).

<sup>92</sup> Id at 28. In terms of economic matter discussed, the group dealt with issues such as exchange rates and balance of payments. See, for example, *Declaration of Rambouillet* (Nov 17, 1975) online at <http://www.g8.utoronto.ca/summit/1975rambouillet/communique.html> (visited Oct 15, 2011); *Announcement of the Ministers of Finance and Central Bank Governors of France, Germany, Japan, the United Kingdom, and the United States (Plaza Accord)* (Sept 22, 1985), online at <http://www.g8.utoronto.ca/finance/fm850922.htm> (visited Oct 15, 2011); *Statement of the G6 Finance Ministers and Central Bank Governors (Louvre Accord)* (Feb 22, 1987), online at <http://www.g7.utoronto.ca/finance/fm870222.htm> (visited Oct 15, 2011).

the G20<sup>93</sup> formed in order to bring together finance ministers and central bank governors from both developed and emerging economies.<sup>94</sup> Notably, unlike the G7 meetings, the G20 meetings were originally conducted by the finance ministers of the various participants, not the heads of state.<sup>95</sup> The G20 structure emphasized the importance of emerging economies in global economic issues.<sup>96</sup> The finance ministers and central bank governors typically met once a year.<sup>97</sup>

After the Asian financial crisis of 1997 and prior to the 2008 financial crisis, the finance ministers and central bank governors met regularly.<sup>98</sup> These meetings addressed issues such as financial-sector regulation and supervision,<sup>99</sup> prevention of terrorist financing,<sup>100</sup> and the reform of the Bretton Woods institutions.<sup>101</sup> An important turning point for the prominence and future of the

<sup>93</sup> The members of the G20 are: Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Mexico, Russia, Saudi Arabia, South Africa, Korea, Turkey, UK, US, and the EU. The EU is represented by the President of the European Council, the President of the European Commission, and the head of the European Central Bank. G20, *What is the G-20* (cited in note 90). Additionally Spain and the Netherlands have attended as observers. The following organizations have also attended as observers: the European Commission, the European Council, the Association of Southeast Asian Nations (ASEAN), the Financial Stability Board (FSB), the International Monetary Fund (IMF), the New Partnership for Africa's Development (NEPAD), the UN, the World Bank, and the WTO. Jenilee Guebert, *Plans for the Third G20 Summit: Pittsburgh 2009*, \*\*44–45 (G-20 Research Group 2009), online at <http://www.g20.utoronto.ca/g20plans/g20leaders090818.pdf> (visited Oct 15, 2011).

<sup>94</sup> See G20, *G20 Home*, online at <http://www.g20.org> (visited Oct 15, 2011).

<sup>95</sup> See Rebecca M. Nelson, *The G-20 and International Economic Cooperation: Background and Implications for Congress* \*1 (Cong. Rsrch. Serv. Aug. 10, 2010), online at [www.fas.org/sgp/crs/row/R40977.pdf](http://www.fas.org/sgp/crs/row/R40977.pdf) (visited Oct 15, 2011).

<sup>96</sup> Id. at \*\*3–4 (noting that emerging economies have become more “active in the international economy”).

<sup>97</sup> G20, *What is the G-20* (cited in note 90) (discussing the normal practices for meetings and activities).

<sup>98</sup> Initially the G20 started out as the G22 and was formed for a one-time meeting. It briefly became the G33 and finally upon the recommendation of the G7 finance ministers became the G20. See Hajnal, *The G8 System and the G20* at 151–52 (cited in note 91). See also G20, *Communiqué: G-20 Finance Ministers and Central Bank Governors* (1999), online at <http://www.g20.utoronto.ca/1999/1999communique.pdf> (visited Oct 15, 2011) (*Communiqué 1999*). Deputies meet twice a year to prepare for the ministerial meeting. See Hajnal, *The G8 System and the G20* at 1 (cited in note 91). The G20 also organizes various technical seminars throughout the year. Id. The meetings are not open to the public.

<sup>99</sup> See *Communiqué 1999* (cited in note 98)

<sup>100</sup> G20, *Communiqué: G-20 Finance Ministers and Central Bank Governors* (2001), online at <http://www.g20.utoronto.ca/2001/2001communique.pdf> (visited Oct 15, 2011); G20, *Communiqué: Meeting of Ministers and Governors in Melbourne* (2006), online at <http://www.g20.utoronto.ca/2006/2006communique.pdf> (visited Oct 15, 2011).

<sup>101</sup> G20, *Communiqué: Meeting of Finance Ministers and Central Bank Governors* (2005), online at <http://www.g20.utoronto.ca/2005/2005communique.pdf> (visited Oct 15, 2011).

G20 came with the 2008 financial crisis. As the crisis deepened, the G7 leaders decided to convene a “summit” of the leaders of the G20 countries. In 2008, then-US President George W. Bush called for the first G20 Leaders Summit to be held in Washington, DC.<sup>102</sup> Since the first summit in November 2008 in Washington, there have been five others: London (2009), Pittsburgh (2009), Toronto (2010), Seoul (2010), and Cannes (2011). “[T]he G20 leaders [will] begin meeting once annually, in the fall, beginning in France in 2011. Mexico will chair the G20 in 2012.”<sup>103</sup>

The first three G20 Summits moved the group from a crisis responder to a premier economic institutional forum.<sup>104</sup> The first summit focused on “short and medium term responses to the crisis;”<sup>105</sup> the second reached agreement on crisis management; and the third created a “new framework to correct global imbalances, taking steps to address food security issues, and eliminating fossil fuel subsidies.”<sup>106</sup> The third and fourth summits, in particular, solidified the G20 network as an executive coordinator of international economic policy-making and began a process of extending its reach to other non-financial issue areas for sustainable development, such as energy policy and food security.

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<sup>102</sup> Alan S. Alexandroff and John Kirton, *The “Great Recession” and the Emergence of the G-20 Leaders’ Summit*, in Alan S. Alexandroff and Andrew F. Cooper, eds, *Rising States, Rising Institutions: Challenges for Global Governance* 177, 180 (Brookings 2010).

<sup>103</sup> John Kirton, *What is the G20?* (G20 Information Centre), online at <http://www.g20.utoronto.ca/g20whatisit.html> (visited Oct 15, 2011).

<sup>104</sup> See Nelson, *The G-20 and International Economic Cooperation* at 1 (cited in note 95). Foreign policy issues remain the purview of the G7 and G8.

<sup>105</sup> Rebecca M. Nelson, *The G-20 and International Economic Cooperation: Background and Implications for Congress* \*1 (Cong. Rsrch. Serv. 2009), online at [http://assets.opencrs.com/rpts/R40977\\_20091209.pdf](http://assets.opencrs.com/rpts/R40977_20091209.pdf) (visited Oct 18, 2011).

<sup>106</sup> Id. See also, for example, G20, *The G-20 Toronto Summit Declaration Preamble*, ¶ 9 (2010), online at [http://www.g20.org/Documents/g20\\_declaration\\_en.pdf](http://www.g20.org/Documents/g20_declaration_en.pdf) (visited Oct 16, 2011) (*Toronto Summit Declaration*). See also, G20, *The G-20 Seoul Summit Declaration*, ¶¶ 51(e), 58 (2010), online at [http://www.g20.org/Documents/2010/11/seoulsummit\\_declaration.pdf](http://www.g20.org/Documents/2010/11/seoulsummit_declaration.pdf) (visited Oct 16, 2011) (*Seoul Summit Declaration*) (discussing an enhanced food security policy and the phase-out of fossil fuel subsidies, respectively); Daniel Cohn-Bendit and Rebecca Harms, *Outcome of the G20 Summit in Pittsburgh (24–25 September 2009)* (European Free Alliance Sept 29, 2009), online at <http://www.greens-efa.eu/fr/outcome-of-the-g20-summit-in-pittsburgh-24-25-september-2009-1238.html> (visited Oct 15, 2011) (discussing the framework for green and global recovery); *Leaders’ Statement: The Pittsburgh Summit*, ¶ 39, Preamble ¶ 24 (2009), online at [http://www.g20.org/Documents/pittsburgh\\_summit\\_leaders\\_statement\\_250909.pdf](http://www.g20.org/Documents/pittsburgh_summit_leaders_statement_250909.pdf) (visited Oct 16, 2011) (*The Pittsburgh Summit*); The White House, *The G-20 Summit in Toronto: Acting on Our Global Energy and Climate Change Challenges* (June 27, 2010), online at <http://www.whitehouse.gov/the-press-office/g-20-summit-toronto-acting-our-global-energy-and-climate-change-challenges> (visited Oct 16, 2011) (discussing the background of the Pittsburgh Summit).

Notably, each of the Leaders Summits displayed the G20's utilization of previously established TRNs to an incrementally increasing degree. The Washington Summit (2008) dealt with crisis management.<sup>107</sup> The leaders agreed to commit "sufficient resources" to the IMF, World Bank, and other development banks so that these institutions could adequately respond to the crisis.<sup>108</sup> While the participants had varying views on the need for a new global financial architecture and its shape, they finally hammered out one version.<sup>109</sup> The European view favored a relatively comprehensive international financial architecture, while the US and Canada envisioned a relatively gradual process of coordination.<sup>110</sup> Discussion between the IMF and the Financial Stability Forum (FSF) resulted in a division of labor and the expansion of the FSF.<sup>111</sup> The leaders sought to stabilize the financial system, recognize the importance of stimulus to the economy, and to "[e]nsure that the IMF, World Bank and other [multilateral development banks] have sufficient resources to continue playing their role in overcoming the crisis."<sup>112</sup> As part of the new blueprint, the leaders committed to implement policies consistent with an array of broad yet common principles.<sup>113</sup> The principles included strengthening transparency and accountability,<sup>114</sup> enhancing sound regulation,<sup>115</sup> promoting integrity in financial markets,<sup>116</sup> reinforcing international cooperation,<sup>117</sup> and reforming international financial

<sup>107</sup> See G20, *Declaration of the Summit on Financial Markets and the World Economy*, ¶ 2 (Nov 15, 2008), online at [www.g20.org/Documents/g20\\_summit\\_declaration.pdf](http://www.g20.org/Documents/g20_summit_declaration.pdf) (visited Oct 15, 2011) (*Washington Declaration*).

<sup>108</sup> Id at ¶ 7.

<sup>109</sup> Id.

<sup>110</sup> Alexandroff and Kirton, *The Great Recession* at 181 (cited in note 102).

<sup>111</sup> *Washington Declaration*, ¶ 9 (cited in note 107). As Alexandroff and Kirton explained, the plan was to have a lightly institutionalized Financial Stability Forum (FSF) that would set new standards and the organizationally powerful IMF would then monitor and enforce compliance with them. Alexandroff and Kirton, *The Great Recession* at 182 (cited in note 102).

<sup>112</sup> *Washington Declaration*, ¶ 9 (cited in note 107).

<sup>113</sup> Id at ¶¶ 8–9 (discussing the Common Principles for Reform of Financial Markets).

<sup>114</sup> This mainly entails "enhancing required disclosure on complex financial products and ensuring complete and accurate disclosure by firms of their financial conditions. Incentives should be aligned to avoid excessive risk-taking." Id at ¶ 9.

<sup>115</sup> This measure is aimed at "strengthen[ing] our regulatory regimes, prudential oversight, and risk management, and ensur[ing] that all financial markets, products and participants are regulated or subject to oversight, as appropriate to their circumstances." Id.

<sup>116</sup> This aims primarily at "bolstering investor and consumer protection, avoiding conflicts of interest, preventing illegal market manipulation, fraudulent activities and abuse, and protecting against illicit finance risks arising from non-cooperative jurisdictions." *Washington Declaration*, ¶ 9 (cited in note 107).

<sup>117</sup> This will facilitate "coordination and cooperation across all segments of financial markets, including with respect to cross-border capital flows." Id.

institutions.<sup>118</sup> To implement these principles for reform, the leaders set out an action plan that contained immediate and medium-term items with more specificity.<sup>119</sup>

At the London Summit (2009), the theme of crisis management continued, but the group also set goals for long-term planning and policy coordination.<sup>120</sup> Given the more long-term view at this summit, it is not surprising that some divergence in policy perspectives and priorities emerged. For example, the US focused its attention primarily on stimulus while the EU sought better global regulation.<sup>121</sup> Emerging powers sought progress on “trade openness, trade finance, development, and reform of international financial institutions.”<sup>122</sup> Still other powers, including the UK, broached the subject of adding climate change to the talks.<sup>123</sup>

Despite these divides, the summit was a success because the G20 maintained its role as an executive coordinator and orchestrated a response to

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<sup>118</sup> See generally id, Action Plan.

<sup>119</sup> See, for example, Rich Miller and Simon Kennedy, *G-20 Shapes New World Order With Lesser Role for U.S., Markets* (Bloomberg Apr 2, 2009), online at [http://www.bloomberg.com/apps/news?pid=newsarchive&sid=axEnb\\_LXw5yc&refer=home](http://www.bloomberg.com/apps/news?pid=newsarchive&sid=axEnb_LXw5yc&refer=home) (visited Oct 15, 2011) (discussing the US’ taking the lead in getting the summit to agree on an increase in IMF rescue funds to \$750 billion from \$250 billion); Associated Foreign Press, *G20 Needs to Act Action on Global Financial Crisis: Analysts* (WAtoday (Austl) Apr 1, 2009), online at <http://www.watoday.com.au/world/g20-needs-to-act-action-on-global-financial-crisis-analysts-20090401-9jor.html> (visited Oct 15, 2011) (discussing the divide between US and Europe); Steve Richards, *Woolly Words Expose Weakness of Leaders’ Convictions* (Independent Apr 2, 2009), online at <http://www.independent.co.uk/opinion/commentators/steve-richards/steve-richards-woolly-words-expose-weakness-of-leaders-conviction-s-1659990.html> (visited Oct 15, 2011) (discussing Brown’s and Obama’s uncertainties going into the summit); José Manuel Durão Barroso, *Declaration on the Preparation of the G20 Summit* (Mar 24, 2009), online at [http://www.europa-eu-un.org/articles/en/article\\_8601\\_en.htm](http://www.europa-eu-un.org/articles/en/article_8601_en.htm) (visited Oct 15, 2011) (illustrating EU’s urging for a global response).

<sup>120</sup> See, for example, Rich Miller and Simon Kennedy, *G-20 Shapes New World Order With Lesser Role for U.S., Markets* (Bloomberg Apr 2, 2009), online at [http://www.bloomberg.com/apps/news?pid=newsarchive&sid=axEnb\\_LXw5yc&refer=home](http://www.bloomberg.com/apps/news?pid=newsarchive&sid=axEnb_LXw5yc&refer=home) (visited Oct 15, 2011) (discussing the US’ taking the lead in getting the summit to agree on an increase in IMF rescue funds to \$750 billion from \$250 billion); Associated Foreign Press, *G20 Needs to Act Action on Global Financial Crisis: Analysts* (WAtoday (Austl) Apr 1, 2009), online at <http://www.watoday.com.au/world/g20-needs-to-act-action-on-global-financial-crisis-analysts-20090401-9jor.html> (visited Oct 15, 2011) (discussing the divide between US and Europe); Steve Richards, *Woolly Words Expose Weakness of Leaders’ Convictions* (Independent Apr 2, 2009), online at <http://www.independent.co.uk/opinion/commentators/steve-richards/steve-richards-woolly-words-expose-weakness-of-leaders-conviction-s-1659990.html> (visited Oct 15, 2011) (discussing Brown’s and Obama’s uncertainties going into the summit); José Manuel Durão Barroso, *Declaration on the Preparation of the G20 Summit* (Mar 24, 2009), online at [http://www.europa-eu-un.org/articles/en/article\\_8601\\_en.htm](http://www.europa-eu-un.org/articles/en/article_8601_en.htm) (visited Oct 15, 2011) (illustrating EU’s urging for a global response).

<sup>121</sup> See, for example, Rich Miller and Simon Kennedy, *G-20 Shapes New World Order With Lesser Role for U.S., Markets* (Bloomberg Apr 2, 2009), online at [http://www.bloomberg.com/apps/news?pid=newsarchive&sid=axEnb\\_LXw5yc&refer=home](http://www.bloomberg.com/apps/news?pid=newsarchive&sid=axEnb_LXw5yc&refer=home) (visited Oct 15, 2011) (discussing the US’ taking the lead in getting the summit to agree on an increase in IMF rescue funds to \$750 billion from \$250 billion); Associated Foreign Press, *G20 Needs to Act Action on Global Financial Crisis: Analysts* (WAtoday (Austl) Apr 1, 2009), online at <http://www.watoday.com.au/world/g20-needs-to-act-action-on-global-financial-crisis-analysts-20090401-9jor.html> (visited Oct 15, 2011) (discussing the divide between US and Europe); Steve Richards, *Woolly Words Expose Weakness of Leaders’ Convictions* (Independent Apr 2, 2009), online at <http://www.independent.co.uk/opinion/commentators/steve-richards/steve-richards-woolly-words-expose-weakness-of-leaders-conviction-s-1659990.html> (visited Oct 15, 2011) (discussing Brown’s and Obama’s uncertainties going into the summit); José Manuel Durão Barroso, *Declaration on the Preparation of the G20 Summit* (Mar 24, 2009), online at [http://www.europa-eu-un.org/articles/en/article\\_8601\\_en.htm](http://www.europa-eu-un.org/articles/en/article_8601_en.htm) (visited Oct 15, 2011) (illustrating EU’s urging for a global response).

<sup>122</sup> See, for example, Rich Miller and Simon Kennedy, *G-20 Shapes New World Order With Lesser Role for U.S., Markets* (Bloomberg Apr 2, 2009), online at [http://www.bloomberg.com/apps/news?pid=newsarchive&sid=axEnb\\_LXw5yc&refer=home](http://www.bloomberg.com/apps/news?pid=newsarchive&sid=axEnb_LXw5yc&refer=home) (visited Oct 15, 2011) (discussing the US’ taking the lead in getting the summit to agree on an increase in IMF rescue funds to \$750 billion from \$250 billion); Associated Foreign Press, *G20 Needs to Act Action on Global Financial Crisis: Analysts* (WAtoday (Austl) Apr 1, 2009), online at <http://www.watoday.com.au/world/g20-needs-to-act-action-on-global-financial-crisis-analysts-20090401-9jor.html> (visited Oct 15, 2011) (discussing the divide between US and Europe); Steve Richards, *Woolly Words Expose Weakness of Leaders’ Convictions* (Independent Apr 2, 2009), online at <http://www.independent.co.uk/opinion/commentators/steve-richards/steve-richards-woolly-words-expose-weakness-of-leaders-conviction-s-1659990.html> (visited Oct 15, 2011) (discussing Brown’s and Obama’s uncertainties going into the summit); José Manuel Durão Barroso, *Declaration on the Preparation of the G20 Summit* (Mar 24, 2009), online at [http://www.europa-eu-un.org/articles/en/article\\_8601\\_en.htm](http://www.europa-eu-un.org/articles/en/article_8601_en.htm) (visited Oct 15, 2011) (illustrating EU’s urging for a global response).

<sup>123</sup> See, for example, Rich Miller and Simon Kennedy, *G-20 Shapes New World Order With Lesser Role for U.S., Markets* (Bloomberg Apr 2, 2009), online at [http://www.bloomberg.com/apps/news?pid=newsarchive&sid=axEnb\\_LXw5yc&refer=home](http://www.bloomberg.com/apps/news?pid=newsarchive&sid=axEnb_LXw5yc&refer=home) (visited Oct 15, 2011) (discussing the US’ taking the lead in getting the summit to agree on an increase in IMF rescue funds to \$750 billion from \$250 billion); Associated Foreign Press, *G20 Needs to Act Action on Global Financial Crisis: Analysts* (WAtoday (Austl) Apr 1, 2009), online at <http://www.watoday.com.au/world/g20-needs-to-act-action-on-global-financial-crisis-analysts-20090401-9jor.html> (visited Oct 15, 2011) (discussing the divide between US and Europe); Steve Richards, *Woolly Words Expose Weakness of Leaders’ Convictions* (Independent Apr 2, 2009), online at <http://www.independent.co.uk/opinion/commentators/steve-richards/steve-richards-woolly-words-expose-weakness-of-leaders-conviction-s-1659990.html> (visited Oct 15, 2011) (discussing Brown’s and Obama’s uncertainties going into the summit); José Manuel Durão Barroso, *Declaration on the Preparation of the G20 Summit* (Mar 24, 2009), online at [http://www.europa-eu-un.org/articles/en/article\\_8601\\_en.htm](http://www.europa-eu-un.org/articles/en/article_8601_en.htm) (visited Oct 15, 2011) (illustrating EU’s urging for a global response).

the crisis.<sup>124</sup> The leaders laid a framework or blueprint for the various sector-specific networks, such as the banking and securities networks, to follow as they develop more specific regulatory prototypes with which to achieve corresponding regulatory goals. For example, the leaders facilitated the operation of a financial network by creating the Financial Stability Board (FSB) as the successor to the FSF.<sup>125</sup> The FSB was asked to partner with the IMF as a monitoring entity.<sup>126</sup> The G20 also agreed to increase funding for the IMF.<sup>127</sup> It endorsed the OECD efforts to “take action against non-cooperative jurisdictions, including tax havens.”<sup>128</sup> It again called on accounting bodies to coordinate with supervisors and regulators to improve standards.<sup>129</sup> Furthermore, participants at the London Summit committed to concluding the Doha Round,<sup>130</sup> a commitment on which the G20 later reneged,<sup>131</sup> then they reasserted,<sup>132</sup> and finally they reaffirmed.<sup>133</sup> It also reaffirmed the commitment to

<sup>124</sup> See Prime Minister Hails Success of G-20 London Summit, online at <http://pm.gc.ca/eng/media.asp?id=2507> (visited Oct 16, 2011); Obama Hails London Summit as Start of Economic Turnaround (CBC News Apr 2, 2009), online at <http://www.cbc.ca/world/story/2009/04/02/g20-obama.html> (visited Oct 16, 2011); Eric Helleiner and Paola Subacchi, *From London to L’Aquila: Building a Bridge Between the G20 and the G8*, (Center for Intl Governance Innovation 2009), online at <http://www.cigionline.org/sites/default/files/CH%20London%20to%20Laquila%20WEB.pdf> (visited Oct 16, 2011).

<sup>125</sup> Recovery and Reform, ¶ 15 (cited in note 120); FSB, *About the FSB: History*, online at <http://www.financialstabilityboard.org/about/history.htm> (visited Oct 16, 2011).

<sup>126</sup> Recovery and Reform, ¶ 15 (cited in note 120); FSB, *About the FSB: History* (cited in note 125).

<sup>127</sup> Recovery and Reform, ¶ 5 (cited in note 120).

<sup>128</sup> Id at ¶ 15.

<sup>129</sup> Id.

<sup>130</sup> Id at ¶ 23. The Leaders saw the importance of not only confronting the present crisis but of forestalling protectionist policies that could worsen it. At the London Summit, the G20 asked the WTO along with UNCTAD and the OECD to “monitor and report publicly on G20 adherence to their undertakings on resisting protectionism and promoting global trade and investment.” See OECD, WTO, UNCTAD, *Report on G20 Trade and Investment Measures \*3* (2009), online at [http://www.unctad.org/en/docs/wto\\_oecd\\_unctad2009\\_en.pdf](http://www.unctad.org/en/docs/wto_oecd_unctad2009_en.pdf) (visited Oct 16, 2011); OECD, WTO, UNCTAD, *Report on G20 Trade and Investment Measures (September 2009 to February 2010)* (2010), online at [http://www.unctad.org/en/docs/wto\\_oecd\\_unctad2010d1\\_en.pdf](http://www.unctad.org/en/docs/wto_oecd_unctad2010d1_en.pdf) (visited Oct 16, 2011).

<sup>131</sup> MDG Gap Task Force, *The Global Partnership for Development at a Critical Juncture* 31 (United Nations 2010), online at [http://www.un.org/en/development/desa/policy/mdg\\_gap/mdg\\_gap2010/mdg8report2010\\_en\\_gw.pdf](http://www.un.org/en/development/desa/policy/mdg_gap/mdg_gap2010/mdg8report2010_en_gw.pdf) (visited Oct 16, 2011) (“[T]he goal set by the G-20 to conclude the negotiations in 2010 appears unrealizable, and no new deadline has been set.”).

<sup>132</sup> *Toronto Summit Declaration*, ¶ 38 (cited in note 106).

<sup>133</sup> *Seoul Summit Declaration*, ¶ 43 (cited in note 106).

reach the Millennium Development Goals<sup>134</sup> and to work towards a successful plan to cope with climate change.<sup>135</sup>

The Progress Report following the London Summit attests to the G20's efforts to harness the resources of various TRNs. With the ongoing prompting and guidance of the G20, these networks kept generating various regulatory prototypes. For example, the BCBS issued final capital requirements standards for resecuritizations and enhanced risk management requirements around structured products and off-balance sheet activities.<sup>136</sup> IOSCO published interim recommendations about regulatory approaches to be implemented in the securitization markets.<sup>137</sup> Subsequently, IOSCO finalized its report on *Good Practices in Relation to Investment Managers Due Diligence When Investing in Structured Finance Instruments*.<sup>138</sup>

Motivated by the success of the London Summit, the Pittsburgh Summit (2009) resulted in even more ambitious blueprints.<sup>139</sup> The leaders officially ordained the G20 as the premier forum for international economic coordination.<sup>140</sup> They stressed the importance of increasing the representation of emerging-market countries at the IMF,<sup>141</sup> as well as making specific commitments on a host of new policy areas, including economic development and the environment.<sup>142</sup> In addition to reforming the IMF, the Summit announced plans for reform of the development banks. Specifically, the G20 called upon the World Bank to strengthen its focus on food security, human

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<sup>134</sup> Recovery and Reform, ¶ 25 (cited in note 120).

<sup>135</sup> Id at ¶ 28.

<sup>136</sup> G20, *Progress Report on the Actions of the London and Washington G20 Summits*, ¶ 48 (2009), online at [http://www.g20.org/Documents/20090905\\_G20\\_progress\\_update\\_London\\_Fin\\_Mins\\_final.pdf](http://www.g20.org/Documents/20090905_G20_progress_update_London_Fin_Mins_final.pdf) (visited Oct 16, 2011) (*London and Washington Progress Report*). For the prototypes, see BCBS, *Enhancements to the Basel II Framework* (July 2009), online at <http://www.bis.org/publ/bcbs157.pdf> (visited Oct 20, 2011); BCBS, *Revisions to the Basel II Market Risk Framework* (July 2009), online at <http://www.bis.org/publ/bcbs158.pdf> (visited Oct 20, 2011); BCBS, *Guidelines for Computing Capital Risk in the Trading Book* (July 2009), online at <http://www.bis.org/publ/bcbs159.pdf> (visited Oct 20, 2011).

<sup>137</sup> See G20, *Progress Report*, ¶ 48 (cited in note 137); IOSCO, *Unregulated Financial Markets and Products* (2009), online at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD290.pdf> (visited Oct 20, 2011).

<sup>138</sup> IOSCO, *Good Practices in Relation to Investment Managers' Due Diligence When Investing in Structured Finance Instruments* (2009), online at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD300.pdf> (visited Oct 20, 2011).

<sup>139</sup> The Leaders announced the summit as turning the page "on the era of irresponsibility." *The Pittsburgh Summit*, Preamble ¶ 1 (cited in note 106).

<sup>140</sup> Id at ¶ 19.

<sup>141</sup> Id at ¶ 20.

<sup>142</sup> See, for example, id at Annex ¶ 5.

development, economic growth for the poor, and financing a green economy.<sup>143</sup> The emphasis of the Leaders' Statement was on forward-looking, sustainable development, launching the *Framework for Strong, Sustainable, and Balanced Growth*.<sup>144</sup> In ushering in these ambitious blueprints, the G20 leaders attempted to coordinate, cross-link, and manage various networks and entities. For example, leaders

ask[ed] the IMF to assist our Finance Ministers and Central Bank Governors in this process of mutual assessment by developing a forward-looking analysis of whether policies pursued by individual G-20 countries are collectively consistent with more sustainable and balanced trajectories for the global economy, and to report regularly to both the G-20 and the International Monetary and Financial Committee (IMFC), building on the IMF's existing bilateral and multilateral surveillance analysis, on global economic developments, patterns of growth and suggested policy adjustments. Our Finance Ministers and Central Bank Governors will elaborate this process at their November meeting and we will review the results of the first mutual assessment at our next summit.<sup>145</sup>

With respect to its efforts on energy and sustainable development, the G20 tapped into pre-existing entities. "We request relevant institutions, such as the IEA, OPEC, OECD, and World Bank, provide an analysis of the scope of energy subsidies and suggestions for the implementation of this initiative and report back at the next summit."<sup>146</sup>

The G20 progress reports play an important role in "monitoring" and moving blueprints forward. The progress reports closely detail the work of BCBS, the FSB, the finance ministers, IAIS, IOSCO, IASB, and the Bank for International Settlements (BIS), among others.<sup>147</sup> For example, one progress report notes the pressing need for supervision and monitoring by nearly every network to combat systemic risk.<sup>148</sup> It chronicles various TRN efforts, such as the IOSCO's *Objectives and Principles of Securities Regulation* (recognizing the need to confront systemic risk); the BCBS's investigation of systemic funding liquidity risks; the FSB's and IMF's monitoring of data gaps; and the IAIS's beginning investigation of systemic risks.<sup>149</sup>

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<sup>143</sup> *The Pittsburgh Summit*, ¶¶ 1, 24–29 (cited in note 106).

<sup>144</sup> Id at ¶ 5.

<sup>145</sup> Id at ¶ 7.

<sup>146</sup> Id at ¶ 30.

<sup>147</sup> See, for example, *London and Washington Progress Report*, ¶¶ 65, 71, 82–88 (cited in note 136).

<sup>148</sup> Id at ¶ 65.

<sup>149</sup> Id at ¶¶ 49, 58, 64, 66.

The Toronto Summit (2010) reaffirmed the G20's role as a premier forum for international economic cooperation.<sup>150</sup> By accepting the recommendations from labor and employment ministers who had met in April,<sup>151</sup> the G20 demonstrated that it considered social implications of economic growth and development. It also marked the completion of a peer review mechanism, the Mutual Assessment Process (MAP),<sup>152</sup> under which the G20 can collectively evaluate each member's record of compliance with previous blueprints and regulatory prototypes. Relying upon IMF and World Bank assessments, the leaders suggested that a more ambitious plan would result in a speedier, more sustainable, and more equitable recovery.<sup>153</sup> Leaders agreed to "at least halve deficits by 2013 and stabilize or reduce government debt-to-GDP ratios by 2016."<sup>154</sup>

The evaluation of the Seoul Summit (2010) has been mixed. One of the pressing issues facing the leaders was currency imbalances; the summit failed to deliver a solution, although participants did pledge to develop prescriptive guidelines to address global imbalances.<sup>155</sup> Nonetheless, some critics have noted that the summit eased tensions amongst countries over quantitative easing and currency devaluation.<sup>156</sup> Given the incremental nature of the G20 operation, one might not be too disappointed with these efforts. Moreover, there were some additional concrete accomplishments that built upon prior work.<sup>157</sup> In particular,

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<sup>150</sup> *Toronto Summit Declaration*, Preamble ¶ 1 (cited in note 106).

<sup>151</sup> Id at Preamble ¶ 5.

<sup>152</sup> See IMF, *Factsheet: The G-20 Mutual Assessment Process (MAP)* (2011), online at <http://www.imf.org/external/np/exr/facts/g20map.htm> (visited Oct 16, 2011).

<sup>153</sup> *Toronto Summit Declaration* at Preamble ¶ 9 (cited in note 106).

<sup>154</sup> Id at Preamble ¶ 10.

<sup>155</sup> See generally Laurence Norman and Ian Talley, *No Deal: Seoul's G20 Summit Fails to Deliver on Currencies, Trade Imbalances* (The Australian Nov 12, 2010), online at <http://www.theaustralian.com.au/business/markets/no-deal-seouls-g20-summit-fails-to-deliver-on-currencies-trade-imbalances/story-e6frg926-1225952694281> (visited Oct 16, 2011); Chakravarthi Raghavan, *G20 Summit: No Accord on 'Currency Values' or Imbalances*, 244 Third World Resurgence 4 (discussing how the November 11–12 Seoul Summit was unable to establish a solution to the differences on currency values or global imbalances but agreed to develop guidelines).

<sup>156</sup> See *G20 Agree to Move toward More Market-Driven Exchange Rate* (CRI English Nov 12, 2010), online at <http://english.cri.cn/6826/2010/11/12/2741s604727.htm> (visited Oct 16, 2011) (noting that the Seoul Summit was held amid tensions among G20 nations on several issues, but the nations were able to find agreement on many controversial issues).

<sup>157</sup> *Preparations for the G20 Seoul Summit in November and its Agenda* (Kor IT Times May 10, 2010), online at <http://www.koreaittimes.com/story/8713/preparations-g20-seoul-summit-november-and-its-agenda> (visited Oct 16, 2011) (discussing the agenda for the G20 Seoul Summit and noting that 60 percent to 70 percent of the agenda built off the agendas from prior summit meetings).

the Summit officially endorsed Basel III and emphasized the continued importance of macro-prudential frameworks such as the IMF's MAP.<sup>158</sup>

The Seoul Summit perhaps best highlights both the successes and the limitations of the G20 in coordinating the many diverse networks at its disposal. It is true that the G20 was instrumental in merging its considerable political will and professional expertise during times of crisis. At the same time, however, the networks at its disposal act incrementally as they build upon a history of work and relevant epistemic communities. As the crisis has subsided, efforts to coordinate beyond the exigency have tended to face greater political hurdles.<sup>159</sup> Therefore, while the G20 continues to administer a host of networks as they

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<sup>158</sup> See *Did the G20 Lose Its Seoul?* (Seeking Alpha Nov 21, 2010), online at <http://seekingalpha.com/article/237890-did-the-g20-lose-its-seoul> (visited Oct 16, 2011) (highlighting the role of the G20 at the Seoul Summit and its endorsement of Basel III and restructuring of IMF). See also *The Basel iii Accord: The New Basel iii Framework*, online at <http://www.basel-iii-accord.com/> (visited Oct 16, 2011) (noting that the G20 leaders officially endorsed the Basel III framework at the November 2010 Seoul Summit); John Lipsky, *The Post-Summit Prospects for Policy Cooperation: An Address to the Economic Club of New York* (Nov 23, 2010), online at <http://www.imf.org/external/np/speeches/2010/112310.htm> (visited Oct 16, 2011) (discussing how the G20 Leaders affirmed the importance of MAP at the Seoul Summit).

<sup>159</sup> See Roya Wolverson, *G20's Tepid Economic Reform* (Council on Foreign Rel Oct 25, 2010), online at <http://www.cfr.org/economics/g20s-tepid-economic-reform/p23218> (visited Oct 16, 2011) ("The G20 finance meeting this weekend in Gyeongju, South Korea, failed to produce concrete measures to tame worsening trade and currency imbalances . . ."); Paul Krugman, *The Third Depression*, NY Times A19 (June 27, 2010) ("Around the world—most recently at last weekend's deeply discouraging G-20 meeting—governments are obsessing about inflation when the real threat is deflation, preaching the need for belt-tightening when the real problem is inadequate spending."); Simon Johnson, *Capital Failure* (NY Times Economix Blog Nov 11, 2010), online at <http://economix.blogs.nytimes.com/2010/11/11/capital-failure/?scp=1&sq=g20%20failure&st=cse> (visited Oct 16, 2011) ("The Group of 20 has completely failed to do what is necessary to rein in global megabanks—and to make them safer."); Anat Admati, et al, Letter, *Healthy Banking System is the Goal, Not Profitable Banks* (Fin Times Nov 9, 2010), online at <http://www.gsb.stanford.edu/news/research/admatiFTletter11.09.10.pdf> (visited Oct 16, 2011) ("Basel III bank regulation proposals that Group of 20 leaders will discuss fail to eliminate key structural flaws in the current system."); Stiglitz Criticizes Multiple Shortcomings of the G20 Agenda (Intl Fin Insts in Latin Am Monitor Sept 29, 2009), online at <http://ifis.choike.org/informes/1111.html> (visited Oct 16, 2011) ("The fact that the G20 allocated its funds almost entirely to the IMF means in part that the world does not yet have the right kind of institutions for effective crisis response."); Anders Åslund, *The Group of 20 Must Be Stopped* (Fin Times Nov 26, 2009), online at <http://www.ft.com/cms/s/0/37deaeb4-dad0-11de-933d-00144feabde0.html#ixzz1PU5zsLUi> (visited Oct 16, 2011) ("[T]he G20 actually violates fundamental principles of international co-operation by arrogating for itself important financial decisions that should be shared by all countries. In so doing it also emasculates the sovereign rights of small countries that have long been the prime defenders of multilateralism and international law as well as the foremost policy innovators."); Hans Dembowski, *Criticism of G20 Crisis Management* (D+C 51 Feb 2009), online at <http://www.inwent.org/ez/articles/087261/index.en.shtml> (visited Oct 16, 2011) ("Robert Zoellick, the president of the World Bank, bemoaned that, instead of safeguarding free trade as promised in November, some G20 members had taken protectionist steps.").

develop norms, which often gel into legal standards, the kind of political impetus characterizing the G20's initial success appears to be waning. As long as the G20 remains a political, and indeed diplomatic, entity as an "Executive Coordinator" amongst different networks,<sup>160</sup> the G20 might have to live with the disappointment resulting from a mismatch between professionalism and politics.

## B. Networks at Play

The G20's coordinated response to the global financial crisis provides a rich opportunity to analyze sophisticated network dynamics. Like-minded regulators from different governments in sector-specific TRNs display these dynamics while working towards goals set by the G20. At the same time, since any TRN may contain more than one sub-network, such as the BCBS sub-network of the banking network, the G20's coordination efforts within each network are vital. As discussed above, the evolution of the G20 into a premier international economic forum tracks the increasing manifestation of its coordination efforts to guide, facilitate, and even balance these intra-network dynamics. The following subsections examine four principal networks at play in the G20: (1) the banking network, (2) the securities network, (3) the insurance network, and (4) the trade network.

### 1. The banking network.

The most prominent TRN that the G20's Leaders Summit coordinates is the banking network. The G20 mobilized the pre-existing banking networks at the FSB, the IMF, and the BCBS. The G20 linked them all together to build a larger, more capable TRN. It then directed the network's activities during the financial crisis of 2008.

The G20 finance ministers and central bank governors formally established the banking network in 1999 at its ministerial. While the ministerial involves finance ministers and central bank governors, lower level officials meet prior to the ministerial to begin negotiations and to work on logistics and technical matters.<sup>161</sup> Much work goes on prior to ministerial meetings, including "two deputies meetings each year as well as extensive technical work, including an array of workshops, reports and case studies on specific subjects."<sup>162</sup> There are also meetings amongst "sherpas," who are the personal representatives of the

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<sup>160</sup> Claire R. Kelly, *Financial Crises and Civil Society*, 11 Chi J Intl L 505, 515 (2011). See also Alexandroff and Kirton, *The "Great Recession"* at 193 (cited in note 102) (referring to the group as an "implicit global executive committee").

<sup>161</sup> Nelson, *The G-20 and International Economic Cooperation* at \*7 (cited in note 95).

<sup>162</sup> Id.

ministers and meet both prior to and following the summits to attend to the details of the proposals and conclusions reached at the summits.

The FSB, while part of the banking network, could be considered a core coordinator amongst various financial networks within the G20, including the securities and insurance networks. This is especially true of its role within the banking network. During the 2008 crisis, the G20 instructed the FSB to take charge of coordinating exit strategies from bailout plans<sup>163</sup> and surveillance of the exit strategies.<sup>164</sup> The banking network also encompasses the World Bank<sup>165</sup> and the IMF, as both institutions utilize the networks of national finance ministers and central bankers.<sup>166</sup> The World Bank funds various projects in developing countries, such as “education, health, public administration, infrastructure, financial and private sector development, agriculture and

<sup>163</sup> Michael Crowley, *G-20 Background Note*, \*4 (The Pew Econ Poly Dept 2009), online at <http://fic.wharton.upenn.edu/fic/policy%20page/G-20-Note-Final.pdf> (visited Oct 16, 2011).

<sup>164</sup> London and Washington Progress Report, ¶¶ 35–38 (cited in note 136). The membership of the FSB is all G20 countries, the former FSF members, Spain, and the European Commission. The FSF preceded the FSB and was itself preceded by the Joint Forum on Financial Conglomerates. Slaughter, *A New World Order* at 135 (cited in note 2). The actual members are the central bank governors and finance ministers from Argentina, Australia, Brazil, Canada, China, France, Germany, Hong Kong SAR, India, Indonesia, Italy, Japan, Mexico, the Netherlands, Republic of Korea, Russia, Saudi Arabia, Singapore, South Africa, Spain, Switzerland, Turkey, UK, and US. FSB, *Links to FSB Members*, online at [http://www.financialstabilityboard.org/about/fsb\\_members.htm](http://www.financialstabilityboard.org/about/fsb_members.htm) (visited Oct 16, 2011). Also, the following organizations take part in the operation of the FSB: IOSCO, the Basel Committee, the BIS, the European Central Bank, the European Commission, the IMF, the OECD, the World Bank, the Committee on the Global Financial System, the Committee on Payment and Settlement Systems, the IAIS, and the IASB.

<sup>165</sup> The World Bank consists of five institutions: The International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA), and the International Centre for Settlement of Investment Disputes (ICSID). For a complete description of these five institutions, see Paul McClure, ed, *A Guide to the World Bank* 10–23 (World Bank 2003). The World Bank provides loans to developing countries to foster economic and social development. Articles of Agreement of the International Bank for Reconstruction and Development, Art I, § (i), 60 Stat 1440, 2 Treaty Ser No 134 (1944), amended 16 UST 1942, 606 Treaty Ser No 294; Articles of Agreement of the International Development Association, Preamble, 11 UST 2284, 439 Treaty Ser No 249 (1960). See The World Bank, *Articles of Agreement*, online at <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/BODEXT/0,,contentMDK:50004943~menuPK:64020045~pagePK:64020054~piPK:64020408~theSitePK:278036,00.html> (visited Oct 16, 2011). Member countries fund it through the purchase of capital stock.

<sup>166</sup> Anne Marie Slaughter points out that the World Bank’s and IMF’s weighted voting mechanisms elevate them somewhat as distinct entities rather than merely forums for a network. Slaughter, *A New World Order* at 22–23 (cited in note 2).

environmental and natural resource management.”<sup>167</sup> It also enforces certain principles and standards by conditioning the provision of those resources on the implementation of those principles and standards.<sup>168</sup>

The IMF carries out the G20’s action plans in the area of banking regulation mainly due to its expertise. The IMF facilitates global monetary cooperation using three tools:<sup>169</sup> economic surveillance, technical assistance, and lending.<sup>170</sup> First, the IMF *monitors* the economic health of member countries, alerting them to potential risks. Through its system of “bilateral surveillance,”<sup>171</sup> it annually evaluates all 186 of its member countries and then discusses with each country “whether there are risks to the economy’s domestic and external stability that would argue for adjustments in economic or financial policies.”<sup>172</sup> It may also engage in multilateral consultations involving global stability issues.<sup>173</sup> Its technical assistance focuses on a variety of topics, including “fiscal policy, monetary and exchange rate policies, banking and financial system supervision and regulation, and statistics.”<sup>174</sup> It also lends to countries in financial crisis. For example, the IMF recently loaned the Ukraine sixteen billion dollars to aid its

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<sup>167</sup> The World Bank, *About Us*, online at <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,pagePK:50004410~piPK:36602~theSitePK:29708,00.html> (visited Oct 16, 2011).

<sup>168</sup> See *Stiglitz Criticizes Multiple Shortcomings* (cited in note 159).

<sup>169</sup> See IMF, *Our Work*, online at <http://www.imf.org/external/about/ourwork.htm> (visited Oct 16, 2011).

<sup>170</sup> Carlo Gola and Francesco Spadafora, *Financial Sector Surveillance and the IMF \*3* (Working Paper No 247 2009), online at <http://www.imf.org/external/pubs/ft/wp/2009/wp09247.pdf> (visited Oct 16, 2011).

<sup>171</sup> Id. See also IMF, *The 2007 Surveillance Decision: Revised Operational Guidance \*9* (2009), online at <http://www.imf.org/external/np/eng/2009/062209.pdf> (visited Oct 16, 2011).

<sup>172</sup> IMF, *How We Do It*, online at <http://www.imf.org/external/about/howwedo.htm> (visited Oct 16, 2011).

<sup>173</sup> David Robinson, *IMF-Backed Plan to Cut Global Imbalances* (IMF Aug 7, 2007), online at <http://www.imf.org/external/pubs/ft/survey/so/2007/SurveyartA.htm> (visited Oct 16, 2011).

<sup>174</sup> IMF, *How We Do It* (cited in note 172).

banking industry.<sup>175</sup> It has also coordinated with the FSB to explore gaps in data collection at the direction of the G20.<sup>176</sup>

Another crucial pillar of the banking network is the BCBS, comprised of the central bank governors from twenty-seven countries.<sup>177</sup> Housed in the BIS, the BCBS “generates global public goods of information and expertise”<sup>178</sup> in the area of banking supervision. It drafts a variety of technical regulatory prototypes relating to capital adequacy and liquidity requirements of banks.<sup>179</sup> These regulatory prototypes, while non-binding in a formal legal sense, are highly respected due to the BCBS’s professional legitimacy. The G20 has invoked the BCBS’s competence and reputation and assigned it several roles in its action plans.<sup>180</sup>

The G20 has orchestrated these components of the banking network to produce both frameworks and more definite regulatory prototypes in its characteristically incremental manner. For example, in implementing the *Framework for Strong, Sustainable and Balanced Growth*, the G20 first tasked the IMF and the World Bank with a reporting function in the Finance Ministers’ Meeting

<sup>175</sup> IMF to Loan Ukraine Billions to Cope with Global Crisis (Radio Free Eur Radio Liberty Oct 27, 2008), online at [http://www.rferl.org/Content/IMF\\_To\\_Loan\\_Ukraine\\_Billions\\_To\\_Cope\\_With\\_Global\\_Crisis/1335307.html](http://www.rferl.org/Content/IMF_To_Loan_Ukraine_Billions_To_Cope_With_Global_Crisis/1335307.html) (visited Oct 16, 2011); IMF, *IMF Completes Second Review under Stand-By Arrangement with Ukraine and Approves US \$3.3 Billion Disbursement*, Press Release No 09/271 (July 28, 2009), online at <http://www.imf.org/external/np/sec/pr/2009/pr09271.htm> (visited Oct 16, 2011).

<sup>176</sup> See FSB, *The Financial Crisis and Information Gaps: Report to the G-20 Finance Ministers and Central Bank Governors* \*4 (2009), online at <http://www.imf.org/external/np/g20/pdf/102909.pdf> (visited Oct 16, 2011).

<sup>177</sup> Stefan Walter, *Basel II and Revisions to the Capital Requirements Directive: Remarks to the European Parliament Committee on Economic and Monetary Affairs on the BCBS’s Reform Program* (May 3, 2010), online at <http://www.bis.org/speeches/sp100503.htm> (visited Oct 16, 2011) (discussing the impact, calibration, and implementation of the BCBS).

<sup>178</sup> Michael S. Barr and Geoffrey P. Miller, *Global Administrative Law: The View from Basel*, 17 Eur J Int L 15, 22 (2006).

<sup>179</sup> See BIS, *About the Basel Committee* (cited in note 25) (noting that the BCBS develops guidelines and supervisory standards for banks, including standards on capital adequacy).

<sup>180</sup> See G20, *Washington Declaration*, Action Plan at 3 (cited in note 107) (discussing that the BCBS “should study the need for and help develop firms’ new stress testing models, as appropriate”). See also G20, *Declaration on Strengthening the Financial System—London* \*4 (2009), online at [http://www.g20.org/Documents/Fin\\_Deps\\_Fin\\_Reg\\_Annex\\_020409\\_-\\_1615\\_final.pdf](http://www.g20.org/Documents/Fin_Deps_Fin_Reg_Annex_020409_-_1615_final.pdf) (visited Oct 16, 2011) (discussing the role of the BCBS in compensation and its position to strengthen international cooperation and international frameworks for prudential regulation); *The Pittsburgh Summit*, ¶ 13 (cited in note 106) (highlighting a way to strengthen the international financial regulatory system by building high quality capital and mitigating pro-cyclicality).

at St. Andrews, Scotland, in November 2009.<sup>181</sup> The Framework specified that the IMF must analyze how countries’ “respective national or regional policy frameworks fit together.”<sup>182</sup> The World Bank had been asked to report on development and poverty reduction.<sup>183</sup> The Framework also initiated a new “mutual assessment” process and constructed a detailed timetable for its operation.<sup>184</sup> Subsequently, at the Leaders Meeting in Toronto, Canada, in June of 2010, the G20 reviewed the policy proposal prepared by the IMF and moved forward on a consultative mutual assessment process. As part of this process, they developed a basket of policy options “to achieve stronger, more sustainable and more balanced growth.”<sup>185</sup>

Of course, the G20’s executive coordination reaches beyond the blueprint level: it also generates more concrete regulatory prototypes, such as the Basel III Accord. The development of Basel III eloquently demonstrates how the G20 coordinated the banking network to produce a regulatory prototype. The G20 Summit in Washington, DC, in November 2008, issued the “Washington Action Plan.” In the Plan, G20 leaders instructed the IMF and the expanded FSF to develop “recommendations,” which would eventually evolve into a new regulatory prototype on bank capital.<sup>186</sup> Upon receiving this instruction, the FSF and its members immediately focused on the bank capital adequacy ratio. The G20 Leaders also agreed that the BCBS would provide new guidelines for harmonized capital requirements by the end of 2009.<sup>187</sup>

The Basel regulatory prototypes aim to use “capital adequacy” requirements to minimize systemic banking risks.<sup>188</sup> Every bank takes on a risk when it makes a loan or other financial instrument that the bank will lose money: for example, the borrower may not repay the loan (“settlement risk”) or the asset may decrease in value, for example, because of changes in interest rates (“market risk”).<sup>189</sup> Because banks and other financial institutions engage in so

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<sup>181</sup> G20, *Communiqué: Meeting of Finance Ministers and Central Bank Governors*, ¶ 3 (2010), online at <http://www.g20.utoronto.ca/2010/g20finance100423.html> (visited Oct 16, 2011). The G20 Pittsburgh summit also committed to reduce fossil fuel energy subsidies. See *The Pittsburgh Summit*, ¶ 29 (cited in note 106).

<sup>182</sup> *The Pittsburgh Summit*, ¶ 5 (cited in note 106)

<sup>183</sup> Id.

<sup>184</sup> Id at ¶ 6–7.

<sup>185</sup> *Toronto Summit Declaration*, ¶ 8 (cited in note 106).

<sup>186</sup> G20, *Progress Report on the Actions of the Washington Action Plan*, ¶ 8 (2009), online at [http://www.g20.org/Documents/FINAL\\_Annex\\_on\\_Action\\_Plan.pdf](http://www.g20.org/Documents/FINAL_Annex_on_Action_Plan.pdf) (visited Oct 16, 2011).

<sup>187</sup> Id at ¶ 13.

<sup>188</sup> See Hal S. Scott, *International Finance: Transactions, Policy, and Regulations* 414–73 (Foundation 17th ed 2010) (discussing capital adequacy regulation in the Basel Accords).

<sup>189</sup> Id at 461–62 (discussing banks’ risks associated with their securities operations).

many transactions with each other, insolvency at one bank may cause such bank to default on loans it owes to other banks, creating a domino effect of insolvencies. The risk that one bank's financial troubles will spread to other banks is "systemic" risk.<sup>190</sup> Capital adequacy requirements try to mitigate systemic risk by requiring banks to keep a percentage of their outstanding loans and other assets available, so that if a settlement or market risk is realized, the bank stays solvent and does not default on obligations to other institutions. "Risk-weighting" requires banks to keep in their reserves a larger percentage of the value of loans that have higher settlement or market risks than they are required to keep for lower-risk loans.<sup>191</sup> To understand the role of capital adequacy standards one must remember that when a highly leveraged firm suffers a loss, creditors tend to withdraw funding, which might require the firm to sell off assets, which may precipitate further losses.<sup>192</sup> If other firms are counterparties or hold similar assets, systemic risk increases and capital dries up. Regulators who prefer greater capital requirements see these capital requirements as buffers against those losses that might precipitate a crisis.

Admittedly, the BCBS's role in capital adequacy started long before the 2008 crisis. Prior to the 2008 crisis the BCBS developed Basel I and Basel II. Both Basel I and Basel II provided capital buffers, yet failed to prevent the 2008 crisis.<sup>193</sup> Some have suggested that the failure of Basel I and Basel II can be traced to the fact that in each, the needed buffer was tied to an individual firm and not to the systemic relationship amongst firms.<sup>194</sup> Moreover, a buffer, which some critics would suggest only provides a second-best solution, might be either too costly or ineffective.<sup>195</sup> The best solution, they would argue, is to force banks

<sup>190</sup> Id at 461 (defining "systemic risk").

<sup>191</sup> Id at 423.

<sup>192</sup> Viral V. Acharya, Nirupama Kulkarni, and Matthew Richardson, *Capital, Contingent Capital, and Liquidity Requirements* in Viral V. Acharya, et al, eds, *Regulating Wall Street: The Dodd-Frank Act and the New Architecture of Global Finance* 143, 143–45 (Wiley 2011).

<sup>193</sup> Id at 143–44.

<sup>194</sup> Id at 145–46.

<sup>195</sup> WSBI-ESBC, *Position Regarding the Basel Consultation on a "Countercyclical Capital Buffer Proposal"* \*\*6–7 (2010), online at [http://www.wsbi.org/uploadedFiles/Position\\_papers/0992-WSBI-ESBG%20Position%20regarding%20the%20Basel%20consultation%20on%20a%20E%20%99CC%20buffer%20proposal%20%9D%20\\_BCBS%20172\\_.pdf](http://www.wsbi.org/uploadedFiles/Position_papers/0992-WSBI-ESBG%20Position%20regarding%20the%20Basel%20consultation%20on%20a%20E%20%99CC%20buffer%20proposal%20%9D%20_BCBS%20172_.pdf) (visited Oct 16, 2011) ("An inappropriate level of regulatory requirements (i.e., too low or too high capital buffers) might prove to be either inefficient or excessively expensive. Because capital is costly and because investors in times of crisis are looking for secure investments, we believe that there is a risk that the proposed buffers would turn into a set of new minimum requirements thereby missing the initial objective."); Building Societies Assn, *Our Response to Two Basel Committee Consultations: Strengthening the Resilience of the Banking Sector (CP 164) and International Framework for Liquidity Risk Measurement, Standards and Monitoring (CP165)* \*5 (2010), online at <http://www.bis.org/publ/bcbs165/tbsa.pdf> (visited Oct 16, 2011) ("Another unintended

to internalize the cost of systemic risk.<sup>196</sup> Basel III, arguably, merely tinkers with the model established in Basel I and Basel II. It does not force banks to internalize the cost of risk, and indeed some critics would contend that Basel III encourages firms to avoid its strictures by seeking a shadow-banking regime, which tends to create systemic risk.<sup>197</sup> Thus, at first glance Basel III appears to be one of the failings of intra-network dynamics. The process of crafting capital adequacy regulation can be insular and limiting. The virtue of empathetic sympathization—that is, that it brings network actors together—also may stop these same actors from taking a step back to see the failures of their actions. If one starts with a failed product, then the outgrowth of future intra-network dynamics will arguably be more failure. Thus, the network dynamics involved in Basel III might lead to more, not less, failure (if one views Basel I and Basel II as flawed products).

Apart from the controversial merits, or demerits, of Basel III, it is still worth examining the developments leading to Basel III to evaluate fully the G20's coordination efforts as well as the intra-network dynamism. The BCBS's goal for Basel III was to hedge better against systemic losses by providing for greater capital requirements, enhanced liquidity, and countercyclical buffers.<sup>198</sup> Still, disagreements arose over what types of investment qualified as "capital" and what percentage of assets needed to be held as capital.<sup>199</sup> The G20 prodded the BCBS along through coordinating the work of the BCBS and other entities such as the FSB, the IMF, and IOSCO, using a combination of action plans

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consequence of too costly liquidity requirements will be to push banks into higher risk business to compensate for holding low margin, or unprofitable assets, clearly not the intention of the proposed rules."); Building Societies Assn, *Independent Commission on Banking: Call for Evidence* \*2 (2010), online at <http://bankingcommission.independent.gov.uk/wp-content/uploads/2011/01/Building-Society-Association-Issues-Paper-Response.pdf> (visited Oct 16, 2011) ("Overall, the Commission must decide what it is trying to optimise, or whether some sort of second best solution, for example relying on capital buffers, is sufficient.").

<sup>196</sup> Acharya, Kulkarni, and Richardson, *Liquidity Requirements* at 151 (cited in note 192).

<sup>197</sup> Id at 144.

<sup>198</sup> BCBS, *Basel III: A Global Regulatory Framework for More Resilient Banks and Banking Systems*, \*\*2–7 (2010), online at <http://www.bis.org/publ/bcbs189.pdf> (visited Oct 16, 2011) (discussing erosion of quality of capital which led to the 2007 financial crisis and listing Basel Committee's goals for Basel III).

<sup>199</sup> IFAM Group, *Basel III*, online at <http://www.ifamgroup.com/basel-iii/> (visited Oct 16, 2011) ("[T]he industry argues that the committee is going overboard in many areas and doing so in ways that will significantly, and unnecessarily, raise the cost of providing loans and other banking services. . . . Banks in every country gain considerable benefit from at least one of the balance sheet items that will no longer count as capital and therefore put forth arguments as to why they should continue to count.").

followed by progress reports.<sup>200</sup> By the Pittsburgh Summit in September 2009, the G20 members agreed on an initial definition of “capital,” though how that definition would apply to certain hybrid equities was unresolved. The G20 then instructed the BCBS to issue concrete proposals to “raise the consistency and transparency of the Tier 1 capital base”<sup>201</sup> and harmonize the definition of capital across jurisdictions by the end of 2009, conduct an impact assessment at the beginning of 2010, and complete the task by the end of 2010.<sup>202</sup>

The making of the new bank capital requirements intensified after the G20 Pittsburgh Summit. By the G20 Toronto Meeting in June, 2010, the BCBS had undertaken a comprehensive “bottom-up” quantitative impact assessment as well as a detailed “top-down” macroeconomic impact assessment of the bank capital requirements.<sup>203</sup> Meanwhile, the guidelines for defining “capital” took more solid shape. These newer regulations provided more detail regarding different types of bank equity, and they required banks to hold substantially more equity than had been proposed in the initial guidelines agreed to at Pittsburgh. In September 2010, the BCBS finally announced its new capital requirements, Basel III, which established a minimum common equity requirement of 7 percent as well as an additional counter-cyclical buffer including up to 2.5 percent of risk-weighted assets. The G20 members endorsed Basel III at the Seoul Summit in November 2010. Notably, at the same time, the G20 leaders and the banking network encouraged states to implement Basel II.<sup>204</sup>

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<sup>200</sup> The G20 Leaders prodded the various agencies through a combination of goal setting and reporting. The Leaders would set goals for particular summits for the various TRNs and would situate these goals in the context of a larger plan of action. The BCBS goals would be part of an overall plan for prudential regulation for example. By charting the plan of action and the progress on each action item, the G20 effectively prodded the TRNs to move forward with their work. See, for example, *London and Washington Progress Report* (cited in note 136); *Progress Report on the Washington Action Plan* (cited in note 186); G20, *Progress Report on the Actions to Promote Financial Regulatory Reform* (2009), online at [http://www.g20.org/Documents/pittsburgh\\_progress\\_report\\_250909.pdf](http://www.g20.org/Documents/pittsburgh_progress_report_250909.pdf) (visited Oct 16, 2011) (*Pittsburgh Progress Report*).

<sup>201</sup> *Pittsburgh Progress Report*, ¶ 10 (cited in note 200).

<sup>202</sup> Id.

<sup>203</sup> G20, *Progress Report on the Economic and Financial Actions of the London, Washington and Pittsburgh G20 Summits Prepared by Korea, Chair of the G20*, ¶ 56 (2010), online at [http://www.g20.org/Documents/2010/07/July\\_2010\\_G20\\_Progress\\_Grid.pdf](http://www.g20.org/Documents/2010/07/July_2010_G20_Progress_Grid.pdf) (visited Oct 16, 2011) (*Progress Report on the Previous Summits*).

<sup>204</sup> Letter from Michel Pébereau and Clemens Börsig, members of European Financial Services Round Table, to Christine Lagarde, Minister of Finance in France (Feb 16, 2011), online at <http://www.efr.be/documents/news/75.2011.02.%20EFR%20Letter%20to%20G20%20Finance%20Minister%20Lagarde%2016.02.2011.pdf> (visited Oct 16, 2011) (urging G20 commitment to implement Basel II and III). See also *Seoul Summit Declaration* (cited in note 106).

The process of developing Basel III required several points of position-shifting and reconciliation where we could expect to see intra-network dynamics at work. First, reports indicate that German and French officials had concerns that the Basel III standards would be too stringent and require implementation too quickly.<sup>205</sup> One proposal attributed to the US and the UK was to compromise on the scope of the standards by tinkering with the definition of “capital,” specifically to exclude minority interests of financial institutions held by banks.<sup>206</sup> Indeed, some saw the willingness of the US and UK to be persuaded as evidence of their belief in the global approach and the legitimacy that had been invested in it.<sup>207</sup> Further, while the Basel III timetable has been criticized as too long, some have pointed to the need to compromise on this issue due to the state of the recovery in some countries as well as the need for some (particularly European) banks to restructure, given the new capital definitions.<sup>208</sup> Some issues, such as whether and how to recognize new capital instruments<sup>209</sup> and the establishment of buffers<sup>210</sup> remained unresolved. These unresolved issues represent a limit of the G20’s coordination, at least at this moment.<sup>211</sup>

At the same time, the incremental formation of Basel III also offers an excellent avenue for locating the intra-network dynamics leading up to this regulatory prototype created by the banking network. First of all, the network collaboration in this highly professional area would not be possible without the widely shared, if not uniform, professional backgrounds among network participants. Government officials from different countries’ finance ministries and central banks spoke a similar, if not identical, language, similar enough to communicate with each other. They understand what the terms “Tier I capital” and “risk capture” mean. This expert sympathization among network participants expands any otherwise local regulatory dialogue into a multilateral horizon so that like-minded regulators can collaborate on the eventual formulation of a regulatory product, such as Basel III.

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<sup>205</sup> Yalman Onaran and Simon Clark, *European Banks Poised to Win Reprieve on Capital Rules* (Bloomberg July 12, 2010), online at <http://www.bloomberg.com/news/2010-05-16/geithner-meeting-barnier-over-basel-iii-creates-pressure-on-banks-capital.html> (visited Oct 16, 2011).

<sup>206</sup> Id.

<sup>207</sup> Id.

<sup>208</sup> Charles Freeland, *Basel III Standards for Banks’ Capital and Liquidity Is on Track* (G+ Oct 9, 2010), online at <http://www.glgroupl.com/News/Basel-III-standards-for-banks-capital-and-liquidity-is-on-track-50915.html> (visited Oct 16, 2011).

<sup>209</sup> Id. See also BCBS, *Proposal to Ensure the Loss Absorbency of Regulatory Capital at the Point of Non-Viability* \*1 (2010), online at <http://www.bis.org/publ/bcbs174.pdf> (visited Oct 16, 2011).

<sup>210</sup> See Freeland, *Basel III Standards for Banks’ Capital and Liquidity Is on Track* (cited in note 208).

<sup>211</sup> See note 159.

Admittedly, not every dialogue leads to consensus or convergence. There may be disagreements on a number of issues at a professional level. To narrow the gap of these disagreements among them, some participants attempt to “persuade” other members to accept their positions. When this attempt to persuade occurs simultaneously from both directions, two parties engage in a “negotiation.” In the banking network, Franco-German regulators persuaded their US and UK counterparts to exclude minority interests of financial institutions held by banks from the definition of “capital.” In return, the US and UK regulators were able to persuade their European counterparts to accept Basel III despite the latter’s concern about implementation due to the new capital definition.<sup>212</sup>

Unsurprisingly, developing countries played a relatively small role, if any, in the establishment of Basel III, mainly due to their limited influence in this area. Nonetheless, they decided to remain engaged in order to preserve their position in the network. This is a good example of willing marginalization. Finally, most participants engaged in deliberation on Basel III despite the fact that they could not resolve all the issues on the table. Some issues remain unresolved. Nonetheless, network participants understood the incremental nature of this network operation and were able to hammer out a modest yet still desirable outcome. The G20 network process that created Basel III typifies “responsive engagement” in that it signifies that the network participants are still willing to negotiate, at least on some issues, even if they may fail to reach agreement on others at this time. Such responsive engagement is vital in preserving momentum in regulatory dialogue regardless of any immediate regulatory end product. In sum, the banking network participants’ understanding of responsive engagement enabled the network operation to move forward. Possibly, these same participants may produce Basel IV or V later on as their networking continues.

The G20 Leaders’ role in the process was to set specific targets (that is, harmonization of definitions), and objectives (guidelines) and deadlines. It then situated these goals in the context of a larger plan of action and reported on the progress. This strategy of setting specific tasks for the TRNs and then reporting on the process facilitated the incremental work of the network dynamics.

In sum, to deliver a new regulatory prototype, such as Basel III, the G20 choreographed various component networks, such as the IMF and the BCBS, in such a way that the TRNs could be geared toward a collective goal. Here, the G20, as an executive coordinator, was able to mobilize its unique political capital

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<sup>212</sup> See Elena Logutenkova and Fabio Benedetti-Valentini, *BNP Grows to Biggest Bank As France Says Size Doesn't Matter* (Bloomberg Nov 4, 2010), online at <http://www.bloomberg.com/news/2010-11-03/bnp-grows-to-biggest-bank-as-france-says-size-doesn-t-matter.html> (visited Oct 16, 2011).

in orchestrating these components, generate various regulatory prototypes, and eventually confirm them. At the same time, however, due to the largely insular nature of intra-network dynamics, the banking network operation may still be insular and unresponsive to external debates or criticisms on the merits of its regulatory products such as Basel III.

## 2. The securities network.

The G20 makes use of IOSCO, a broad and active network of national securities regulators.<sup>213</sup> IOSCO develops and promotes “consistent standards of regulation, oversight and enforcement in order to protect investors, maintain fair, efficient and transparent markets, and seek to address systemic risks.”<sup>214</sup> It operates through several committees, the most important of which is the Technical Committee.<sup>215</sup>

Over the years IOSCO has developed a number of important standards and best practices: accounting standards,<sup>216</sup> core standards to facilitate cross-border offerings and listings,<sup>217</sup> global investment performance standards,<sup>218</sup>

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<sup>213</sup> See IOSCO, online at <http://www.iosco.org> (visited Oct 16, 2011). Currently IOSCO has 201 members: 115 ordinary members, 11 associate members, and 75 affiliate members. *IOSCO: Membership and Committees List*, online at <http://www.iosco.org/lists/> (visited Oct 16, 2011). It has three categories of membership: ordinary, associate, and affiliate. See id. Ordinary membership is open to primary national securities regulators. *About IOSCO: Membership Categories and Criteria*, online at <http://www.iosco.org/about/index.cfm?section=membership> (visited Oct 16, 2011). As ordinary members, national securities regulators each have one vote in the Presidents’ Committee’s Annual Conference. Associate members are other securities and or futures regulators in a jurisdiction. Associate members have no vote and are not eligible for the Executive Committee; however, they are members of the Presidents’ Committee. Id. Affiliate members are self-regulatory bodies, which are not members of Presidents’ Committee, and are without a vote or eligibility for the Executive Committee. Id.

<sup>214</sup> IOSCO, *About IOSCO: General Information*, online at <http://www.iosco.org/about> (visited Oct 16, 2011).

<sup>215</sup> The Technical Committee’s work covers multinational disclosure and accounting, regulation of secondary markets, regulation of market intermediaries, enforcement and the exchange of information, investment management, and credit rating agencies. IOSCO, *About IOSCO: Working Committees*, online at <http://www.iosco.org/about/index.cfm?section=workingcomts> (visited Oct 16, 2011).

<sup>216</sup> The Technicacal Comm of the IOSCO, *Statement on Accounting Standards Development and Enforcement* (Oct 21, 2008), online at <http://www.iasplus.com/iosco/0810techcommittee.pdf> (visited Oct 16, 2011).

<sup>217</sup> IOSCO, *IASC Standards: Assessment Report \*4* (2000), online at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD109.pdf> (visited Oct 16, 2011).

<sup>218</sup> Emerging Markets Comm of the IOSCO, *Performance Presentation Standards for Collective Investment Schemes \*2* (Dec 2000), online at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD114.pdf> (visited Oct 16, 2011).

auditing standards,<sup>219</sup> disclosure standards to facilitate cross-border offerings and listings by multinational issuers,<sup>220</sup> and international standards for central counterparty clearing organizations.<sup>221</sup> These standards and best practices are widely adopted by the leading financial regulators and are, as a result, followed by transnational firms.<sup>222</sup>

IOSCO's engagement with the G20's crisis management began when IOSCO sent an open letter to the G20, applauding its efforts to deal with the crisis and offering assistance.<sup>223</sup> Its Technical Committee created a task force to support the G20's efforts.<sup>224</sup> It undertook a number of tasks in connection with the G20's efforts, including its collaboration with the BCBS and the IAIS as part of a Joint Forum that resulted in the report on the *Differentiated Nature and Scope of Financial Regulation*.<sup>225</sup>

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<sup>219</sup> IOSCO, *Statement on International Auditing Standards* (Nov 9, 2007), online at <http://www.iasplus.com/iosco/0711isastatement.pdf> (visited Oct 16, 2011).

<sup>220</sup> IOSCO, *A Resolution of the Presidents' Committee on IOSCO Endorsement of Disclosure Standards to Facilitate Cross-Border Offerings and Listings by Multinational Issuers* (1998), online at <http://www.iosco.org/library/resolutions/pdf/IOSCORES17.pdf> (visited Oct 16, 2011).

<sup>221</sup> IOSCO, *Recommendations for Central Counterparties* \*2 (2004), online at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD176.pdf> (visited Oct 16, 2011).

<sup>222</sup> IOSCO, *IOSCO Publishes Regulatory Standards for Funds of Hedge Funds* (Sept 14, 2009) online at <http://www.iosco.org/news/pdf/IOSCONEWS166.pdf> (visited Oct 16, 2011).

<sup>223</sup> Jane Diplock, Christopher Cox, and Guillermo Larraín, Open Letter to the G20 (Nov 12, 2008), online at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD282.pdf> (visited Oct 16, 2011).

<sup>224</sup> IOSCO, *IOSCO Technical Committee Launches Task Force to Support G-20 Aims* (Nov 25, 2008), online at [www.iosco.org/news/pdf/IOSCONEWS134.pdf](http://www.iosco.org/news/pdf/IOSCONEWS134.pdf) (visited Oct 16, 2011).

<sup>225</sup> See Joint Forum, *Review of the Differentiated Nature and Scope of Financial Regulation: Key Issues and Recommendations* \*4 (Jan 2010), online at [http://www.iaisweb.org/\\_\\_temp/Review\\_of\\_the\\_Differentiated\\_Nature\\_and\\_Scope\\_of\\_Financial\\_Regulation\\_\\_January\\_2010.pdf](http://www.iaisweb.org/__temp/Review_of_the_Differentiated_Nature_and_Scope_of_Financial_Regulation__January_2010.pdf) (visited Oct 16, 2011) (containing core principles as well as cross-sectoral standards to avoid systemic risk and regulatory arbitrage); *Progress Report on the Previous Summits*, ¶ 63 (cited in note 203). The report focused on underwriting standards as well as hedge fund activities. Each of the networks involved, including IOSCO, were tasked with developing principles to respond to regulatory deficits while the FSB oversaw policy implementation. IOSCO, for example, in June 2010 issued its “revised Objectives and Principles of Securities Regulation to incorporate eight new principles.” Id at ¶ 66. The resulting report illustrates the long-standing collaboration of IOSCO with Basel Committee as well as the IAIS over many years. The report relied on numerous prior reports and studies, including Joint Forum, *Supervision of Financial Conglomerates* (Feb 1999), online at [www.bis.org/publ/bcbs47.pdf](http://www.bis.org/publ/bcbs47.pdf) (visited Oct 18, 2011); Joint Forum, *Core Principles: Cross-Sectoral Comparison* (Nov 2001), online at [www.bis.org/publ/joint03.pdf](http://www.bis.org/publ/joint03.pdf) (visited Oct 18, 2011); Joint Forum, *Risk Management Practices and Regulatory Capital: Cross-Sectoral Comparison* (Nov 2001), online at [www.bis.org/publ/joint04.pdf](http://www.bis.org/publ/joint04.pdf) (visited Oct 18, 2011); Joint Forum, *Credit Risk Transfer* (Mar 2005), online at [www.bis.org/publ/joint13.pdf](http://www.bis.org/publ/joint13.pdf) (visited Oct 18, 2011); Joint Forum, *Regulatory and Market Differences: Issues and Observations* (May 2006), online at [www.bis.org/publ/joint15.pdf](http://www.bis.org/publ/joint15.pdf); Joint Forum, *Customer Suitability in the Retail Sale of Financial Products and Services* (Apr 2008), online at [www.bis.org/publ/joint20.pdf](http://www.bis.org/publ/joint20.pdf) (visited Oct 18, 2011); Joint Forum, *Credit Risk Transfer*:

Most illustrative for our purposes though is IOSCO's engagement in the regulation of CRAs, both before and during the 2008 financial crisis, which reveals the use of intra-network dynamics over a period of time.

IOSCO's focus on CRAs emerged after the East Asian financial crisis and again after the failures of WorldCom and Enron in 2002. CRAs issue ratings that indicate only "the likelihood that a particular debt security will perform according to its terms."<sup>226</sup> While a high credit rating never meant that something was a good investment, the extent to which regulators, such as the SEC or the Banking Network in Basel II, referenced credit ratings infused them with credibility.<sup>227</sup> As is widely known now, this veneer of credibility created problems because there were real gaps in CRAs' regulation long before the most recent crisis.<sup>228</sup>

The IOSCO Technical Committee targeted the CRA gap starting in 2003 with a *Report of the Activities of Credit Rating Agencies*.<sup>229</sup> IOSCO also published a set of Principles Regarding the Activities of CRAs in 2003.<sup>230</sup> But critics questioned the sufficiency of these principles to address CRA problems stemming from Basel II's use of the ratings.<sup>231</sup> IOSCO responded with a *Code of Conduct Fundamentals for CRAs*, offering greater specificity with respect to such issues as conflicts of interest, independence, and transparency.<sup>232</sup> Interestingly, the rating agencies themselves got into the act, developing their own *Code of Professional Conduct* in the second half of 2005. Indeed, IOSCO's March 2009

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*Developments from 2005 to 2007* (July 2008), online at [www.bis.org/publ/joint21.pdf](http://www.bis.org/publ/joint21.pdf) (visited Oct 18, 2011); Joint Forum, *Stocktaking on the Use of Credit Ratings* (June 2009), online at [www.bis.org/publ/joint22.pdf](http://www.bis.org/publ/joint22.pdf) (visited Oct 18, 2011); and Joint Forum, *Report on Special Purposes Entities* (Sept 2009), online at [www.bis.org/publ/joint23.pdf](http://www.bis.org/publ/joint23.pdf) (visited Oct 18, 2011). The conclusions and recommendations are based upon this prior work of each of the networks working independently as well as the three working together through the Joint Forum.

<sup>226</sup> Karmel and Kelly, 34 Brooklyn J Intl L at 924–25 (cited in note 85). See also Standard & Poor's, *Guide to Credit Rating Essentials* \*\*3–4 (2010), online at [http://www.asifma.org/pdf/SP\\_CreditRatingsGuide.pdf](http://www.asifma.org/pdf/SP_CreditRatingsGuide.pdf) (visited Oct 18, 2011).

<sup>227</sup> Karmel and Kelly, 34 Brooklyn J Intl L at 925 (cited in note 85).

<sup>228</sup> See, for example, id at 925 ("The failure of the CRAs to promptly adjust ratings or forecast the demise of issuers that went bankrupt when the stock market technology bubble burst then led to scrutiny of their performance and the lack of government regulation.").

<sup>229</sup> The Technical Comm of the IOSCO, *Report on the Activities of Credit Rating Agencies* \*\*1–2 (2003), online at <http://www.fsa.go.jp/inter/ios/20030930/05.pdf> (visited Oct 16, 2011).

<sup>230</sup> The Technical Comm of the IOSCO, *IOSCO Statement of Principles Regarding the Activities of Credit Rating Agencies* (2003), online at <http://www.fsa.go.jp/inter/ios/20030930/02.pdf> (visited Oct 16, 2011).

<sup>231</sup> Karmel and Kelly, 34 Brooklyn J Intl L at 927 (cited in note 85).

<sup>232</sup> The Technical Comm of the IOSCO, *Code of Conduct Fundamentals for Credit Rating Agencies* \*\*3–4 (2004, revised May 2008), online at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD180.pdf> (visited Oct 16, 2011).

*Report Assessing CRAs* found that many of them had adopted codes of conduct that reflected IOSCO's *Code of Conduct Fundamentals*.<sup>233</sup>

In 2006, prior to the most recent crisis, the US Congress addressed perceived deficiencies in the CRA system. Following the IOSCO's *Code of Conduct* for CRAs, Congress passed the Credit Agency Reform Act of 2006 "which established a system of registration and regulation of [CRAs] and instructed the SEC to formulate implementing rules."<sup>234</sup> IOSCO's principles "focused on the quality of the ratings process, including updating of opinions, conflicts of interest, employee and analyst independence, and transparency."<sup>235</sup> The 2006 CRA Reform Act implemented these principles by, among other things, establishing a system of non-mandatory registration and imposing substantive requirements with respect to conflicts of interest, public information, and anticompetitive practices.<sup>236</sup> The Securities Exchange Commission (SEC) passed implementing rules. Among other things, the rules "prohibit credit raters from rating their own work, and ban employees who help determine a credit rating from negotiating any fees."<sup>237</sup>

Although IOSCO's CRA prototype had become hard law in the US, IOSCO continued elaborating its standards. It updated its *Code of Conduct* and issued a Consultation Report.<sup>238</sup> But critics persisted. In 2008, EU Commissioner Charles McCreevy called IOSCO's efforts toothless.<sup>239</sup> The EU pushed for and developed stricter standards for the regulation of CRAs, the strictest of any

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<sup>233</sup> *Progress Report on the Previous Summits*, ¶ 93 (cited in note 203).

<sup>234</sup> Karmel and Kelly, 34 Brooklyn J Intl L at 927 (cited in note 85). See also Credit Rating Agency Reform Act of 2006, 15 USC § 78o-7 (2006 & Supp 2010).

<sup>235</sup> Karmel and Kelly, 34 Brooklyn J Intl L at 927 (cited in note 85).

<sup>236</sup> Global Legal Information Network, *Credit Rating Agency Reform Act of 2006*, online at <http://www.glin.gov/view.action?glinID=190699> (visited Oct 16, 2011) (summarizing the Act, including registration system and requirements).

<sup>237</sup> EU Lawmakers Back Strict Rules on Credit Agencies (EurActiv Mar 25, 2009), online at <http://www.euractiv.com/en/financial-services/eu-lawmakers-back-strict-rules-credit-agencies/article-180606> (visited Oct 16, 2011).

<sup>238</sup> See The Technical Comm of the IOSCO, *Final Report: The Role of Credit Rating Agencies in Structured Finance Markets*, Annex A (2008), online at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD270.pdf> (visited Oct 16, 2011).

<sup>239</sup> Gillian Tett, *Unease as Regulators Call for More Control Over Ratings System* (Fin Times June 25, 2008), online at <http://www.ft.com/intl/cms/s/0/c0ee5928-424e-11dd-a5e8-0000779fd2ac.html#axzz1RMNi2Bxi> (visited Oct 16, 2011). It has been suggested that the EU wanted to break the dominance of the US credit rating agencies. Jim Brunsden, *Commission Plans to Get Tough With Rating Agencies* (EuropeanVoice.com June 3, 2010), online at <http://www.europeanvoice.com/article/2010/06/commission-plans-to-get-tough-with-rating-agencies/68104.aspx> (visited Sept 23, 2011).

jurisdiction.<sup>240</sup> The EU Parliament initially put the Committee of European Securities Regulators (CESR) at the center of a CRA registration system that included monitoring and implementation. The substantive provisions called for a review of business models and a decrease in the use of ratings by regulators.<sup>241</sup> The US balked at the extraterritorial application of the EU regulations.<sup>242</sup>

Once the 2008 crisis emerged, the G20 attempted to coordinate regulatory outcomes. Starting with the very first summit, the G20 called upon national regulators to improve CRA oversight. Previously, the US had pressed for greater cooperation, while the EU seemed committed to tougher regulation.<sup>243</sup> The G20, through the FSB, asked the US and EU to resolve significant inconsistencies among their CRA regulations.<sup>244</sup> The FSB also urged G20 countries to reduce the use of ratings as the dominant means of assessing risk. Adhering to the FSB's call, the Dodd-Frank Wall Street Reform and Consumer Protection Act eliminated references to credit ratings in several statutes and the EU is considering similar measures.<sup>245</sup> As a related matter, the BCBS has also been asked to address reducing the "use of external ratings in the regulatory capital framework."<sup>246</sup> Likewise, the FSB collects data on the measures taken by national authorities to reduce their reliance on ratings and to develop principles "for use by authorities in reducing their reliance on ratings."<sup>247</sup> The FSB committed itself to harmonizing CRA regulatory standards in this area.<sup>248</sup>

Throughout the crisis, the G20's coordinated work on CRAs continued. It reiterated its calls for improved regulatory oversight at the London, Pittsburg,

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<sup>240</sup> See *Reforming the Ratings Agencies: Will the U.S. Follow Europe's Tougher Rules?* (Knowledge@Wharton May 27, 2009), online at <http://knowledge.wharton.upenn.edu/article.cfm?articleid=2242> (visited Oct 16, 2011).

<sup>241</sup> The rules further provide the CRAs may not provide advisory services; must disclose the models, methodologies and key assumptions upon which ratings are based; must differentiate the ratings of complex products with a specific symbol; must publish an annual transparency report; must have at least two directors on their boards whose salary does not depend on the ratings agency's business performance; and must create an internal function to review the quality of their ratings. Id.

<sup>242</sup> *EU Lawmakers Back Strict Rules on Credit Agencies* (cited in note 237).

<sup>243</sup> Kristina St. Charles, Note, *Regulating Imperialism: The Worldwide Export of European Regulatory Principles on Credit Rating Agencies*, 19 Minn J Intl L 399, 419–46 (2010) (discussing EU's stricter CRA regulations and the differences from US regulations).

<sup>244</sup> *Progress Report on the Previous Summits*, ¶¶ 93–95 (cited in note 203).

<sup>245</sup> Id. See also Kevin Drawbaugh, *Global Regulators Urge Credit Rating Agency Curbs* (Reuters Oct 27, 2010), online at <http://www.reuters.com/article/2010/10/28/financial-regulation-credit-raters-idCNN2728165520101028> (visited Oct 16, 2011).

<sup>246</sup> *Progress Report on the Previous Summits*, ¶ 95 (cited in note 203).

<sup>247</sup> Id.

<sup>248</sup> Arner, Panton, and Lejot, 23 Pac McGeorge Global Bus & Dev L J at 40 (cited in note 240).

and Toronto Summits.<sup>249</sup> At the Seoul Summit, the G20 approved Basel III's recommendation to reduce reliance on CRAs.<sup>250</sup> IOSCO responded to this G20 goal with its May 2010 *Principles Regarding Cross-Border Supervisory Cooperation*.<sup>251</sup> IOSCO has monitored CRAs' adoption of codes of conduct consistent with IOSCO's *Code of Conduct Fundamentals for CRAs*, finding that more CRAs are adopting the IOSCO standards.<sup>252</sup> IOSCO is also monitoring the supervisory initiative of various jurisdictions in light of IOSCO's *CRA Principles*.<sup>253</sup>

Despite the G20's coordination, the network dynamics seem to have had limited success in moving the key players towards regulatory convergence. CRAs were originally unregulated.<sup>254</sup> The US started to move toward regulation after Enron collapsed in 2002, culminating in the 2006 Credit Rating Agency Reform Act.<sup>255</sup> In the EU, CRAs were likewise unregulated at first. In 2008, the EU decided to take a tough approach to CRA regulation, tougher than the regulations adopted by either IOSCO or the US. Therefore, one might observe that even before the onset of the financial crisis, the expert community saw the necessity of regulating CRAs. However, the resulting mixture of EU, US, and IOSCO regulatory standards betrays the scarcity of intra-network dynamics, in particular when compared to the banking network, as well as the difficulty of executive coordination by the G20.

The problem of conflicts of interests, which plagues the industry, is a case in point. Serious conflicts arose in the industry because issuers chose and paid the CRAs they used. A CRA that wanted business would be better off if it tended to give favorable ratings. Initially, this was not a big problem. As each CRA had an interest in preserving its professional reputation, it would not be advantageous for a CRA to risk its reputation when there was a sufficient supply

<sup>249</sup> See id (discussing the G20 and Washington Action Plan).

<sup>250</sup> Nagesh Narayana, *G20 Agrees on Reducing Reliance on CRA Ratings* (Intl Bus Times Nov 11, 2010), online at <http://www.ibtimes.com/articles/80745/20101111/basel-3-cra-bis-ratings.htm> (visited Oct 16, 2011).

<sup>251</sup> *Progress Report on the Previous Summits*, ¶ 46 (cited in note 203).

<sup>252</sup> Id at ¶ 93.

<sup>253</sup> Id.

<sup>254</sup> Claire A. Hill, *Regulating the Rating Agencies*, 82 Wash U L Q 43, 55–56 (2004) (explaining that the designation of a CRA by the SEC, through the use of a no action letter, merely meant that the CRA or Nationally Recognized Statistical Rating Organization was one that was accepted by the market place as a “recognized rating agency”).

<sup>255</sup> 15 USC § 78o-7; Hill, 82 Wash U L Q at 56–57 (cited in note 254) (explaining the rules centered around disclosure and prohibiting the SEC from regulating the substance of the CRA's ratings). The SEC followed up with rules focusing on record-keeping reports and procedures. Following some criticism, the SEC amended its rule to address transparency and conflicts of interest issues).

of potential customers (issuers) in the market.<sup>256</sup> Unfortunately, when it came to mortgage-related structured bonds, there were not as many issuers, and therefore there was an increased threat of conflicts.<sup>257</sup> All regulatory bodies recognize conflicts of interest as a problem. The expert community has been persuaded by common experience and understanding that there needs to be some external force that counteracts this inherent conflict. However, as each jurisdiction is developing its own course, intra-network dynamics, such as persuasion, negotiation, responsive engagement, and even strategic cooptation, appear to be absent for the time being.

For example, the US regulation under the Dodd-Frank Act seems weak when compared to EU efforts. While the Dodd-Frank Act prohibits CRAs from considering sales and marketing when arriving at a rating, it does little else to confront conflicts risks.<sup>258</sup> Instead, it calls for a two-year study to determine the feasibility of having another entity assign ratings to structured finance projects.<sup>259</sup> In contrast, the EU approach requires that an issuer not only supply information to the CRA it chooses so that the CRA can provide the rating, but that the issuer must also make that information available to all CRAs, allowing other CRAs to rate it and thus creating competition.<sup>260</sup> Another issue affecting conflicts of interest involves providing consultancy or advisory services to a rated entity or its affiliate. The EU prohibits the provision of such services.<sup>261</sup> As one commentator notes, this EU provision resembles the requirements of IOSCO's *Code of Conduct*.<sup>262</sup> Yet the US failed to adopt this type of provision in its 2006 legislation.<sup>263</sup> While the Dodd-Frank legislation did address the issue, it simply ordered the SEC to study the issue, rather than prohibiting the practice itself.<sup>264</sup>

Notably, however, the G20 has not given up on the matter. Its July 2010 Progress Report notes that "at the request of the FSB, the EU, US and Japan are continuing their discussions to resolve any significant inconsistencies or frictions

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<sup>256</sup> Edward I. Altman, et al, *Regulation of Rating Agencies*, in Acharya, et al, eds, *Regulating Wall Street* 443, 448 (cited in note 192).

<sup>257</sup> Id at 448–49.

<sup>258</sup> See Dodd-Frank, 15 USC §§ 78o-7(h)(3), 78u-4(b)(2).

<sup>259</sup> See id at § 78o-9.

<sup>260</sup> Altman, et al, *Regulation of Rating Agencies* at 460 (cited in note 256) (explaining EU regulation).

<sup>261</sup> St. Charles, 19 Minn J Intl L at 432 (cited in note 243) (citing Council Regulation 1060/2009, Annex I, § B(4) 2009 OJ (L 302) 1, 25).

<sup>262</sup> St. Charles, 19 Minn J Intl L at 432, citing IOSCO, *Code of Conduct Fundamentals for Credit Rating Agencies (Revised Code of Conduct)* § 2.5 (2004, revised May 2008).

<sup>263</sup> Id, citing Dodd-Frank, 15 USC § 78o-7(c)(2).

<sup>264</sup> 15 USC § 78o-9.

that may arise as a result of differences among their new CRA regulations.<sup>265</sup> At Seoul the Leaders approved the Basel III recommendation to reduce reliance on CRAs, but implementation remains with national jurisdictions.<sup>266</sup>

In sum, the securities network demonstrates the limited success, as measured in terms of regulatory convergence, of the G20's coordination. While the G20 did succeed in establishing a regulatory prototype calling for its members to duly regulate CRAs and minimize their reliance on CRAs, the level of national implementation has not been uniform. Notably, the relative scarcity of intra-network dynamics in this area, when compared to the banking network, may explain the current transatlantic gap in regulating CRAs, such as in the area of conflicts of interest.

### 3. The insurance network.

The insurance network resides in the IAIS, which brings together insurance regulators and supervisors from over 140 countries.<sup>267</sup> The IAIS develops best practices and core principles for insurance supervision.<sup>268</sup> Established in 1994 as a forum to develop international insurance norms,<sup>269</sup> the IAIS is composed of 190 members from 140 countries.<sup>270</sup> The Executive Committee, the governing body of the organization, is composed of fifteen representatives from different geographical regions.<sup>271</sup> Under the Executive Committee are four committees: a Technical Committee, an Implementation Committee, an Audit Committee, and a Budget Committee.<sup>272</sup> Under the Technical Committee are various working parties responsible for drafting IAIS standards.<sup>273</sup> The standards are best

<sup>265</sup> *Progress Report on the Previous Summits*, ¶ 94 (cited in note 203).

<sup>266</sup> See FSB, *Principles for Reducing Reliance on CRA Ratings* \*2 (2010), online at [http://www.financialstabilityboard.org/publications/r\\_101027.pdf](http://www.financialstabilityboard.org/publications/r_101027.pdf) (visited Oct 16, 2011).

<sup>267</sup> IAIS, *About the IAIS*, online at <http://www.iaisweb.org/About-the-IAIS-28> (visited Oct 18, 2011).

<sup>268</sup> Id.

<sup>269</sup> Elizabeth F. Brown, *The Development of International Norms for Insurance Regulation*, 34 Brooklyn J Int'l L 953, 957, 963 (2009).

<sup>270</sup> The NAIC and an insurance regulator from each of the fifty-six US jurisdictions serve as members. IAIS, *IAIS Members*, online at <http://www.iaisweb.org/IAIS-members-31> (visited Oct 18, 2011). See also Brown, 34 Brooklyn J Int'l L at 963 (cited in note 269).

<sup>271</sup> IAIS, *About the IAIS* (cited in note 267); Yoshi Kawai, *Remarks at the Royal Institute of International Affairs: IAIS Standards Setting Activities* \*10 (Feb 3, 2004) online at [http://www.iaisweb.org/\\_temp/IAIS\\_standard\\_setting\\_activities\\_Speech\\_by\\_Yoshihiro\\_Kawai.pdf](http://www.iaisweb.org/_temp/IAIS_standard_setting_activities_Speech_by_Yoshihiro_Kawai.pdf) (visited Oct 16, 2011).

<sup>272</sup> IAIS, *By-Laws*, Art 15(3) (2009), online at [http://www.iaisweb.org/\\_temp/By-laws\\_2009\\_edition\\_.pdf](http://www.iaisweb.org/_temp/By-laws_2009_edition_.pdf) (visited Oct 18, 2011).

<sup>273</sup> Kawai, *IAIS Standards Setting Activities* at \*10 (cited in note 271). After a working party drafts a document, it consults with other IAIS members and observers and then seeks approval from the

practices that “assist supervisors in assessing the practices that companies in their jurisdictions have in place.”<sup>274</sup> The Implementation Committee assists members by organizing training and seminars, developing implementation tools, facilitating the provision of technical assistance, and supporting the Financial Sector Assessment Programme conducted by the IMF and World Bank.<sup>275</sup>

The G20 leaders have looked to the IAIS with respect to several issues. It has tapped the IAIS in its efforts to coordinate capital adequacy standards.<sup>276</sup> In response to the G20’s request in 2009, the IAIS adopted a guidance paper on the use of supervisory colleges. It has also adopted the *Insurance Core Principles Review Process*.<sup>277</sup> As stated above, it coordinated with the BCBS and IOSCO as part of the Joint Forum. The IAIS collaboration with the BCBS and IOSCO in the Joint Forum preceded the 2008 financial crisis and the reports that followed the crisis built upon that prior work.<sup>278</sup>

Finally, in response to the financial crisis and urging from the G20, the IAIS is now “developing group-wide supervisory standards for all insurance groups and a *Common Framework for the Supervision of Internationally Active Insurance Groups* (“ComFrame”).<sup>279</sup> A task force chaired by a member of the Swiss Financial Market Supervisory Authority (FINMA) designed a work plan meant to provide qualitative and quantitative requirements that would assist in monitoring group structures, group business mixes, and intra-group transactions.<sup>280</sup> In January

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Technical Committee and endorsement from the Executive Committee. Id. The draft is finally presented at an annual General Meeting where it must be approved by two-thirds of the members. Id.

<sup>274</sup> IAIS, *Insurance Core Principles, Standards, Guidance and Assessment Methodology* (2011), online at [http://www.iaisweb.org/\\_\\_temp/Insurance\\_Core\\_Principles\\_\\_Standards\\_\\_Guidance\\_and\\_Assessment\\_Methodology\\_\\_October\\_2011.pdf](http://www.iaisweb.org/__temp/Insurance_Core_Principles__Standards__Guidance_and_Assessment_Methodology__October_2011.pdf) (visited Nov 9, 2010).

<sup>275</sup> Kawai, *IAIS Standards Setting Activities* at \*10 (cited in note 271).

<sup>276</sup> *Progress Report on the Washington Action Plan*, ¶ 16 (cited in note 186) (“The IAIS is working to assess issues that have emerged from the financial crisis with respect to the assessment of the solvency of insurance companies and the group-wide solvency requirements for internationally active insurance groups.”).

<sup>277</sup> IAIS, *Insurance Core Principles and Methodology* (2003), online at [http://www.iaisweb.org/\\_\\_temp/Insurance\\_core\\_principles\\_and\\_methodology.pdf](http://www.iaisweb.org/__temp/Insurance_core_principles_and_methodology.pdf) (visited Oct 16, 2011).

<sup>278</sup> See BIS, *Joint Forum*, online at <http://www.bis.org/bcbs/jointforum.htm> (visited Oct 16, 2011). See also IAIS, *Joint Forum*, online at <http://www.iaisweb.org/Joint-Forum-49> (visited Oct 16, 2011) (showcasing the reports created by the Joint Forum).

<sup>279</sup> FSB, *Overview of Progress in the Implementation of the G20 Recommendations for Strengthening Financial Stability* \*5 (2010), online at [http://www.financialstabilityboard.org/publications/r\\_100627c.pdf](http://www.financialstabilityboard.org/publications/r_100627c.pdf) (visited Oct 16, 2011).

<sup>280</sup> See generally IAIS, Press Release, *IAIS Improves Development of a Common Framework for the Supervision of International Active Insurance Groups* (Jan 19, 2010), online at

2010, the Executive Committee approved recommendations for the design and work plan of the framework.<sup>281</sup> The Executive Committee will implement the plan, starting with a consultative paper in 2011, followed by implementation in 2013.<sup>282</sup>

In the insurance network, as in other networks, network dynamics complicate the G20's coordination efforts. The IAIS efforts, particularly those in connection with *ComFrame*, have spurred US regulatory efforts.<sup>283</sup> *ComFrame* addresses holding company capital adequacy, an issue already addressed by the EU in its regulations of insurers<sup>284</sup> through its *Solvency II* directive. *Solvency II* establishes a risk-based regulatory regime,<sup>285</sup> sets new capital adequacy and risk management standards, and "aims to change investment behaviour by imposing varying capital charges on assets."<sup>286</sup> A real fear exists as to whether US efforts would pass an EU equivalency test with *Solvency II*.<sup>287</sup> US industry feels that the EU system is too costly.<sup>288</sup> Working through the IAIS, as well as the EU, the US is attempting to influence the *Solvency II* standards. US insurers, working through the National Association of Insurance Commissioners, have tried to become part of a provisional regime that, at least for some time, will be treated as "equivalent" to the EU's *Solvency II*.<sup>289</sup>

All in all, there is wide disagreement between the EU and US approaches, which undermines some intra-network dynamics such as persuasion and

[http://www.iaisweb.org/\\_\\_temp/19\\_January\\_2010\\_\\_IAIS\\_approves\\_development\\_of\\_a\\_Common\\_Framework\\_for\\_the\\_Supervision\\_of\\_Internationally\\_Active\\_Insurance\\_Groups.pdf](http://www.iaisweb.org/__temp/19_January_2010__IAIS_approves_development_of_a_Common_Framework_for_the_Supervision_of_Internationally_Active_Insurance_Groups.pdf) (visited Oct 16, 2011).

<sup>281</sup> Id.

<sup>282</sup> *Strengthening Financial Stability* at \*5 (cited in note 279).

<sup>283</sup> Tom Finnell, *Assessing the Solvency of U.S. Insurance Groups—International Pressures Mount* (Insurance Perspectives Oct 2010), online at [http://www.invotex.com/perspectives\\_1010.html](http://www.invotex.com/perspectives_1010.html) (visited Oct 16, 2011).

<sup>284</sup> As one commentator notes, "ConFrame [sic] is poised to include requirements for quantitative assessments by regulators of group capital." Id.

<sup>285</sup> Nikki Tait, *EU Insurers Face Solvency II Deadlines* (Fin Times Jan 19, 2011), online at <http://www.ft.com/cms/s/0/36960460-23e2-11e0-8bb1-00144feab49a.html#axzz1Cum99eQO> (visited Oct 17, 2011).

<sup>286</sup> Steve Johnson, *Insurers Gear up for New Charges* (Fin Times Jan 30, 2011), online at <http://www.ft.com/cms/s/0/9b9bb046-2b10-11e0-a65f-00144feab49a.html#axzz1Cum99eQO> (visited Oct 17, 2011) ("Equities will need to be backed by reserves of 30–40 per cent, while European sovereign debt is deemed risk free.").

<sup>287</sup> Finnell, *Assessing the Solvency of U.S. Insurance Groups* (cited in note 283).

<sup>288</sup> Id.

<sup>289</sup> Deloitte, *IAIS Update \*2* (2010), online at [http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/FSI/US\\_FSI\\_IAISUpdate\\_120910.pdf](http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/FSI/US_FSI_IAISUpdate_120910.pdf) (visited Oct 16, 2011).

negotiation. The back and forth between the US and EU is taking place at the same time that the IMF, as instructed by the G20, is implementing its MAP program, which assesses the stability of each country's financial architecture, including the capital adequacy standards for insurers.<sup>290</sup> The dynamics in this area largely remain to be seen and it will be interesting to note how the G20's push for the IMF to implement the MAP influences the dynamics between the EU and the US as well as among other key players.

#### 4. The trade network.

It is controversial whether there exists a genuine trade network that functions at the G20 level. As a result of the 2008 financial crisis, the G20 tapped the WTO along with the OECD and UNCTAD to monitor and report on the trade and investment measures amongst the G20 countries.<sup>291</sup> These institutions generated several reports detailing the types and impact of various trade and investment measures. Aside from being tasked with a reporting function that was already being undertaken in some respects by the WTO, the trade network has not been incorporated into the ongoing efforts of the G20. To be fair, the very preparation of these reports can be said to have restrained countries in their enacting of protectionist measures. But this participation has been somewhat marginalized, as the G20 progress reports and Leaders Summit declarations reveal. While there is language calling for the conclusion of the Doha Round and the need to resist protectionist tendencies, the WTO, OECD, and UNCTAD joint reports evince a sense of frustration that the G20 has not pushed for more on the trade front. While trade officials have significant independent power to act on behalf of their countries in relations with other countries, they are still bound by domestic politics. Thus, it would be difficult to claim that the trade network exists in the G20 as an independent network.

### V. EVALUATING THE G20'S COORDINATION

Having identified a model of new global governance in the G20's coordination of multiple TRNs, the next step would be to evaluate the model. One might conceive two basic criteria for this purpose. First, does it work? Second, is it legitimate?

When ascertaining whether it works, critics often point to the tedious process of G20 operation, particularly after the initial success in coordinating

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<sup>290</sup> IMF, *Factsheet: The G-20 Mutual Assessment Process* (cited in note 152).

<sup>291</sup> OECD, WTO and UNCTAD Renew Calls to G20 to Resist Protectionism (Aug 3, 2010), online at [http://www.oecd.org/document/60/0,3343,en\\_2649\\_34529562\\_44741628\\_1\\_1\\_1,00.html](http://www.oecd.org/document/60/0,3343,en_2649_34529562_44741628_1_1_1,00.html) (visited Oct 18, 2011).

anti-crisis measures.<sup>292</sup> Some critics simply question the empirical foundation for defining “success.”<sup>293</sup> Others consider the lack of satisfying progress as a structural dilemma inherent in the nature of a network.<sup>294</sup> We would break the legitimacy question into three sub-questions: is it (1) accountable, (2) equitable, and (3) appropriately representative?<sup>295</sup> The G20’s opaque nature raises transparency and accountability questions. Also, now that most network operations are undeniably dominated by the Western developed countries, poor countries’ concerns about alienation, marginalization, and even exploitation should not be readily dismissed. Finally, even though TRNs may claim legitimacy based on expertise, TRN insularity raises concerns, given their influence in a pluralistic world.

### A. The Effectiveness of G20 Operation

Assessing the G20’s efficacy requires an assessment of the coordinated network structure generally and also an inquiry into whether the G20 has in particular accomplished what it has set out to do. Unsurprisingly, neither inquiry will be free from debate. As Alexandroff and Kirton point out, the experts disagree about whether the G20 structure will be an effective one. Some see it as a step backward from rules-based multilateralism, or as an outright failure, while others see it as a strong start to creating a much-needed global governance regime.<sup>296</sup> Looking more particularly at the tasks that the G20 has set out for

<sup>292</sup> See, for example, Marina Larionova, *Assessing G8 and G20 Effectiveness in Global Governance So Far*, 31 *Intl Org Res J* 99, 99 (2010) (noting that there is information that would call into question the G20’s success as an anti-crisis management mechanism).

<sup>293</sup> See Kenneth Anderson, *Squaring the Circle? Reconciling Sovereignty and Global Governance through Global Government Networks*, 118 *Harv L Rev* 1255, 1277–78 (2005) (reviewing Slaughter, *A New World Order* (cited in note 2)).

<sup>294</sup> See Verdier, 34 *Yale J Intl L* at 166 (cited in note 7). See also Heather Stewart and Larry Elliott, *Hopes Fading for Salvation at the Summit*, The Guardian, Observer Business, Media & Cash Section 4 (Mar 22, 2009) (noting that some critics doubt if the diverse members of the G20 can come to any agreement whatsoever).

<sup>295</sup> Interestingly, these criteria in themselves might conflict with each other. For example, scholars often attribute the initial success of the G20 in tackling the financial crisis to the smallness of its membership, which facilitated an agile decision-making process, and which in turn could translate into effectiveness. At the same time, however, a number of non-members, particularly in developing countries, criticize its exclusive membership, which keeps those countries at the margin of the global decision-making process.

<sup>296</sup> See Alexandroff and Kirton, *The “Great Recession”* at 177–78 (cited in note 102).

itself and its success in accomplishing those tasks, the response has been varied as well.<sup>297</sup>

First, it is vital to recognize that the effectiveness of a G20 operation depends largely on that of the TRN itself as a regulatory engine. In this regard, the verdict on the efficacy of the TRN among scholars is a mixed one. Anne-Marie Slaughter argues a government network is the “real new world order,”<sup>298</sup> and the “blueprint for the international architecture of the 21st century.”<sup>299</sup> Kal Raustiala even argues that government networks could complement treaties by facilitating their operation or smoothing their negotiation, or even supplement them by conducting certain gap-filling functions.<sup>300</sup> However, Kenneth Anderson rightly points out the difficulty of evaluating “whether these government networks are actually *solving* problems or merely *talking* about problems.”<sup>301</sup>

Skeptics challenge the eventual effectiveness, and thus the very rationale, of a TRN. Their skepticism is two-fold: empirical and structural. First, skeptics may contend that the G20 case study suffers a selection bias. They may argue that its alleged success hinges mostly on its subject matter rather than on the network operation itself. In other words, they contend that the network theory would not work as well in more sensitive areas such as arms control or nuclear non-

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<sup>297</sup> Ivan Savic and Nick Roudev, *Progress on G20 Financial Regulatory Commitments from Washington 2008 until Toronto 2010* (2010), online at <http://www.g20.utoronto.ca/analysis/g20finregs.html> (visited Oct 18, 2011).

<sup>298</sup> Slaughter, *A New World Order* at 183, 197 (cited in note 2). Here, Slaughter uses the term “networks” as referring to relatively loose, cooperative arrangements across borders between and among like agencies that seek to respond to global issues. Id at 14. According to Slaughter, there are three different types of network: “information networks,” which not only exchange regulatory views but also filter information on regulatory standards; “enforcement networks,” which facilitate individual and collective enforcement of network norms; and “harmonization networks,” in which regulatory standards converge. Id at 167–68. Perhaps one should not bundle all networks together in one category for the purpose of evaluation. Each network addresses a different problem, although there might be some functional overlapping among these three kinds. Id. Therefore, a different type of network should be subject to a different criterion for its effectiveness. In this regard, Slaughter’s three categories of government networks depending on their major functions (goals) in networking, may help. In this sense, the G20 might be said to meet all of these three criteria since it facilitates all the regulatory dialogues among government officials (information network), creates regulatory prototypes (harmonization network), and even commits itself to adopt and implement those prototypes subject to peer review (enforcement network).

<sup>299</sup> Slaughter, 76 Foreign Aff at 197 (cited in note 20).

<sup>300</sup> Raustiala, 43 Va J Intl L at 6 (cited in note 22).

<sup>301</sup> Anderson, 118 Harv L Rev at 1276 (cited in note 293) (emphasis added) (arguing that Slaughter fails to provide persuasive “empirical” evidence as to whether a government network actually works).

proliferation as it has in financial regulation.<sup>302</sup> Likewise, skeptics might point out the lack of empirical confirmation of the political cross-bargain between certain regulatory subjects. In theory, one might reasonably speculate that the US might cede to the EU's penchants for stricter CRA regulation in exchange for the latter's adoption of a modified version of the Volcker rule.<sup>303</sup>

Admittedly, the subject-matter of networking is critical for its potential success. As seen in the government networks addressing the Y2K problem, those issues around which networkers share strongly converging interests are more readily prone to a coordinated response from networkers than other issues.<sup>304</sup> And while the G20 may claim success in addressing the financial crisis,<sup>305</sup> it has not been able to agree on the post-crisis measures, in particular the global currency imbalances. These issues appear to be analogous to those related to "vital national security interests" or those "touching on issues of high domestic political sensitivity."<sup>306</sup> Therefore, the issue-specificity matters in determining the overall success of G20 operation, though it might not be the sole factor.<sup>307</sup>

Perhaps a more difficult question might be how to define success or failure. This question is basically an empirical one. If one focuses solely on end products from the G20's coordination, there might be plenty of proofs for its success, as long as an evaluator fully appreciates the incremental nature of such norm-making processes and thus the inevitably soft attributes of these prototypes. Yet if one ascribes its success to regulatory changes that produce real-life behavioral changes, not merely the existence of newly-crafted multiple regulatory standards, we might have to wait for some time before we render any definite judgment. Indeed, what might at first seem a success can be proven later to be a failure.<sup>308</sup> Likewise, one might argue that those new standards would have

<sup>302</sup> Verdier, 34 Yale J Intl L at 123 (cited in note 7).

<sup>303</sup> We thank Pierre-Hugues Verdier for this point.

<sup>304</sup> Anderson, 118 Harv L Rev at 1275–76 (cited in note 293).

<sup>305</sup> Emily Kaiser, *G20 on Financial Crisis Response: It Worked* (Reuters Sept 25, 2009), online at <http://www.reuters.com/article/2009/09/25/columns-us-g20-communique-victory-idUSTRE58O59K20090925> (visited Oct 18, 2011).

<sup>306</sup> Slaughter, *A New World Order* at 208 (cited in note 2).

<sup>307</sup> Anderson argues in this way. See Anderson, 118 Harv L Rev at 1276 (cited in note 293).

<sup>308</sup> See Jeffery Atik, *Basel II: A Post-Crisis Post-Mortem*, 19 Transnatl L & Contemp Probs 731, 748–59 (2011). For additional information on the criticisms of Basel II, see also Amy Scott, *Banks Brace for Basel II* (Marketplace: Am Pub Media July 2, 2008), online at [http://marketplace.publicradio.org/display/web/2008/07/02/basel\\_ii/](http://marketplace.publicradio.org/display/web/2008/07/02/basel_ii/) (visited Oct 18, 2011); Avinash D. Persaud, *Point of View: Banking on the Right Path*, 48 Fin & Dev Q (2008), online at <http://www.imf.org/external/pubs/ft/fandd/2008/06/saurina.htm> (visited Oct 18, 2011); Andrew Crockett, General Manager of the BIS and Chairman of the FSF, *Remarks at the 38th SEACEN Governors' Conference* (Feb 13, 2003), online at

materialized anyway from national, not necessarily global, initiatives. In such case, the G20 would have played a rather modest role.

In contrast, some scholars pin their skepticism on the very *structure* of TRNs. They question the power of the bonds or socialization among networkers. They basically view networkers as government officials who tend to serve and be controlled by their domestic constituencies, rather than having loyalty to a “hypothetical global polity” such as a transgovernmental network.<sup>309</sup> In this context, Kenneth Anderson observes that government officials “are primarily fiduciaries acting on behalf of others whose values they represent, *not* seekers of reason or the truth as such, and they are not free to ignore the constituents they represent and to depart on their own searches for truth with their fellow truth-seekers in an international forum.”<sup>310</sup> Skeptics also argue that without any formal bargains, TRNs cannot effectively handle distributive consequences, such as the costs and benefits of adopting a certain standard that might negatively or positively affect each state.<sup>311</sup> Moreover, they argue that networks alone cannot secure enforcement of those standards once they are adopted.<sup>312</sup> Finally, skeptics predict that networkers are forced to defect from previously established standards if domestic lobbies pressure them.<sup>313</sup>

Unlike the empirical critique, however, these structural attacks against the effectiveness of government networks betray some “realist” assumptions. They nearly equate global governance with the world government. Without a unified world government, all treaties, even if they are technically binding, are basically vague anyway and unenforceable domestically on many occasions. In other words, international cooperation—formal and informal—may not bring forth any immediate compliance that can be secured by direct remedies in the domestic sense. Also in our view, the structural critique is overly consequentialist. Insofar as realists are readily inclined to dismiss the effectiveness of transgovernmental networks based on the lack of domestic enforcement mechanisms, they largely lose sight of the value of micro-level networking processes. We would argue that the realist world is too simplistic:

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<sup>309</sup> <http://www.bis.org/speeches/sp030213.htm> (visited Oct 18, 2011) (addressing each of five criticisms generally levied against Basel II); Jón Danielsson, et al, *An Academic Response to Basel II \*3* (2001), online at <http://www.bis.org/bcbs/ca/fmg.pdf> (visited Oct 18, 2011) (arguing that Basel II proposals failed to address a number of issues that could destabilize the global financial system).

<sup>310</sup> Verdier, 34 Yale J Intl L at 115 (cited in note 7).

<sup>311</sup> Anderson, 118 Harv L Rev at 1292–93 (cited in note 293).

<sup>312</sup> Verdier, 34 Yale J Intl L at 115, 129 (cited in note 7).

<sup>313</sup> Id at 115–16.

<sup>313</sup> Id at 129.

realists are blinded by their fidelity to enforcement. Simply, there are more dynamics going on within the TRNs than realists conceive.

True, networkers as regulators are subject to various domestic checks and pressures from not only their governments but also the media and the public. Yet they are neither “masterless ronin”<sup>314</sup> nor mere mechanical tools of their government. They also “shape” their governments’ policies. Most of them are not political appointees. On the contrary, many are career officials who sit on the same issue area for decades. Even politicians cannot ignore their judgments. Likewise, skeptics assume that the domestic power dynamics on a given regulatory issue are always linear and domestic constituencies’ preferences unitary. The reality is far more complicated. There is simply more room for regulators, as norm-sponsors, to advocate and internalize network standards that enjoy professional (expert) legitimacy.<sup>315</sup>

More importantly, the soft nature of standards recommends them because they will be reviewed by national regulators prior to implementation. As seen in the example of EU Directives, it is up to each domestic jurisdiction to choose how to implement the network standards, or more precisely, how to “fine-tune” them, in accordance with its domestic legal system. In addition, a TRN can have a monitoring or surveillance mechanism, as seen in the G20 Progress Report, thereby securing opportunities for self-correction via feedback. Finally, the G20, as the Leaders’ Summit itself, holds some ability to encourage compliance.

In sum, the empirical line of critique on TRNs has a point in that this new model of global governance still needs to be further vetted. Nonetheless, insofar as the G20 has succeeded in generating various frameworks and regulatory prototypes, its operation could be called a success.

While the ability of the G20 to generate prototypes can be used to proclaim the G20 a success, before doing so we should critique whether these are at least the prototypes called for by the circumstances. In other words, did the G20 do what it had intended to do? The Washington Declaration speaks in broad terms of promoting “effectively regulated financial markets”<sup>316</sup> but it also sets some more specific tasks for itself, including reinforcing international cooperation, reforming international financial institutions, and even more specific goals, such as exercising strong oversight over CRAs.<sup>317</sup> We believe that the G20 set for itself a primary goal of developing an architecture to coordinate

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<sup>314</sup> Anderson, 118 Harv L Rev at 1296 (cited in note 293).

<sup>315</sup> Indeed, as discussed above, this may be an independent criticism of TRNs.

<sup>316</sup> *Washington Declaration*, ¶ 2 (cited in note 186).

<sup>317</sup> Id at ¶ 9.

the workings of the various TRNs to combat the crisis and that it was successful in doing so.

The construction of the architecture had several key components. Early on, leaders worked out the structure and role of the FSF, thereby transforming it into the FSB.<sup>318</sup> During the Washington Summit, FSF Chair Mario Draghi and IMF Managing Director Dominique Strauss-Kahn resolved their disagreement about their roles and the relationships of their respective institutions to the new global financial architecture. The two agreed that a lightly institutionalized FSF would set new standards, but the “organizationally powerful IMF would then monitor and enforce compliance with them.”<sup>319</sup> The resulting action plan reflected this agreement.<sup>320</sup>

The Leaders tapped the skills of the finance ministers to initiate an “action plan” and “timeline.”<sup>321</sup> That action plan called upon the resources and efforts of the IMF, the FSF, the finance ministers, the BCBS, the World Bank, the OECD, and the key global accounting standards bodies (IASB and FASB).<sup>322</sup> The G20 “Progress Reports” on its actions plans reveal a carefully choreographed response to the crisis.<sup>323</sup> The Washington Action Plan, for example, asked the FSF to assist private-sector bodies as well as key global accounting-standard setting bodies with improving transparency and accountability; the FSF and IMF were asked to develop “recommendations to mitigate pro-cyclicality”; the BCBS was asked to study stress testing models; and the OECD was asked to facilitate tax information exchange, among other things.<sup>324</sup>

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<sup>318</sup> FSB, *Financial Stability Board Charter* (2009), online at [http://www.financialstabilityboard.org/publications/r\\_090925d.pdf](http://www.financialstabilityboard.org/publications/r_090925d.pdf) (visited Oct 18, 2011).

<sup>319</sup> Alexandroff and Kirton, *The “Great Recession”* at 182 (cited in note 102).

<sup>320</sup> *Washington Declaration*, Action Plan, ¶ 5 (cited in note 107).

<sup>321</sup> Id at ¶ 10.

<sup>322</sup> Id.

<sup>323</sup> The progress reports are extremely detailed and focus on each of the bodies tasked with any duty under the action plans. See, for example, *Progress Report on the Actions of the Washington Action Plan*, ¶ 4 (cited in note 186) (“The Trustees of the International Accounting Standard Committee Foundation (IASCF) have agreed to establish a formal link to a newly created external Monitoring Board composed of public authorities, including the chairs of the expanded IOSCO Technical Committee and the IOSCO Emerging Markets Committee. . . . The success of this monitoring body will be reviewed by summer 2010. Members also approved to expand the International Accounting Standards Board (IASB) membership to 16 members and provided guidelines for geographic diversity.”).

<sup>324</sup> Id at ¶¶ 9, 24, 34.

Interestingly, in some ways the G20 acted like a *mega-network*,<sup>325</sup> taking on both a norm-making and a coordinative function. Its coordination spurred regulatory prototypes, with swiftly implementable guidelines and recommendations, as well as frameworks consisting of long-term action plans or policy directions to coordinate between and among sector-specific regulatory prototypes.<sup>326</sup> In addition, the G20's unique surveillance (peer review) mechanisms, such as the MAP,<sup>327</sup> under which the G20 can collectively evaluate each member's record of compliance with previous blueprints and regulatory prototypes, is yet another sign of effectiveness in executive coordination. Importantly, the G20 Leaders' coordination resulted in part from their shared belief in the necessity of the response to the crisis. Undeniably, though, despite some shared beliefs, the Leaders group remains a *political* grouping subject to typical political pressures from diverse constituencies.

## B. Legitimacy Questions: Accountability, Equity, and Representation of the G20 Operation

### 1. Accountability.

While the ineffectiveness critique of the TRNs assumes a lack of autonomy of network participants, the legitimacy critiques take a diametrically opposite position on the nature of network participants. The legitimacy critiques include concerns over accountability, equity, and representation. While we think that the legitimacy critiques have merit, we believe that they can be ameliorated. In fact, we hope that our dissection of the coordinated network phenomenon aids in that effort.

<sup>325</sup> Such notion of a “*mega-network*” or a horizontal “network of networks” is not new. Slaughter locates such a network of networks in the FSF, formed in 1996 by amalgamating three independent government networks—the Basel Committee, the IOSCO, and the IAIS—in order to address those regulatory issues common to different types of financial institutions (banks, securities companies, and insurance companies), such as the capital adequacy ratio and other risk-related rules. See Slaughter, *A New World Order* at 135 (cited in note 2).

<sup>326</sup> Admittedly the leaders (prime ministers or presidents) are not professional regulators themselves and probably do not know anything about how the international finance regime is actually operating. But they offer critical political “glue” that holds those individual networks together as well as some aura of legitimacy. As a corollary, the G20 will move on even if all the current leaders are replaced in the next elections as long as those professional regulators still manage the micro-level regulatory networking. The networks that it coordinates have existed for some time and have been strengthened by the G20 Leaders’ coordination. Alexandroff and Kirton, for example, describe the actual negotiations in the Washington Summit as having “go[ne] well,” stating that there was a “substantial degree of personal involvement, passion, and even spontaneous discussion among the leaders.” Alexandroff and Kirton, *The “Great Recession”* at 183 (cited in note 102).

<sup>327</sup> See IMF, *Factsheet: The G-20 Mutual Assessment Process* (cited in note 152).

Some scholars fear that the disaggregation of a unitary state, which forms a foundation of TRNs, would unduly weaken state authority.<sup>328</sup> They fear that those regulators would acculturate themselves too much to the network norms or their ideals in a way that may go against the traditional values of state sovereignty or national interest.<sup>329</sup> Therefore, they suspect that the government network would “[tip] in favor of global governance in ways that devalue democracy and democratic accountability.”<sup>330</sup> For example, there is a real question of whether G20 nations are going to hand over sovereignty to the G20 or any other institution to institute changes that might be needed to ameliorate the tension between globalization and financial risk.<sup>331</sup>

There are responses to these concerns. TRNs are still subject to various domestic mechanisms of checks and balances. While network participants as norm-entrepreneurs internalize network standards by creating new domestic legal and political dynamics, these standards are still subject to domestic judicial or legislative challenges in a post-internalization stage.<sup>332</sup> One could even argue that TRNs may enhance accountability by providing counterforce against domestic special interests that often capture domestic regulators and undermine public policy. Nonetheless, the TRN’s soft, informal nature may still be a double-edged sword. Although it may facilitate interstate cooperation, it may sidestep various checks and disciplines secured by a formal mechanism, such as administrative or constitutional law, or the concern of transparency and democratic accountability.<sup>333</sup> Ideally, national lawmakers should be attuned to these concerns and not allow the TRN process to foreclose national checks and balances.<sup>334</sup>

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<sup>328</sup> See, for example, Anderson, 118 Harv L Rev at 1299 (cited in note 293) (“In the case of a unitary state, giving substate agencies sovereign powers within a particular subject matter really does weaken the state.”).

<sup>329</sup> Id.

<sup>330</sup> Id at 1301.

<sup>331</sup> Jean Pisani-Ferry, *International Governance—Is the G20 the Right Forum?* \*4 (Bruegel Policy Contribution Mar 2009), online at <http://aei.pitt.edu/10666/> (visited Oct 18, 2011).

<sup>332</sup> Raustiala, 43 Va J Intl L at 80–81 (cited in note 22) (discussing the transnational legal process).

<sup>333</sup> Verdier, 34 Yale J Intl L at 115, 169 (cited in note 7) (observing that TRNs’ very advantages, such as informality, tend to raise some problems that remain largely unattended by pre-existing literatures). See also Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 Yale L J 1490, 1530–34 (2006); Benedict Kingsbury, Nico Krisch, and Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 L & Contemp Probs 15, 34–35, 37–39 (2005).

<sup>334</sup> See Section III.

## 2. Equity.

Another potential criticism against the TRN is that the whole network operation is biased in favor of the powerful developed countries.<sup>335</sup> While similar concerns exist in treaty formation, the condition is exacerbated in TRNs. The end products of a TRN, such as regulatory prototypes, might already reflect those of the dominant states.<sup>336</sup> Based on his empirical study of various government networks, Kal Raustiala observes that networks tend to impose powerful nations' regulatory models upon less powerful countries since the former dominate in the networking process.<sup>337</sup> Therefore, the North may be a standard-setter, while the South may be a standard-taker.<sup>338</sup>

In this vein, Slaughter, the chief advocate of TRNs, herself acknowledges that regulatory convergence toward network norms, often pressured by the very dynamics of a network, might be seen as illegitimate in a certain domestic political context.<sup>339</sup> Stephen Toope even argues that “[n]etworks . . . are sites of power, and potentially of exclusion and inequality.”<sup>340</sup> Likewise, networks might undermine the traditional space of more formal public international law under

<sup>335</sup> Ashwani Kumar, *G20 and Global Governance: A New “New” Deal for the Global Poor!*, in Thomas Fues and Peter Wolff, eds, *How Can the New Summit Architecture Promote Pro-Poor Growth and Sustainability* 36, 36–38 (German Dev Institute 2010); Sir Richard Jolly, *Future Directions for the G20: Towards Legitimacy and Universality*, in Fues and Wolff, eds, *New Summit Architecture* at 32–35 (cited in note 335).

<sup>336</sup> Julia Black, *Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes* \*13 (London Sch of Econ Legal Studies Working Paper No 2/2008, Feb 2008), online at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1091783](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1091783) (visited Oct 18, 2011). See also Susanne Soederberg, *The Politics of Representation and Financial Fetishism: the Case of the G20 Summits*, 31 Third World Q 523, 524 (2010) (arguing that the G20 served to “naturalise and depoliticise the crisis, thereby legitimating a narrow and very particular” response to it under what she dubbed “financial fetishism”).

<sup>337</sup> Raustiala, 43 Va J Intl L at at 24–25 (cited in note 22).

<sup>338</sup> “The analysis here predicts that powerful jurisdictions will, as a result, compete as standard-setters within the network; weak jurisdictions will often import these standards.” Id at 68. “[C]ooperative arrangements modelled [sic] after the SEC’s [MOUs] are now used by securities regulators around the world. Consequently . . . the SEC is able to obtain enforcement-related information from numerous jurisdictions, including emerging and developed markets.” Picciotto, 17 Nw J Intl L & Bus at 1047 (cited in note 26); Practicing Law Institute, *International Affairs in The SEC Speaks in 2001*, 1235 Corp L & Practice Course Handbook 977, 981–86 (Practicing Law Institute 2001).

<sup>339</sup> Slaughter, *A New World Order* at 171–72 (cited in note 2).

<sup>340</sup> Stephen J. Toope, *Emerging Patterns of Governance and International Law*, in Byers, ed, *The Role of Law in International Politics* 91, 96–97 (cited in note 20). See also Verdier, 34 Yale J Intl L at 130 (cited in note 7).

which less powerful countries might receive better protection via sovereign equality.<sup>341</sup>

While this power disparity critique holds water in general, particular benefits may still exist under certain circumstances for less-developed members of the network when they adopt pre-made, pre-tested regulatory standards of major advanced countries, in particular through strategic co-optation, discussed above.<sup>342</sup> First, such regulatory importation may reduce regulatory costs in that importing jurisdictions need not create those standards from scratch.<sup>343</sup> Second, from the standpoint of less developed members, adopting the dominant member's standards tends to accord the former's standards an aura of legitimacy, which in turn encourages more members to adopt the dominant standards, such as those of the US.<sup>344</sup> Third, as more members within the TRN adopt a certain (dominant) standard, the utility generated by adopting that standard tends to increase. Economists label this phenomenon of self-proliferation of dominant standards the "network effect."<sup>345</sup> Moreover, at least as far as the G20 is concerned, the new geography of power embodied in the G20 membership could mitigate power disparity concerns to some extent. Admittedly, questions still remain regarding whether this is the right representation, whether there are countries missing, and whether the northern countries have too much influence.<sup>346</sup>

It is true that some less developed countries' government officials may still lack both physical and technical resources necessary to participate actively in the networking to maximize the aforementioned regulatory benefits. This is basically a "development" issue, which developed countries might want to tackle in terms of development assistance, such as capacity-building efforts.<sup>347</sup> Markedly, it is in the interest of developing countries that these less developed countries are better

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<sup>341</sup> Philip Alston, *The Myopia of the Handmaidens: International Lawyers and Globalization*, 8 Eur J Int'l L 435, 446 (1997).

<sup>342</sup> See Section II.B.

<sup>343</sup> Raustiala, 43 Va J Int'l L at 59–60 (cited in note 22).

<sup>344</sup> Id.

<sup>345</sup> Raustiala, 43 Va J Int'l L at 63 (cited in note 22), quoting Michael L. Katz and Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 Am Econ Rev 424, 424 (1985).

<sup>346</sup> Nelson, *The G-20 and International Economic Cooperation* at \*24 (Cong Rsrch Serv 2009) (cited in note 105). See also Stephen Fidler, *WTO Chief Blasts Top Economies' Financial Oversight*, Wall St J A12 (May 17, 2010) (noting that Pascal Lamy has questioned the G20's legitimacy and what incentives exist for non-G20 nations to follow the rules set by the G20); David Bosco, *Who's Afraid of the G20?* (Foreign Pol Sep 28, 2010), online at [http://bosco.foreignpolicy.com/posts/2010/09/28/does\\_the\\_g\\_20\\_need\\_a\\_secretariat](http://bosco.foreignpolicy.com/posts/2010/09/28/does_the_g_20_need_a_secretariat) (visited Oct 18, 2011) (reporting that some non-G20 members think that the G20 is a "fundamentally illegitimate, self-selected body").

<sup>347</sup> See generally Cho, 56 Ala L Rev 483 (cited in note 15).

equipped in engaging in the networking process and bringing regulatory prototypes home since these developing countries' involvement will increase the regulatory impact of the networking.

### 3. Representation.

The use of coordinated networks also raises a host of other legitimacy questions. Representativeness, or input legitimacy,<sup>348</sup> seems weak because, as we know, networkers are not elected; they tend to be civil servants. The career regulator status of network participants means that network legitimacy is based more on expertise, or output legitimacy,<sup>349</sup> than on representativeness. TRNs may be perceived as legitimate because they produce good work.<sup>350</sup> Of course, what constitutes good work assumes a normative position, so even the expertise justification is not perfect. Financial regulation affects environmental efforts,<sup>351</sup> labor,<sup>352</sup> pensions,<sup>353</sup> health care,<sup>354</sup> and even food security.<sup>355</sup> Specialized career regulators are poorly situated to consider the externalities imposed on other issue areas. Bank regulators in the banking network come from a common background and experience. Their ability to tolerate risk may be different from someone who focuses on labor or healthcare or even trade. However we conceive of legitimacy,<sup>356</sup> we need to be able to evaluate to what extent

<sup>348</sup> Robert Keohane and Joseph S. Nye, *Between Centralization and Fragmentation: The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy* \*\*12–15 (Kennedy Sch of Govt Working Paper Series, 2001), online at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=262175](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=262175) (visited Oct 18, 2011) (discussing input legitimacy criteria).

<sup>349</sup> Claire R. Kelly, *The Politics of Legitimacy in the UNCITRAL Working Methods*, in Tomer Broude, Marc L. Busch, and Amelia Porges, eds, *The Politics of International Economic Law* 106, 123–24 (Cambridge 2011).

<sup>350</sup> Fritz Scharpf, *Governing in Europe: Effective and Democratic?* 2 (Oxford 1999) (discussing input and output legitimacy).

<sup>351</sup> See Stuart Eizenstat, *The U.S. Role in Solving Climate Change: Green Growth Policies Can Enable Leadership Despite Economic Downturn*, 30 Energy L J 1, 1 (Nov 14, 2008) (noting the pall the economic crisis had placed over climate change efforts).

<sup>352</sup> Kelly, 11 Chi J Intl L at 528–29 (cited in note 160). See also *Something's Not Working: America's Labour Market* (The Economist Apr 29, 2010), online at [http://www.economist.com/node/16010303?story\\_id=16010303](http://www.economist.com/node/16010303?story_id=16010303) (visited Oct 18, 2011); Catherine Rampell, *In a Job Market Shift, Some Workers Are Left Behind*, NY Times A1 (May 13, 2010).

<sup>353</sup> See *Something's Not Working* (cited in note 352).

<sup>354</sup> Claire R. Kelly, *Conceptions of Legitimacy among International Entities in the Global Political Economy*, in *Law, Contestation, and Power in the Global Political Economy* (Oñati Intl Inst Workshop, forthcoming 2012) (on file with author).

<sup>355</sup> Id.

<sup>356</sup> For a description of various legitimacy frameworks see, Kelly, *The Politics of Legitimacy* (cited in note 349).

unrepresentative or expert institutions reach beyond their expertise to account for the values of a pluralistic society.

One might claim that it is the coordination of the G20 that legitimizes the goals of the TRNs. We would argue that such a claim needs careful examination. One would have to consider to what extent the G20 could (and did) take account of the interests and constituencies affected by the TRNs. Our concern here is not that a political grouping such as the G20 could never legitimize the work of the TRNs, simply that we should not assume that it does. Nor should we allow the expert status of the TRNs to supply the G20 with a veneer of legitimacy that may be undeserved.

In addition to the general concerns of representativeness, there are some specific representativeness concerns that stem from the work that TRNs do. Networkers' expertise, their insular dealings, and the matters at stake subject them to a unique danger of capture. Most agencies face capture by special interests because those special interests have tremendous incentives to focus their efforts on persuading the agency to adopt favorable positions.<sup>357</sup> More dispersed groups that may be affected by the agency have less ability to coordinate.<sup>358</sup> Capture at the TRN level is especially problematic for several reasons. The networks collect an elite set of regulators working, at times, far away in secluded settings. These regulators are already known to industry and in some instances move between government work and industry. These regulators are particularly attractive to special interest groups because capturing just one of the regulators may allow an interest group a veto over the entire process.<sup>359</sup> But what is particularly problematic is the influence of different states' positions on any particular proposal. Suppose that regulator from State A wants a rule regulating hedge funds that is fairly strict and enforceable. Regulator from State B agrees that hedge funds should be regulated but prefers a softer approach. Lobbyist C (working for the hedge fund industry) will not only lobby State A to change its position but will also lobby State B to press hard on regulator from State A.

The fluid and incremental nature of networks also calls for a new conception of legitimacy. Networks operate over a period of time. Their tasks change, sometimes at their own insistence. Our conception of legitimacy must account for the fact that networks may sometimes act as semi-autonomous norm generators working over time.<sup>360</sup> The combination of this incremental

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<sup>357</sup> Edward J. Janger, *Predicting When the Uniform Law Process Will Fail: Article 9, Capture, and the Race-to-the-Bottom*, 83 Iowa L Rev 569, 584–85 (1998) (explaining capture).

<sup>358</sup> Id.

<sup>359</sup> Id at 586.

<sup>360</sup> See Kelly, *Conceptions of Legitimacy* (cited in note 354).

work and the fact that their end products often harden into domestic law leads to the possibility of a gloss of unwarranted legitimacy.<sup>361</sup> Further, because their work spans decades, they invest time, credibility, and capital that creates a certain amount of path dependence. Once a national jurisdiction considers hardening a network prototype or recommendation through regulation or legislation there has already been considerable buy-in because of the amount of time and expertise expended at the network level. Thus, there is a real concern whether the national checks and balances discussed above will be side stepped. We would worry that the incremental process could undermine national debate. Thus, our conception of legitimacy must account for the incremental and semi-autonomous operations of networks. TRNs need to manage their legitimacy proactively and seek input and processes that justify their work over a period of time. States must ensure that their national processes are not short-circuited.

TRN's insularity and technical focus also create a challenge for representative legitimacy. TRNs hear from the same voices, in part because in order to converse intelligently in their world one must speak the technical language they speak.<sup>362</sup> One might wish to complement TRN's expertise with input legitimacy in the form of additional process or indirect representation. For example, transparency can help. One might perceive TRNs as more legitimate if their proceedings were viewed and understood by more people. In this regard, TRNs should reach out to the public and inform it of their missions and achievements. These "social marketing" efforts are necessary to gain understanding and support directly from the people, not necessarily through the medium of states.<sup>363</sup>

Nonetheless, transparency has costs as well. Transparency can sometimes thwart negotiations.<sup>364</sup> And one can never assure transparency in all aspects of negotiations.<sup>365</sup> Alternatively, opening the TRN process to members of civil society, for example, might improve process, representation, and transparency, but it is less than a perfect solution. More participation might mean more delays<sup>366</sup> or even derailment of regulatory efforts.<sup>367</sup> Allowing for more

<sup>361</sup> Karmel and Kelly, 34 Brooklyn J Intl L at 930–35 (cited in note 85).

<sup>362</sup> See Kelly, 11 Chi J Intl L at 547 (cited in note 160).

<sup>363</sup> Regarding "social marketing," see Social Marketing Institute, *Social Marketing*, online at <http://www.social-marketing.org/sm.html> (visited Oct 18, 2011).

<sup>364</sup> Richard B. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?*, 68 L & Contemp Probs 63, 68 (2005) (discussing "norms of confidentiality in negotiation").

<sup>365</sup> See Barr and Miller, 17 Eur J Intl L at 23 (cited in note 178).

<sup>366</sup> Kelly, 11 Chi J Intl L at 546 n 274 (discussing the "delay and possible derailment [that] may result from greater participation where special interest groups may seek to distort outcomes") (cited in note 160). See Esty, 115 Yale L J at 1531–32 (cited in note 333).

participation does not mean it will be forthcoming. Both the BCBS and IOSCO have public comment procedures but receive comments almost exclusively from industry insiders. Finally, one should not assume that civil society is itself accountable or representative in all respects.<sup>368</sup> The type of process or procedure needs to be coordinated as well. Our conception of legitimacy may need to be more contextual.<sup>369</sup>

In sum, while the G20 coordination tends to raise a number of accountability and legitimacy concerns, they are not insurmountable. Yet the G20 should first acknowledge, not dismiss, the validity of those concerns. The G20 should also find ways to address each concern, focusing on its unique context. One solution might not serve all occasions. For example, measures enhancing transparency, if implemented randomly, might in fact unduly retard the decision-making process at the professional level.

## VI. CONCLUSION

Coordinated TRNs herald a new model of global governance that is flexible, spontaneous, and effective. As seen in the G20 example, the coordinated TRN model can deliver prompt regulatory responses to the global challenges of our time, such as the recent financial crisis. One might reasonably speculate that a conventional international response through pure diplomacy or treaty-making would not have achieved the same result. As the G20 leaders themselves declared with confidence, the TRN model “worked.”<sup>370</sup>

Nonetheless, this nascent paradigm of global governance has attracted various criticisms from different standpoints, such as efficacy and legitimacy. As discussed above, some of these criticisms are not without merit, while others may be exaggerated. Certainly we want to consider the meritorious concerns.

First, governments, including the G20 members, should facilitate more communication and better networking among like-minded networkers (government officials) and between these networkers and international organizations that often offer forums for such networking. For this purpose, governments should encourage personnel exchanges and hold many policy discussion forums, such as workshops and seminars, so that regulators in the same sector from different countries can brainstorm and deliberate on areas of

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<sup>367</sup> See Benedict Kingsbury, *The Concept of “Law” in Global Administrative Law*, 20 Eur J Int L 23, 35 (2009); Esty, 115 Yale L J at 1520–21 (cited in note 333) (noting that participation can bog down the process).

<sup>368</sup> See Dana Brakman Reiser and Claire R. Kelly, *Linking NGO Accountability and the Legitimacy of Global Governance*, 36 Brooklyn J Int'l L 1001, 1014–15 (2011).

<sup>369</sup> See Kelly, 11 Chi J Int'l L at 549 (cited in note 160).

<sup>370</sup> Kaiser, *It Worked* (cited in note 305).

common interest. As Kal Raustiala argues, government networks could complement treaties by facilitating their operation or smoothing their negotiation, or even supplement them by conducting certain gap-filling functions.<sup>371</sup> In a related vein, governments should also consider issue areas that these networks affect that are beyond their areas of expertise and take steps to include voices that speak to those issue areas. Civil society may be able to offer assistance in this regard; however, government must be mindful of whether civil society participants are themselves legitimate.

Second, developed countries should offer a genuine, not merely lip-service, level of development aid to developing countries to boost the latter's human capital. Without serious capacity-building, developing countries cannot effectively participate in this networking process. In this situation, any network standard (regulatory prototype) would have a hard time surviving the dominance critique.<sup>372</sup>

Third, TRNs should establish more active, rigorous and consistent surveillance mechanisms to increase the overall efficacy of their network standards. Without this policy evaluation and feedback process, any initial blueprints or regulatory prototypes would soon cease to evolve. Importantly, it is the characteristic nature of a government network that a network standard should continuously evolve toward a more solid outcome.

Fourth, government should invest more in social marketing or public relations over the network phenomenon. For most people, the network phenomenon remains esoteric. Insofar as people are ill-informed of this new model of global governance, its prospect is not bright. Moreover, government networks can anticipate any constructive criticisms from domestic constituencies and civil society only when they are well-informed of the network phenomenon.<sup>373</sup>

Finally, the G20 as a *mega*-network, or a network of networks, faces unique challenges that may not be shared by other individual networks. While a network symbolizes the "disaggregation" of the state,<sup>374</sup> in so far as each network is a sector-specific and de-centralized phenomenon, the G20 "re-aggregates" those multiple networks into a mega-network, which inevitably restores a conventional *inter-national* representativeness. As long as the G20 holds this plenipotentiary nature, the current *size* of membership will continue to be debated, probably without any immediate consensus. Moreover, as the exigency of the current

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<sup>371</sup> Raustiala, 43 Va J Intl L at 6 (cited in note 22).

<sup>372</sup> See text accompanying notes 335–47.

<sup>373</sup> See text accompanying note 362–69.

<sup>374</sup> Slaughter, *A New World Order* at 12 (cited in note 2).

financial crisis eventually ebbs, the political capital bestowed on the G20 network will also decline.<sup>375</sup> Under this circumstance, the erstwhile strong professional cohesion that binds various individual networks together may disappear. Then, the G20 may degrade into an empty talk shop.

To avoid this worst-case scenario and preserve the G20 momentum, some pundits, including Cannes G20 Summit host, French President Nicolas Sarkozy, propose that a permanent secretary be instituted for the G20. Plausible as this proposal may sound in the first place, it also generates new dilemmas for the G20. First, the G20 has in fact been successful due to soft institutionalization. Yet with this hard institutionalization and consequent augmented bureaucratization, the G20 may lose its characteristic agility in policy response. Second, this new mega-bureaucracy, which may only parallel the UN in its magnitude, may invite a familiar foreboding of a World Government among sovereigntists. Such foreboding may cost the G20 some legitimacy, regardless of its merits.

In conclusion, it is fair to state that the hitherto success of TRNs in general, as well as that of the G20 in particular, may not offer a firm guarantee for their future prosperity. Although this new model of global governance is salutary, the jury is still out for a final verdict. Meanwhile, however, the G20 has enough room to further evolve into a better paradigm of global governance.

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<sup>375</sup> See Kay McLellan, *Global Regulatory Reform Consensus ‘Weakening’* (Mortgage Solutions Oct 4, 2010), online at <http://www.mortgagesolutions.co.uk/mortgage-solutions/news/1740292/global-regulatory-reform-consensus-weakening> (visited Oct 18, 2011).