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Dodd-Frank and International Regulatory Convergence: The Case for Mutual Recognition

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Dodd-Frank and International Regulatory Convergence: The Case for Mutual Recognition

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Vladimir: Go ahead.
Estragon: After you.
Vladimir: No no, you first.[1]

I. INTRODUCTION

The financial crisis of 2008 was a "failure of regulation."[2] Regulators on both the national and international levels failed to appreciate, and adequately respond to, activities that presented significant risks to the global financial system.[3] Following the crisis, decisionmakers at every level moved into high gear, releasing a slew of proposals and rules designed to prevent a similar disaster in the future. What is notable about these efforts is the degree to which authorities from different nations have committed themselves to the same policies. This trend represents a firm awareness of the interconnectedness of the global financial system and the need to adopt a united approach to shared problems.

Ultimately, however, coordinating financial regulations is much easier said than done. While leaders may agree, in principle, to certain policies, the implementation of those policies is hindered by the fragmented and territorial nature of financial regulatory authority.[4] At the time of this writing, in early 2012, national regulators have yet to adopt many of the policies agreed to during the height of the crisis. There is also a growing risk that nations will back out of their commitments or fail to implement them as envisioned. Proponents of international financial regulation are seeking ways to incentivize nations to make good on their promises. Meanwhile, financial institutions and legal practitioners seek clarity on their current and future regulatory obligations.

The aim of this note is to apply international regulatory theory to efforts to improve the global financial regulatory system. It will consider why some regulatory approaches are more effective than others. Finally, it will explain why one of those approaches—mutual recognition—may offer a promising strategy for achieving the objectives of global financial regulation. In regulatory parlance, mutual recognition requires that one nation acknowledge the comparability of another's financial regulatory system, even if some aspects of the systems are not the same.[5] Under mutual recognition, entities from different jurisdictions would be authorized to

1. Samuel Beckett, Waiting for Godot, act 1. The play famously ends with the characters finding themselves unable to move. *Id.* at act 2. At times, international regulators seem to find themselves in a similar predicament.

2. Eric J. Pan, *Four Challenges to Financial Regulatory Reform*, 55 Vill. L. Rev. 743, 743 (2010).

3. *See infra* Part II.A.

4. *See infra* Parts II.B–C.

5. *See, e.g.*, Letter from Conrad P. Voldstad, CEO, Int'l Swaps and Derivatives Ass'n (ISDA), to Michel Barnier, Comm'r for the Internal Mkt. and Servs., European Comm'n & Timothy Geithner, Sec'y U.S. Dep't of Treasury (July 5, 2011), *available at* http://www.gfma.org/correspondence/item.aspx?id=89 [hereinafter Voldstad Letter] ("We also urge global regulators to enter into mutual recognition arrangements where each would limit the extra-territorial reach of their regulation so long as a firm complies with their home country regulations.").

conduct cross-border business, while submitting to the authority of only one regulatory regime.[6] Proponents argue this approach would encourage cooperation between regulators and improve regulatory efficiency, while reducing the burden on regulated entities and decreasing the risk of regulatory arbitrage.[7] As applied in this paper, mutual recognition is seen as assisting U.S. regulators in achieving certain objectives of the Dodd-Frank Act—in particular, the regulation of derivatives.

Part II of this article will set the stage by recalling the events of the financial crisis of 2008 and the international community's response as articulated by the G-20.[8] Part III will provide an overview of derivatives and derivatives regulation as envisioned by the G-20's proposals. Part IV will provide a description of regulatory convergence from the perspective of international law theory and how it relates to financial regulation. Part V will discuss some of the challenges facing global regulators in addressing risks in the derivatives market and appraise the G-20's efforts to overcome them. Part VI will propose how mutual recognition could offer a solution to the practical problems facing global regulators within the theoretical limits described. Part VII will conclude.

II. ACT ONE: THE FINANCIAL CRISIS

This note begins with an admittedly simple retelling of the events of the financial crisis of 2008.[9] The purpose of this Part is to describe the causes of the financial crisis and some of the regulatory proposals that followed.

A. September 2008: The Pot Boils Over

On September 14, 2008, Lehman Brothers, one of the United States' largest and most venerable investment banks, filed for Chapter 11 bankruptcy.[10] This news came a week after the U.S. Department of the Treasury forced mortgage companies Fannie Mae and Freddie Mac into government conservatorship[11]—a move that would

6. For a discussion of how mutual recognition would work, see *infra* Part VI.B.

7. *See infra* Part VI.B.

8. For a description of the G-20, see Part II.B.

9. For a timeline of the events of the financial crisis, see Kendall Jones et al., *International Timeline*, 2008 Fin. Crisis & Global Recession, http://2008financialcrisis.umwblogs.org/international-timeline/ (last visited Sept. 22, 2012). Throughout this note, the "financial crisis" or the "crisis" refers to the 2008 crisis.

10. Carrick Mollenkamp et al., *Lehman Files for Bankruptcy, Merrill Sold, AIG Seeks Cash*, Wall St. J. (Sept. 16, 2008, 6:52 PM), http://online.wsj.com/article/SB122145492097035549.html. The writing was on the wall by at least 2007, when the residential mortgage market was heading downward and companies including American International Group (AIG) were disclosing significant losses as a result. *See* Carrick Mollenkamp et al., *Behind AIG's Fall, Risk Models Failed to Pass Real-World Test*, Wall St. J. (Oct. 31, 2008), http://online.wsj.com/article/SB122538449722784635.html ("By mid-2007, as the housing slump took hold, the subprime mortgage market was weakening and many mortgage bonds were sinking in value. Ratings agencies began downgrading many mortgage securities, a departure from the historical pattern . . . .").

11. Zachary A. Goldfarb et al., *Treasury to Rescue Fannie and Freddie; Regulators Seek to Keep Firms' Troubles from Setting Off Wave of Bank Failures*, Wash. Post, Sept. 7, 2008, at A01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/09/06/AR2008090602540.html.

eventually cost taxpayers upwards of $124 billion[12]—and just three days before the government shelled out $85 billion to shore up American International Group (AIG).[13] Despite this seeming profligacy, the government refused to provide the financial backing necessary to conclude a sale of Lehman's assets to Barclays PLC or Bank of America, thereby ensuring Lehman's demise.[14] Bank of America managed to pick up rival Merrill Lynch & Co. for $50 billion at about $29 per share—a roughly 50% discount from the stock's peak value in 2007.[15]

The turmoil in the U.S. banking sector quickly spread around the world, depressing stock markets from Europe to Asia and halting the flow of credit.[16] What began as a slowdown in the U.S. mortgage market had grown into an economic disaster on a global scale.[17] The collateral victims included emerging nations as far away as South Korea as well as economic prodigies such as Iceland.[18] That same month, U.S. President George W. Bush approved legislation for the purchase of $700 billion worth of banks' "troubled assets" in a bid to jumpstart the credit markets.[19] It was the first of several multibillion-dollar interventions by the U.S. government over the course of the next three years.[20] By the end of 2008, the U.S.

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12. Nick Timiraos, *Fannie, Freddie Bailout Cost Revised Lower*, Wall St. J., Oct. 28, 2011, at A2, *available at* http://online.wsj.com/article/SB10001424052970203687504577001653467422674.html.

13. Matthew Karnitschnig et al., *U.S. to Take Over AIG in $85 Billion Bailout; Central Banks Inject Cash as Credit Dries Up*, Wall St. J. (Sept. 16, 2008), http://online.wsj.com/article/SB122156561931242905.html.

14. *Id.* ("[T]he government essentially pulled the plug on Lehman Brothers Holdings Inc.").

15. Matthew Karnitschnig et al., *Bank of America to Buy Merrill*, Wall St. J., Sept. 15, 2008, at A1, *available at* http://online.wsj.com/article/SB122142278543033525.html; Mollenkamp et al., *Lehman Files for Bankruptcy, Merrill Sold, AIG Seeks Cash*, *supra* note 10.

16. Peter S. Goodman, *Credit Enters a Lockdown*, N.Y. Times, Sept. 25, 2008, at A1, *available at* http://www.nytimes.com/2008/09/26/business/26assess.html; *Lehman Brothers Collapse Stuns Global Markets,* CNN (Sept. 15, 2008), http://edition.cnn.com/2008/BUSINESS/09/15/lehman.merrill.stocks.turmoil/index.html; Carrick Mollenkamp et al., *Lehman's Demise Triggered Cash Crunch Around Globe,* Wall St. J., Sept. 29, 2008, at A1, *available at* http://online.wsj.com/article/SB122266132599384845.html.

17. *See* David Cho & Binyamin Appelbaum, *Unfolding Worldwide Turmoil Could Reverse Years of Prosperity*, Wash. Post, Oct. 7, 2008, at A01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/10/06/AR2008100603249.html; Martin Fackler, *Financial Crisis Spreads to Emerging Nations*, N.Y. Times, Oct. 23, 2008, at B1, *available at* http://www.nytimes.com/2008/10/24/business/worldbusiness/24won.html.

18. *See* Fackler, *supra* note 17; *see also* Charles Forelle, *Iceland Borrows $2 Billion from IMF,* Wall St. J., Oct. 25, 2008, at A9, *available at* http://online.wsj.com/article/SB122486370333666973.html.

19. Dina Temple-Raston, *Bush Signs $700 Billion Financial Bailout Bill*, NPR (Oct. 3, 2008), http://www-cdn.npr.org/templates/story/story.php?storyId=95336601.

20. Within months, newly elected President Barack Obama would sign a $787 billion "stimulus package." *See US Congress Passes Stimulus Plan*, BBC News (Feb. 14, 2009), http://news.bbc.co.uk/2/hi/business/7889897.stm. Other examples include the U.S. Department of the Treasury's Troubled Asset Relief Program (TARP). *See* Edmund L. Andrews & Eric Dash, *U.S. Expands Plan to Buy Banks' Troubled Assets*, N.Y. Times, March 23, 2009, at A1, *available at* http://www.nytimes.com/2009/03/24/business/economy/24bailout.html. The Federal Reserve undertook a three-part campaign of "quantitative easing" to the tune of hundreds of billions of dollars. *See, e.g.*, John Hilsenrath, *Fed Fires*

Dow Jones Industrial Average had lost nearly 34% of its value.[21] England's FTSE 100 had fallen more than 30%, and the Shanghai stock market was down 65%.[22] During the first quarter of 2009 alone, American households saw their combined wealth decline by roughly $1.3 trillion.[23]

B. Global Leaders to the Rescue

The global response to the financial crisis began to take shape in late 2008.[24] However, it was not until early 2009 that global leaders would agree on a plan for international regulatory reforms to address the perceived causes of the crisis.[25] On October 8, 2008, the world's major central banks, including the Federal Reserve, the European Central Bank, the Bank of England, and the Chinese central bank, lowered interest rates in unison—an unprecedented action.[26] Days later, the G-7 adopted a five-point plan to shore up financial institutions and encourage lending.[27] Eurozone members followed suit by providing billions to support domestic banks and guaranteeing new debt.[28] The scale of the response increased when U.S. President George W. Bush convened a meeting of the G-20 in Washington, D.C., on November 15, 2008.[29]

$600 Billion Stimulus Shot, Wall St. J., Nov. 4, 2010, at A1, *available at* http://online.wsj.com/article/SB10001424052748703506904575592471354774194.html.

21. *Record Stock Market Falls in 2008*, BBC News (Dec. 31, 2008), http://news.bbc.co.uk/2/hi/business/7805644.stm.

22. *Id.*

23. Tami Luhby, *Americans' Wealth Drops $1.3 Trillion*, CNNMoney (Jun. 11, 2009, 3:45 PM), http://money.cnn.com/2009/06/11/news/economy/Americans_wealth_drops/. Between 2007 and 2009, American households saw their total wealth decline by about 45%, according to a Federal Reserve survey. *See* Jill Schlesinger, *Fed Survey: We're 45% Poorer*, CBS News (Mar. 25, 2011, 10:58 AM), http://www.cbsnews.com/8301-505123_162-38043560/fed-survey-were-45-poorer/.

24. *See* Tai-Heng Cheng, When International Law Works: Realistic Idealism After 9/11 and the Global Recession 204–07 (2012) (describing efforts by global leaders to undermine and then cooperate with one another as the crisis unfolded).

25. *Id.* at 204 ("At the height of the crisis in 2008, although the need for coordination was great, it was more difficult to achieve, because regulators perceived their vital national interests to be precarious. After the immediate crisis subsided in April 2009, regulators were better able to discharge their prescriptive function.").

26. *Id.* at 206; *see also* Carter Dougherty & Edmund L. Andrews, *Central Banks Coordinate Global Cut in Interest Rates*, N.Y. Times (Oct. 8, 2008), http://www.nytimes.com/2008/10/09/business/09fed.html.

27. Cheng, *supra* note 24, at 206; *see also* Edmund Conway, *Financial Crisis: The Five-Point Rescue Plan*, Telegraph (Oct. 11, 2008), http://www.telegraph.co.uk/finance/financialcrisis/3176131/Financial-crisis-The-five-point-rescue-plan.html.

28. Cheng, *supra* note 24, at 206; *see also* Ian Traynor, *Eurozone Countries Agree on Brown Rescue Plan*, The Guardian (Oct. 12, 2008), http://www.guardian.co.uk/business/marketforceslive/2008/oct/13/europeanbanks-europe.

29. Sheryl Gay Stolberg & Mark Landler, *Bush Calls World Leaders to Summit on Markets,* N.Y. Times (Oct. 22, 2008), http://www.nytimes.com/2008/10/23/business/economy/23bush.html; *see also* Tom Barkley, *G-20 Releases Statement on Crisis*, Wall St. J. (Nov. 15, 2008), http://online.wsj.com/article/SB122675491756631041.html.

The G-20 is an association of finance ministers and central bank governors from nineteen nations and the European Union whose origin lies in the financial crisis of the late 1990s.[30] G-20 members meet periodically to confer on issues related to national policies, international cooperation, and international financial institutions with the aim of supporting growth and development across the globe.[31] Because of the ad hoc nature of the group and its membership of high-powered individuals, at least one commentator has compared the G-20 to a band of "cartoon superheroes" descending on the scene in times of crisis.[32]

The G-20's 2008 Washington, D.C., summit resulted in the acceptance of a declaration agreeing on, among other things, the causes of the financial crisis (including excessive risk-taking and inadequate regulation), a set of actions to be undertaken following the summit (including providing greater support to developing nations through institutions such as the International Monetary Fund, or "IMF"), and a shared set of principles for reforming financial regulations (including transparency, sound regulation, and international cooperation).[33] Among the outcomes of the summit were recommendations for "[s]trengthening transparency of credit derivatives markets and reducing their systemic risks."[34] Subsequent gatherings to clarify these points have taken place in London and Pittsburgh in 2009 and in Toronto and Seoul in 2010.[35] A sixth summit took place in Cannes in November 2011.[36]

The statements made by G-20 participants are characterized by an unwavering commitment to pursuing a coordinated approach to problem-solving.[37] As commentators have noted, the nature of the most recent crisis has laid bare the interconnectedness that emerged in the global economy in the decades since World War II.[38] The efforts of the G-20 are based on the recognition of this fact. According

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30. *What Is the G-20?*, G-20.org, http://www.g20.org/index.php/en/what-is-the-g20 (last visited Sept. 23, 2012) [hereinafter *About the G-20*]. The formal name for the G-20 is the Group of Twenty. *See id.*

31. *See generally id.*

32. Eric J. Pan, *Challenge of International Cooperation and Institutional Design in Financial Supervision: Beyond Transgovernmental Networks*, 11 Chi. J. Int'l L. 243, 264 (2010).

33. *See* Summit on Fin. Mkts. and World Econ., *Declaration of the Summit on Financial Markets and the World Economy* (Nov. 15, 2008), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2008/11/20081115-1.html.

34. Press Release, Office of the Press Sec'y, White House, Fact Sheet: Summit on Fin. Mkts. and the World Econ. (Nov. 15, 2008), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2008/11/20081115-4.html.

35. *See Previous Leaders' Summit*, G20.org, http://www.g20.org/index.php/en/previous-leaders-summits (last visited Sept. 23, 2012).

36. *See G20 Leaders Summit in Cannes: Final Communiqué,* Telegraph (Nov. 4, 2011), http://www.telegraph.co.uk/finance/financialcrisis/8870083/G20-Leaders-Summit-in-Cannes-final-Communique.html.

37. *See, e.g.*, *id.* ("To address the immediate challenges faced by the global economy, we commit to coordinate our actions and policies. Each of us will play their part.").

38. *See, e.g.*, IBA Legal Practice Division Task Force on Extraterritorial Jurisdiction, Report of the Task Force on Extraterritorial Jurisdiction 273 (2009), *available at* http://www.ibanet.org/Document/Default.aspx?DocumentUid=ECF39839-A217-4B3D-8106-DAB716B34F1E

to Professor Eric Pan, "The cross border nature of many firms' operations and their reach . . . demands cooperation and coordination between states and regions."[39]

Scholars point to two principal reasons for the need to adopt coordinated policies towards international financial issues: regulatory arbitrage and contagion. Arbitrage occurs when companies shift operations from jurisdictions with strict regulations to jurisdictions with weaker regulations.[40] According to Pan, "The ability of cross-border financial institutions to shift their operations and services among jurisdictions means that any new forms of regulation must be in coordination with other countries."[41]

Arbitrage is accompanied by the risk of "financial contagion" that results when high-risk financial activities are allowed to carry on in one place, despite the risk these activities pose to the global system as a whole.[42] Allowing risk to re-concentrate in areas with weak regulations would defeat the purpose of adopting stricter regulations elsewhere. As Professor Chris Brummer notes, "An interdependent world requires broad cooperation; otherwise, fraudsters will just move to the weakest regime, which would effectively mean that the efforts of regulators that adopt the optimal rule would be wasted."[43] The conclusion is that all major financial centers must adopt similar, effective measures to address the perceived underlying causes of the crisis.

To this end, the G-20 has issued proposals touching on nearly every aspect of the financial services industry. These proposals have included: adopting higher capital standards for banks,[44] harmonizing international accounting standards,[45] placing

[hereinafter IBA Task Force] ("There is a profound consensus among regulators, academics, financial institutions and others that the regulatory framework of the international financial markets needs to undergo a fundamental change to address the diminished influence of national and regional securities regulators over cross-border financial activities."); Silvia Ostry, *Convergence and Sovereignty: Policy Scope for Compromise?*, *in* Coping with Globalization (Aseem Prakash & Jeffrey A. Hart eds., 2000), *available at* http://www.utoronto.ca/cis/COPJUL13.pdf (referring to the "deep integration" that has occurred in the global economy since World War II).

39. Eric J. Pan, *The Future of International Financial Regulation*, CII Thinkpiece No. 40 (Chartered Ins. Inst.) June 2010, at 2, *available at* http://www.cii.co.uk/downloaddata/TP40_Pan_Intnatl_Fin_Regn_7June2010.pdf.

40. *Arbitrage*, Wikipedia, http://en.wikipedia.org/wiki/Arbitrage (last visited Sept. 23, 2012).

41. Pan, *supra* note 39, at 3.

42. "Financial contagion refers to a scenario in which small shocks, which initially affect only a few financial institutions or a particular region of an economy, spread to the rest of financial sectors and other countries whose economies were previously healthy, in a manner similar to the transmission of a medical disease." *Financial contagion*, Wikipedia, http://en.wikipedia.org/wiki/Financial_contagion (last visited Sept. 23, 2012).

43. Chris Brummer, *Post-American Securities Regulation*, 98 Calif. L. Rev. 327, 343 (2010) (footnote omitted).

44. *See, e.g.*, G-20, *Declaration on Strengthening the Financial System*, London Summit (Apr. 2, 2009), *available at* http://www.mofa.go.jp/policy/economy/g20_summit/2009-1/annex2.html ("[A]ll G20 countries should progressively adopt the Basel II capital framework; and the BCBS and national authorities should develop and agree by 2010 a global framework for promoting stronger liquidity buffers at financial institutions, including cross-border institutions.").

45. *See id.* ("We have agreed that the accounting standard setters should improve standards for the valuation of financial instruments based on their liquidity and investors' holding horizons, while reaffirming the framework of fair value accounting.").

caps on executive compensation to discourage unnecessary risk-taking,[46] cracking down on international tax evasion,[47] and strengthening mechanisms to track and compare nations' progress at implementing these and other regulatory improvements.[48]

Of the issues taken on by the G-20 following the crisis, one of the most significant and contentious has been the regulation of over-the-counter (OTC) derivatives.[49] OTC derivatives are financial instruments used for both risk management and speculation.[50] The misuse of certain complex derivatives has been blamed for causing the financial crisis by increasing the amount of risk in the financial system and concentrating it in certain systemically important entities.[51]

The G-20 agreed at the 2009 London summit to "promote the standardisation and resilience of credit derivatives markets, in particular through the establishment of central clearing counterparties subject to effective regulation and supervision" and to develop an "action plan" by later that year.[52] At the Pittsburgh summit in September 2009, members pledged that "[a]ll standardized OTC derivative contracts should be traded on exchanges or electronic trading platforms, where appropriate, and cleared through central counterparties by end-2012 at the latest."[53] The members also called on the Financial Stability Board (FSB) to monitor and appraise implementation efforts.[54]

However, while global leaders have agreed to a broad plan for regulating the OTC derivatives market, national regulators have managed to implement only a few of these prescriptions.

C. 2012 and Beyond: A Regulatory Cliffhanger

The top-down approach taken by the G-20 following the financial crisis is an example of legal convergence. Convergence, or harmonization, occurs when legal

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46. *See id.* ("We have endorsed the principles on pay and compensation in significant financial institutions developed by the FSF to ensure compensation structures are consistent with firms' long-term goals and prudent risk taking.").

47. *See id.* ("We stand ready to take agreed action against those jurisdictions which do not meet international standards in relation to tax transparency.").

48. *See id.* ("We have agreed that the Financial Stability Forum should be expanded, given a broadened mandate to promote financial stability, and re-established with a stronger institutional basis and enhanced capacity as the Financial Stability Board (FSB).").

49. *See id.* ("[W]e will promote the standardisation and resilience of credit derivatives markets, in particular through the establishment of central clearing counterparties subject to effective regulation and supervision. We call on the industry to develop an action plan on standardisation by autumn 2009."); *see also* G-20, *Leaders' Statement* at *the Pittsburgh Summit*, at 9 (Sept. 24–25, 2009), *available at* http://www.treasury.gov/resource-center/international/g7-g20/Documents/pittsburgh_summit_leaders_statement_250909.pdf [hereinafter G-20 Pittsburgh Statement].

50. For a more complete description of derivatives, see *infra* Part III.A.

51. *See infra* Part III.A.

52. G-20, *Declaration on Strengthening the Financial System*, *supra* note 44.

53. G-20 Pittsburgh Statement, *supra* note 49, at 9.

54. *See id.*

systems become more similar to one another, usually through the deliberate adoption of policies.[55] In international law, this approach is notable because it places the onus for implementing shared prescriptions on national governments, without formally obligating them to do so.[56] In other words, the recommendations adopted by the G-20 at its recent summits are just that: recommendations that member states can adopt or discard at their will.

Following the Pittsburgh summit in 2009, lawmakers in the United States and Europe introduced two major pieces of legislation designed to harmonize U.S. and European financial regulations, including the regulation of OTC derivatives. These were the U.S. Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act" or the "Act")[57] and the European Union's European Market Infrastructure Regulation (EMIR).[58] The laws were intended to implement G-20 recommendations including the increased use of central counterparties (CCPs) for clearing OTC derivatives trading.[59]

At the time of this writing, these acts' provisions concerning derivatives trading have yet to take effect. The reasons for this delay are varied. In Europe, the challenges have included the need to reach an agreement among member nations for how derivatives regulation ought to function.[60] In the United States, some lawmakers and private parties opposed to the Dodd-Frank Act have attempted to use their influence to undermine regulators' efforts to adopt new regulations under the Act.[61] Meanwhile, regulators—

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55. *See* Ostry, *Convergence and Sovereignty: Policy Scope for Compromise?*, *in* Coping with Globalization, *supra* note 38, at 2–3. Ostry associates convergence with the "erosion of national sovereignty." *Id.* at 2. That assertion, while interesting, is beyond the scope of this paper, although increasing convergence will likely have implications for how decisionmaking authority is allocated between and among nation-states.

56. *See* Chris Brummer, *How International Financial Law Works (And How It Doesn't)*, 99 Geo. L.J. 257, 271 (2011) ("Assuming countries follow policies that promote the interests of their domestic firms, soft law should provide little utility as a means of making credible commitments.") (footnote omitted).

57. Dodd–Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C § 5301 (2012).

58. *Proposal for a Regulation of the European Parliament and of the Council on OTC Derivatives, Central Counterparties and Trade Repositories*, COM (2010) 484 final (Sept. 15, 2010), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0484:FIN:EN:PDF; *see also Commission Proposal on OTC Derivatives and Market Infrastructures – Frequently Asked Questions*, Europa.eu, (Sept. 15, 2010), http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/10/410&format=HTML&aged=0&language=EN&guiLanguage=en.

59. *Commission Proposal on OTC Derivatives and Market Infrastructures – Frequently Asked Questions*, *supra* note 58; *see also* David Eatough, *New EU Proposal for the Regulation of the OTC Derivatives Market*, DLA Piper (Oct. 26, 2010), http://www.dlapiper.com/new-eu-proposal-for-the-regulation-of-the-otc-derivatives-market-10-26-2010/.

60. *See* Pan, *supra* note 2, at 775 ("[T]he European Union remains limited by its ever-present challenge of balancing expansion of EU-level institutions with the sovereign interests of its member states.") (footnote omitted); *see also* Jessica Meek, *Wave of New Regulations Bring Inconsistencies and Loopholes*, Risk.net (Sept. 1, 2011), http://www.risk.net/operational-risk-and-regulation/feature/2101269/wave-regulation-brings-inconsistencies-loopholes (describing efforts to ensure derivatives regulations are formulated and applied consistently among EU member states).

61. *See* Julie Steinberg, *SEC and CFTC Hiring in Jeopardy as Republicans Slow Dodd-Frank*, FINS.com (Jan. 3, 2011), http://www.fins.com/Finance/Articles/SB129407710451571961/SEC-and-CFTC-Hiring-

who are ultimately responsible for shaping and enforcing the rules—have also failed to reach a consensus on how the laws should be put into practice, all the while contending with shortages of resources and talent and a growing complacency toward the need for regulation and convergence in the first place.[62]

However, failure to adopt meaningful policies could come at a great cost. In addition to the threats of arbitrage and contagion mentioned above, there is a third danger that should not be overlooked: the harm to business and the capital markets that could occur as a result of incompetent, excessive, or vague regulations.[63] As some commentators have noted, financial regulators have a duty not only to ensure the safety and soundness of national markets, but also to enhance the financial sector's operation.[64] The challenge is to not only succeed at harmonizing financial regulations, but to do it right.

III. DERIVATIVES REGULATION IN A NUTSHELL

Derivatives played a key role in the financial crisis and regulating their use internationally involves unique challenges. Part III.A. will provide a brief description of what derivatives are and how they are currently regulated, and Part III.B. will offer a primer on international regulatory convergence and relevant international law theory, namely transgovernmentalism. With this background, it will be possible to show how derivatives regulation, as conceived by the G-20, does or does not fit into the transgovernmental framework provided.

in-Jeopardy-as-Republicans-Slow-Dodd-Frank. Moreover, opponents of the Dodd-Frank Act's provisions are beginning to look to the courts for relief, especially following an appeals court ruling throwing out an SEC rule on shareholder rights, which may have implications for rules created under Dodd-Frank. *See* Jean Eaglesham, *Fight over Dodd-Frank Shifts to Courts*, Wall St. J. (July 29, 2011), http://online.wsj.com/article/SB10001424053111904772304576470313933175814.html; Jesse Hamilton & Joshua Gallu, *Dodd-Frank Rules May Be at Legal Risk After SEC Loses U.S. Court Appeal,* Bloomberg (July 23, 2011), http://www.bloomberg.com/news/2011-07-22/dodd-frank-act-s-rules-may-be-at-legal-risk-after-sec-appeals-court-defeat.html.

62. *See* Meek, *supra* note 60; *see also* Jean Eaglesham, *Atlas Shrugged. Will Regulators?*, Wall St. J. (July 20, 2011), http://online.wsj.com/article/SB10001424052702304567604576456383493081922.html ("As the Dodd-Frank financial-overhaul law nears its first anniversary on Thursday, SEC and CFTC officials are straining to write dozens of rules required by the law.").

63. IBA Task Force, *supra* note 38, at 277 ("Global financial intermediaries cope with a range of contrasting regulations that serve no coherent policy impact, with the consequent problems creating a burden on management time, incoherent efforts to promote similar policies leading to different demands on firms, lack of market clarity, increased difficulty of enforcement cooperation, the creation of compliance traps, the need to multiply systems, and confusion of personnel and danger of inadvertent violations.").

64. *See, e.g.*, Eric J. Pan, *Structural Reform of Financial Regulation*, 19 Transnat'l L. & Contemp. Probs. 796, 799–801 (2011) ("Financial regulation should have two goals: to ensure the safety and soundness of the financial system (which includes the promotion of consumer protection) and to foster the growth and development of the financial markets.").

A. Derivatives: An Overview

In simplest terms, a derivative is a contract whose value is derived from an underlying asset.[65] For example, an options contract, which is a type of derivative, may give a party the "option" to purchase or sell something (e.g., an equity) at a certain price.[66] Likewise, a futures contract may give a party the right to purchase or sell a commodity (e.g., wheat) at an agreed-upon price on a future date.[67] Derivatives have been used in some form for reasons such as these for centuries by everyone from Japanese rice traders to Dutch sea merchants.[68] However, their use exploded significantly in the 1970s as companies looked for ways to hedge against fluctuations in currency and interest rates.[69] Indeed, regulators encouraged their use for this purpose.[70]

The third major category of derivative is the "swap," which allows parties to exchange one type of obligation for another.[71] For example, parties to a swap contract may agree to trade a fixed interest rate for a variable one as a way to manage the risk of interest rate changes.[72] Interest rate swaps are the most common swaps by volume; others include currency and commodity swaps.[73] And then there are credit default swaps (CDS), the black sheep of the swaps family.[74] Robert Litan provides a succinct description of CDS contracts:

> [i]n a CDS, the buyer makes regular payments over some fixed period (typically five years but as short as a single year and as long as ten years) to the seller, who pays the notional amount of the CDS if the issuer of the referenced obligation (such as a bond or a loan) defaults. CDS contracts are sold on the debt of single companies or countries, on specific issues of mortgage securities, or indices of these instruments. Although most of the adverse publicity and commentary about CDS arrangements refers to the "insurance" they provided for mortgage-related securities, in fact only about 1% of all CDS cover these

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65. Robert E. Litan, The Derivatives Dealers' Club and Derivatives Markets Reform: A Guide for Policy Makers, Citizens and Other Interested Parties 3, 12 (2010), *available at* http://www.brookings.edu/papers/2010/0407_derivatives_litan.aspx.

66. *Derivatives: Over the Counter, Out of Sight*, The Economist (Nov. 12, 2009), http://www.economist.com/node/14843667.

67. *See id.*

68. *See id.*

69. *See id.*

70. *See id.*

71. *See id.*

72. *Id.*

73. Litan, *supra* note 65, at 13 ("At year end 2008, the notional total of interest rate swaps exceeded $400 trillion . . . .").

74. Warren Buffett made headlines after calling swaps and other complex derivatives "financial weapons of mass destruction." Letter from Warren Buffett, Chairman, Berkshire Hathaway, to Shareholders (Feb. 21, 2003), *available at* www.berkshirehathaway.com/letters/2002pdf.pdf.

> instruments. Over 90% of CDS are written to cover corporate defaults (or corporate indices).[75]

The causes for the financial crisis of 2008 were complex and many.[76] However, a commonly accepted—and easy-to-follow—narrative is that loan originators sold vast amounts of risky loans that were then repackaged (securitized) and sold off to investors, who—for one reason or another—were unaware of the creditworthiness of the borrowers.[77] These complex instruments then became the underlying assets upon which CDS contracts were based. When the housing market began to weaken in 2007, and loan defaults became more frequent, the income streams upon which the instruments depended disappeared.[78] This triggered covenants in the CDS contracts and overwhelmed issuers who were widely exposed to the market.[79] The result was the implosion of the banking sector in September 2008.[80]

Despite their risks—and reputation—swaps, like all derivatives, are an essential risk management tool for many firms.[81] Without them, firms would be left without a method for hedging against risks beyond their control and would be discouraged from entering into economically useful activities.[82] Eliminating the use of derivatives would be akin to denying firms the right to acquire insurance on certain deals. Rather than moving ahead without protection, many actors would prefer to avoid significantly risky deals all together, regardless of their wider economic benefit.[83]

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75. Litan, *supra* note 65, at 13.

76. *See* Mark Jickling, *Causes of the Financial Crisis*, Cong. Res. Service (Apr. 9, 2010), www.au.af.mil/au/awc/awcgate/crs/r40173.pdf.

77. For a concise retelling of the events leading to the financial crisis, see Cheng, *supra* note 24, at 201–04.

78. *See id.*

79. *See id.*

80. *Id.*; *see also* U.S. Senate Permanent Subcomm. on Investigations, Committee on Homeland Sec. and Governmental Affairs, Wall Street and the Financial Crisis: Anatomy of a Financial Collapse, 318 (2011) [hereinafter Senate Report] ("A key factor in the recent financial crisis was the role played by complex financial instruments, often referred to as structured finance products, such as residential mortgage backed securities (RMBS), collateralized debt obligations (CDOs), and credit default swaps (CDS), including CDS contracts linked to the ABX Index. These financial products were envisioned, engineered, sold, and traded by major U.S. investment banks."). *But see* Houman B. Shadab, *Guilty by Association? Regulating Credit Default Swaps*, 4 Entrepreneurial Bus. L.J. 407, 412 (2010) (arguing that "the financial crisis is primarily the result of the economywide mispricing of mortgage-related debt *securities* such as CDOs and not primarily the result of the utilization and growth of credit *derivatives* such as CDSs").

81. *See Derivatives: Over the Counter, Out of Sight*, *supra* note 66; Christian Weistroffer, Credit Default Swaps: Heading Towards a More Stable System 8 (2009); *see also* Litan, *supra* note 65, at 13 ("Even most critics of swaps concede their usefulness for hedging.").

82. *See* Weistroffer, *supra* note 81.

83. *See id.* at 8 ("By buying CDS protection, credit risk of the reference entity is replaced by the risk of the CDS counterparty failing. If this means a true reduction in risk exposure, less capital will be committed to the loan, which in turn frees capital for other productive investments.").

B. Regulating Derivatives: A How-To

This Part will detail derivatives regulation as described by the IMF[84] and the Brookings Institute,[85] and how such regulations would address risks in the derivatives market. Part V will touch on some of the complexities that arise when the proposal is applied to existing systems in the United States and Europe.

Users trade derivatives in one of two ways—on an exchange or over-the-counter.[86] The basic difference is that an exchange matches orders based on buy and sell prices, while the price of an OTC trade is negotiated through a dealer.[87] Exchanges are considered to be more transparent and orderly than OTC trading.[88] In the United States, commodity options and futures have been exchange-traded as a matter of law since 1936 and are subject to the regulation of the Commodity Futures Trading Commission (CFTC).[89] The Securities and Exchange Commission (SEC) has jurisdiction over the market for security options and some security futures products.[90] Swaps, on the other hand, have been generally unregulated since the passage of the Commodity Futures Modernization Act of 2000.[91] By June 2009, the market for OTC swaps was estimated to have topped $600 trillion.[92]

The model for derivatives regulation calls for moving products that are currently traded in the OTC market to being traded on exchanges—when possible.[93] The two primary components of this scheme are CCPs and the exchanges themselves.[94] The function of these entities is to provide a forum for conducting transactions and a vehicle for enforcing regulatory prescriptions designed to enhance the market's

84. *See* Int'l Monetary Fund, Global Financial Stability Report: Meeting New Challenges to Stability and Building a Safer System 91 (2010) [hereinafter IMF Report].

85. *See* Litan, *supra* note 65.

86. *See Derivatives: Over the Counter, Out of Sight*, *supra* note 66 ("Derivatives are bought and sold in two ways. Contracts with standardised terms are traded on exchanges. Tailored varieties are bought 'over the counter' (OTC) from big 'dealer' banks.").

87. *See* Litan, *supra* note 65, at 12.

88. *See id.* at 17; *see also* IMF Report, *supra* note 84.

89. *See* Commodity Exchange Act, 7 U.S.C. § 1 (2012); *History of the CFTC*, U.S. Commodity Futures Trading Comm'n, http://www.cftc.gov/About/HistoryoftheCFTC/index.htm (last visited Sept. 23, 2012).

90. *See Security Futures Products*, U.S. Commodity Futures Trading Comm'n, http://www.cftc.gov/IndustryOversight/ContractsProducts/SecurityFuturesProduct/sfpoverview (last visited Sept. 23, 2012).

91. *See* Commodity Futures Modernization Act of 2000, 7 U.S.C. § 105 (2012).

92. IMF Report, *supra* note 84, at 2; *Derivatives: Over the Counter, Out of Sight*, *supra* note 66, at 3.

93. Proponents note that derivatives that are not standardized and that cannot be traded on exchanges would remain in the OTC market, but should be subject to higher collateral requirements. *See* IMF Report, *supra* note 84, at 10; Litan, *supra* note 65 at 5, 10.

94. Other components include rules against the comingling of client funds, margin requirements, and rules for how CCPs and other market participants should be managed. *See* Litan, *supra* note 65. The IMF includes derivatives regulation as one prong of a broader proposal to bolster economic stability that includes the use of "living wills" for large institutions and the establishment of financial "firewalls" to allow economies to absorb shocks more easily. IMF Report, *supra* note 84, at 2.

stability and transparency.[95] Under this model, transactions that currently take place in the OTC market would migrate to CCPs and exchanges—mimicking the current arrangement for equities and exchange-traded derivatives including options and futures.[96] Additionally, CCPs and exchanges would be responsible for monitoring their users to ensure that participants met minimum requirements for derivatives trading.[97]

The second part of the proposal is to move as many swaps contracts as possible onto exchanges where standardized contracts can be traded.[98] In an OTC transaction, only the parties themselves know the price of the contract.[99] Moving the transactions onto an exchange, particularly an electronic one, would force the details of the transaction into the open, providing more transparency to the market.[100] Moreover, by creating a space for trading standardized contracts, an exchange would create a more liquid market and assist in the formulation of prices.[101]

The G-20's proposal calls for the increasing use of both CCPs and exchanges in what is now the OTC derivatives market.[102] However, there are significant obstacles to its implementation—and implementation is half the battle.

IV. ACT TWO: ENTER CONVERGENCE

Understanding what regulatory convergence is and how it takes place in the international arena will make it possible to appraise the G-20's proposals for derivatives regulation from the perspective of international law theory and to consider the approaches that are most likely to succeed in practice.

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95. *See* IMF Report, *supra* note 84.

96. *Id.*

97. *See* Litan, *supra* note 65, at 5 n.2 ("Clearing refers to all of activities that are involved in confirming, monitoring and ensuring that sufficient collateral or margin is provided (where it is required) until a trade is actually settled (monies exchanged between the buyer and the seller). A 'central' clearinghouse performs all these activities in one place, and acts as the legal go-between for the buyer and the seller.").

98. *See id.* at 5.

99. *See id.* at 8.

100. *Id.*; *see also* IMF Report, *supra* note 84, at 2 n.1 ("This chapter does not extensively discuss proposals to force OTC derivatives trading onto organized exchanges, although such a move would have obvious price transparency benefits to the users of these contracts.").

101. *See* Litan, *supra* note 65, at 29 ("And once contracts are traded on exchanges, parties will have a demand for more price transparency. If markets don't deliver that result, then regulators can and should. With more price transparency, there will be less systemic risk because 'marks' are more timely and accurate, and of course, even more liquidity.").

102. *See* G-20, *supra* note 49, ¶13 ("All standardized OTC derivative contracts should be traded on exchanges or electronic trading platforms, where appropriate, and cleared through central counterparties by end-2012 at the latest.").

A. What is Regulatory Convergence?

Convergence is the outcome of one or more processes through which the legal systems of different nations become more similar. These processes are driven by "natural" forces, including the increased sharing of information and technology as well as intentional choices by decisionmakers.[103]

In today's world, no significant piece of lawmaking—financial lawmaking in particular—can be fully understood if thought of parochially, that is, as a national solution conceived of and formulated in isolation in response to a domestic problem. Rather, legislative processes—indeed, all legal processes—must be considered in the context of a global system of "authoritative decision," in which effective power is increasingly distributed beyond and across nation-state boundaries.[104] Decisions taken by national bodies, even the U.S. Congress, are influenced by global events and the actions of decisionmakers abroad.[105] Likewise, decisionmakers elsewhere are influenced by the exercise of authority in the United States, whether directly or indirectly.[106] Despite this interconnectedness, formal authority for decisionmaking remains fragmented territorially among nation-states.[107] This feature of international law is a remnant of the Westphalian system that took hold in the sixteenth century.[108] András Jakab describes this system succinctly:

> [t]he world consists of, and is divided by, sovereign states which recognise no superior authority; the process of law-making, the settlement of disputes and law enforcement are largely in the hands of individual states. All states are internationally regarded as equal before the law; legal rules do not take account of asymmetries of power. International law is orientated to the establishment of minimal rules of co-existence; the creation of enduring

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103. *See* Ostry, *Convergence and Sovereignty: Policy Scope for Compromise?*, *in* Coping with Globalization, *supra* note 38, at 2.

104. This Part relies heavily on the framework of the New Haven School of international law, as developed by Profs. Myres S. McDougal and Harold D. Lasswell along with subsequent scholars. In New Haven-speak, authoritative decision refers to the process "through which the common interest of the members of the world community is identified, clarified, and protected." Lung-Chu Chen, An Introduction to Contemporary International Law 11 (2d ed. 2000); *see also* Myres S. McDougal, Harold D. Lasswell, & W. Michael Reisman, *The World Constitutive Process of Authoritative Decision,* 19 J. Legal Educ. 253 (1967), *available at* http://digitalcommons.law.yale.edu/fss_papers/675; Cheng, *supra* note 24.

105. *See* Lung-Chu Chen, *Constitutional Law and International Law in the United States of America*, 42 Am. J. Comp. L. 453, 455 (1994) ("Decisions made locally can have inclusive effects, with impacts reaching the national, regional, and international levels. Consequently, just as decision processes within the United States have effects on the international community, decision processes in other nations and in intergovernmental organizations at the regional and international levels impact and affect conditions, and ultimately the law, in the United States.") (footnote omitted).

106. *See id.*

107. *See, e.g.*, McDougal et. al., *supra* note 104, at 263–64.

108. *See generally* András Jakab, *Neutralizing the Sovereignty Question—Compromise Strategies in Constitutional Argumentations About the Concept of Sovereignty for the European Integration*, 2 Eur. Const. L. Rev. 375, 383–86 (2006) (describing the evolution of the concept of sovereignty in Europe following the Peace of Westphalia in 1648).

> relationships among states is an aim, but only to the extent that it allows national political objectives to be met.[109]

This view of the world is increasingly outmoded and "out of place in today's world of interdependence."[110] Individuals around the world are aware of their growing connectedness, and decisionmakers are under pressure to cooperate with their foreign counterparts to address issues of common concern. In order to understand international law from this perspective, it is not enough to study relations between states. Rather, one must inquire into the authoritative process of decisionmaking taking place at every level of the international system and involving a comprehensive range of participants.[111]

This reality is becoming increasingly clear in the area of finance. As the International Bar Association's Task Force on Extraterritorial Jurisdiction observes, "Today, the regulatory framework consisting of generally independent national regulatory systems no longer matches the reality of global capital flows as transactions involving foreign issuers, financial intermediaries and investors become more the norm than the exception."[112] As the financial crisis has shown, the failure to properly regulate this system can have dire consequences. Decisionmakers are now looking for ways to bridge the divides between national authorities in order to create more comprehensive and effective regulations.[113]

There are a number of ways to pursue international legal convergence. Some modes are more common in certain areas of law than in others. And certain modes

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109. *Id.* at 384 (footnote omitted).

110. *See* Chen, *supra* note 104, at 217 ("The persisting assertion and use of sovereignty, with its sixteenth-century absolutist connotation, thus appear out of place in today's world of interdependence."); *see also* Oona Hathaway & Scott J. Shapiro, Outcasting: Enforcement in Domestic and International Law (Nov. 3, 2010) (unpublished manuscript), *available at* www.iilj.org/courses/documents/HC2010Nov10.HathawayShapiro.pdf (describing and challenging what the authors refer to as the "Modern State Conception" of international law).

111. *See* Chen, *supra* note 104, at 223 (describing "an interdependent world in which transnational interaction has grown enormously and in which nonstate and state actors are in constant interplay under changing, complex conditions, generating value outcomes of varying magnitudes across state boundaries."); *see also id.* at 323 ("The outcomes of the comprehensive world constitutive process of authoritative decision are the various decisions taken when making and applying law to manifold problems. These decisions may be conveniently classified into seven functions: intelligence (information), promotion, prescription, invocation, application, termination, and appraisal. The effectiveness and the economy with which these functions are performed directly affect the quality of protection afforded by international law.").

112. IBA Task Force, *supra* note 38, at 276 (footnote omitted); *see also* David Zaring, A Paradigm of Global Financial Regulation (June 3, 2011) (draft paper for LSA annual meeting), at 6, *available at* http://www.stanford.edu/group/lawlibrary/cgi-bin/asimow/lsa/wordpress/wp-content/uploads/2011/04/zaring-lsa2011.pdf ("The globalization of the financial economy has created a variety of problems for regulators: markets can cross borders easily, while regulators can do so only with difficulty . . . .").

113. Brummer, *supra* note 43, at 362 ("The 2008 financial crisis has, in particular, spurred a dramatic realignment of regulatory philosophy among countries, including the United States, whereby more stringent regulatory standards are more universally desired."); Brummer, *supra* note 56, at 259 ("Few developments in the wake of the financial crisis have been more stunning—or significant—than the coming of age of the international financial system.").

are more effective at securing compliance than others. Generally speaking, scholars tend to categorize these modes into two categories: "hard" or "soft." The difference between them is the degree to which their prescriptions are accompanied by an expectation of authoritative control or enforcement. The "hardest" and most traditional form of international agreement is a treaty describing clearly the signatory nation's obligations and the consequences for violating them.[114] Soft forms of international law are more ambiguous and lack treaties' legal force.

For example, even in the absence of a treaty, regulators from different nations may choose to coordinate with one another to develop similar policies. This is the approach taken by the International Accounting Standards Board (IASB) and the U.S. Financial Accounting Standards Board (FASB), which are collaborating to converge U.S. Generally Accepted Accounting Principles (GAAP) and International Financial Reporting Standards (IFRS).[115] The benefit of such partnerships—and soft law in general—is that they can be forged rather quickly.[116] Another example of soft international law is the Basel Accords, which are a set of non-binding standards issued by the Basel Committee on Banking Supervision concerning key aspects of banking regulation, including capital requirements.[117] Although the Basel Committee is not an authoritative body and operates without the benefit of a treaty, its prescriptions are highly influential, and many domestic authorities have been quick to implement them.[118]

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114. *See* Chen, *supra* note 104, at 255–75.

115. *See IASB and FASB Report Substantial Progress Towards Completion of Convergence Program*, Fin. Accounting Standards Bd. (Apr. 21, 2011), http://www.fasb.org/cs/ContentServer?c=FASBContent_C&pagename=FASB/FASBContent_C/NewsPage&cid=1176158460171. The convergence of accounting standards is truly a global undertaking. Nations including the United States, United Kingdom, India, South Korea, and Nigeria, to name a few, are currently in the process of harmonizing in some way their locally accepted accounting principles with IFRS—albeit with different levels of urgency. *See IFRS Delayed in India for One Year*, Accountancy Age (Mar. 2, 2011), http://www.accountancyage.com/aa/news/2029907/ifrs-delayed-india; Kim Yon-se, *Korea Boosts Accounting Transparency*, Korea Herald (Feb. 23, 2011, 7:00 PM), http://www.koreaherald.com/business/Detail.jsp?newsMLId=20110223000638; Chijioke Ohuocha, *Nigeria's Move to IFRS Seen Boosting Stock Valuations,* Reuters (June 30, 2011), http://www.reuters.com/article/2011/06/30/nigeria-ifrs-idUSLDE75S0KT20110630.

116. The Public Company Accounting Oversight Board is an example of a regulatory organization that has been active in striking agreements with foreign regulators. It seeks to gain access to foreign auditors working with U.S. companies for the purpose of inspection. *See* Kevin Reed, *US Audit Watchdog Gains Access to UK Auditors*, Accountancy Age (Jan. 10, 2011), http://www.accountancyage.com/aa/news/1935937/audit-watchdog-gains-access-uk-auditors; Tammy Whitehouse, *SEC, PCAOB Send Delegation to China*, Compliance Week (July 7, 2011), http://www.complianceweek.com/sec-pcaob-send-delegation-to-china/article/206996/. The SEC also coordinates with foreign counterparts on programs of common interest. *See, e.g.*, *SEC, Turkish Regulator to Talk Turkey on Investor Protection*, Fin. Advisor (July 25, 2011), http://www.fa-mag.com/fa-news/8042-sec-and-turkey-securities-regulator-agree-to-engage-in-new-dialogue.html.

117. *About the Basel Committee*, Bank for Int'l Settlements, http://www.bis.org/bcbs/about.htm (last visited Sept. 23, 2012).

118. *See generally* Cheng, *supra* note 24, at 209–15 (discussing the global response to the 2008 financial crisis and the impact of the Basel Committee).

B. *Theories of Convergence and Their Application to International Financial Regulation*

The question of international financial regulation has received increasing attention in recent years, as evidenced by works such as Chris Brummer's book *Soft Law and the Global Financial System*, which offers an anatomy of the international financial regulatory system.[119] Generally speaking, scholars who have written about convergence in the field of international financial regulation tend to analyze the issue in one of two ways. The first is to consider how regulators, as a practical matter, go about regulating the international financial system in the absence of formal authority.[120] The second is to consider whether regulators' decisions are credible in the absence of a global body with the power to enforce them.[121]

1. *How International Regulators Regulate*

A broadly accepted theory about how international financial regulation works is "networking" theory[122] or "transgovernmentalism."[123] It describes how regulators[124] from different nations come together to devise solutions to problems that are international in nature. Transgovernmentalism was brought to the fore in Anne-Marie Slaughter's *A New World Order* in 2004.[125] Notably, the theory characterizes regulators as being motivated by the desire for greater regulatory effectiveness and a spirit of cooperation, informed primarily by a professional interest that transcends national boundaries. As Chris Brummer further explains, networking assumes that

> [d]ecisionmaking is not vested in the hands of uninformed political elites. Rather, it is guided by a stable of skilled technocrats who develop shared expectations and trust allowing them to dispense with time-consuming treaties and formal international organizations.[126]

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119. Chris Brummer, Soft Law and the Global Financial System (2012).

120. *See, e.g.*, K. Sabeel Rahman, Note, *Envisioning the Regulatory State: Technocracy, Democracy, and Institutional Experimentation in the 2010 Financial Reform and Oil Spill Statutes*, 48 Harv. J. on Legis. 555, 560 (2011) ("As Richard Stewart writes, 'The ultimate problem [of administrative law] is to control and validate the exercise of essentially legislative powers by administrative agencies that do not enjoy the formal legitimation of one-person one-vote election.'") (quoting Richard Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1667, 1688 (1975)).

121. *See, e.g.*, Brummer, *supra* note 56, at 271–72 (exploring how "reputational costs" may help regulators secure compliance with prescriptions).

122. *See* Brummer, *supra* note 56.

123. *See* Pan, *supra* note 32, at 254–58.

124. *See* Cheng, *supra* note 24, at 196 (adopting the definition of regulators used by Anne-Marie Slaughter: "'appointed top officials or career civil servants who possess a special expertise in a particular subject'") (quoting Anne-Marie Slaughter, A New World Order 38 (2004)).

125. Anne-Marie Slaughter, A New World Order (2004).

126. Brummer, *supra* note 43, at 342.

These technocratic[127] networks operate within a "decentralized regulatory space" granted to them by their national legislators in which "the national–international dichotomies associated with public international law do not apply."[128] Within these mandates, regulators are free to coordinate and adopt prescriptions and to forge agreements with other regulators as necessary to accomplish their objectives.[129] As Pan states, "Regulators . . . must have the freedom to act without political interference and retain the ability to interpret their statutory objectives in developing relevant rules and regulations."[130] The prescriptions adopted in this way are not fully authoritative. As Brummer explains, "In contrast to areas like international trade, financial agreements do not take the form of legally binding treaties. Instead, international financial rules are promulgated mainly through nonbinding agreements."[131] These nonbinding agreements are quintessential examples of soft law.[132]

Soft law is well suited to the fast-moving world of finance because it is easier to formulate than hard law (i.e., treaties), which requires extensive negotiations between executives.[133] Treaties also come with significant "sovereignty costs" that can create hesitation among parties.[134] To the contrary, soft law offers flexibility, as Brummer writes:

> Soft law . . . provides a decisively cheaper means of agreement-making. It carries what can be thought of as low bargaining costs due to its informal status. Perhaps most important, it does not necessarily require extensive participation by heads of state or lengthy ratification procedures. Instead, agreements can be entered into between administrative agencies and technocrats—with relatively little interference by outsiders.[135]

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127. *See* Brummer, *supra* note 56, at 274 ("That regulators engage in such activities demonstrates a significant departure from traditional public international law models of diplomacy, where political elites and heads of state participate. It injects technocratic skill at the highest level of the rulemaking process.").

128. *Id.* at 273 (footnote omitted).

129. *See* Cheng, *supra* note 24, at 196 ("Regulators do not represent states in making international laws. Instead, they use informal prescriptions, which may or may not involve enforcement mechanisms.").

130. Pan, *supra* note 64, at 811.

131. *See* Brummer, *supra* note 56, at 261; *see also* Zaring, *supra* note 112, at 9 ("No comprehensive treaty sets forth these commitments, and no such treaty has been designed to ensure that countries honor their obligations regarding international finance . . . . Instead, the form of law created by financial regulatory cooperation lacks the formality of traditional international law, and accordingly lacks the straightforward public international law source legitimacy that, for example, the trade organization enjoys.").

132. Cheng, *supra* note 24, at 199–200 ("In the international legal system, soft laws are not legal rules such as those identified in Article 38 of the ICJ Statute but are informal prescriptions that nonetheless authoritatively shape expectations of appropriate conduct by governing elites and can control outcomes in international problems.") (footnote omitted).

133. *See* Chris Brummer, *Why Soft Law Dominates International Finance—And Not Trade*, 13 J. Int'l Econ. L. 623 (2010); *see also* Cheng, *supra* note 24, at 198 ("For some regulators of critical industries, such as finance, a secondary function is to manage international crises when they emerge, to stabilize global order, and to restore normal patterns of activities. In a crisis, the time available for them to make decisions is short.").

134. Brummer, *supra* note 133, at 631.

135. *Id.* (footnote omitted).

National regulators are also increasingly coordinating their actions through intermediary organizations designed to facilitate a higher level of multilateral action. Examples include the Basel Committee on Banking Supervision, the International Organization of Securities Commissions (IOSCO), the IASB, the Committee on Payments and Settlements Systems (CPSS),[136] and to an extent the IMF and the World Bank.[137] These entities each provide a forum in which national regulators can interact and serve a vital function in the monitoring and appraising of members' efforts to adopt relevant prescriptions. Coordinating agencies accomplish their work by issuing best practices and standards, publishing expert reports, and providing opportunities for information sharing and the coordination of enforcement across borders.[138]

The G-20 is another example of an organization that plays a role in the formulation and promulgation of soft international law.[139] Much of its work is carried out through the FSB, the successor organization to the Financial Stability Forum that had been established by the G-7 in 1999.[140] The FSB was created at the G-20's 2009 London summit with the mission to "give momentum to a broad-based multilateral agenda for strengthening financial systems and the stability of international financial markets" through actions that include assessing member nations' financial systems and regulatory structures, coordinating the exchange of information among members, and promoting necessary reforms.[141] The FSB is "a network of networks"[142] and also interacts with key organizations including the Basel Committee, the IASB, and the IOSCO.[143] Among the FSB's contributions to the G-20's efforts is the issuing of progress reports on subjects including reforms to the OTC derivatives markets.[144]

2. *Are International Regulations Credible?*

The next question that arises is whether prescriptions adopted by international regulators are credible. In other words, what about them compels nations or other actors to conform? As discussed above, one of the primary advantages of soft law is

136. *See id.* at 627–28.

137. *See* Brummer, *supra* note 56, at 280–81.

138. *See* Brummer, *supra* note 133.

139. *Id.* at 627.

140. *About the FSB: History*, Fin. Stability Bd., http://www.financialstabilityboard.org/about/history.htm (last visited Sept. 23, 2012).

141. *About the FSB: Mandate*, Fin. Stability Bd., http://www.financialstabilityboard.org/about/mandate.htm (last visited Sept. 23, 2012).

142. Brummer, *supra* note 43, at 359.

143. *See About the FSB: FSB Member Institutions*, Fin. Stability Bd., http://www.financialstabilityboard.org/about/fsb_members.htm (last visited Sept. 23, 2012).

144. *See, e.g.*, Fin. Stability Bd., Progress in the Implementation of the G20 Recommendations for Strengthening Financial Stability 5 (2011), http://www.financialstabilityboard.org/publications/r_110415a.pdf.

that it is faster and easier than more formal types of law. However, this is also the source of its greatest weakness. In theory, it is as easy for nations to break their soft obligations, for little or no cost, as it is for them to enter into those obligations.

Nevertheless, scholars such as Chris Brummer argue that soft law can become more authoritative when combined with other costs such as reputational costs. Brummer writes, "agreements frequently memorialize consensus on issues with important domestic import for parties. As a result, defection from even informal agreements can have reputational costs that hamper a regulator's ability to promote its policies abroad."[145] Brummer suggests that these reputational costs are particularly effective in the area of enforcement and points to the example of the Financial Action Task Force (FATF), which was created to combat international money laundering. FATF member states essentially undertook a shaming campaign aimed at coercing noncompliant nations to adopt anti-laundering measures.[146] The campaign was largely a success.[147] Moreover, soft law can be enhanced by tying it to incentives such as membership in certain organizations.[148]

In the case of the G-20, there is added momentum because of the involvement of heads of state. By involving a range of participants, organizations such as the G-20 can tap into "cross-functional networks"[149] to multiply their influence. Brummer explains:

> [T]he G-20 invites participation from both regulators and political elites—from finance ministers representing their countries' executives, to heads of state themselves . . . . [O]ccasional participation by presidents and prime ministers lends more credibility to commitments made by countries, even though the commitments are not memorialized as formal treaties. Because heads of state wield authority over regulators, either directly or indirectly, and can help to hold a wide array of market and governmental actors accountable, their acknowledgement of policy positions creates significant pressure for reform.[150]

V. THE G-20 AND TOP-DOWN CONVERGENCE: AN APPRAISAL

This Part will consider whether transgovernmental theory is adequate to explain the connection between the G-20's proposal for derivatives regulation and subsequent legislative acts. This Part will focus its analysis on the Dodd-Frank Act, leaving a discussion of EMIR for another time. It concludes that some aspects of the Act's history do, in fact, exceed the theory's scope and have not been fully considered by scholars.

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145. Brummer, *supra* note 56, at 263; *see also* Roberta S. Karmel & Claire R. Kelly, *The Hardening of Soft Law in Securities Regulation*, 34 Brook. J. Int'l L. 883 (2009).

146. *See* Brummer, *supra* note 56, at 295–97.

147. *See id.* at 297 (footnote omitted).

148. *Id.* at 289.

149. Brummer, *supra* note 43, at 357–60 (describing "cross-functional networks").

150. *Id.* at 361.

A. The G-20 and Dodd-Frank

The Dodd-Frank Act is a hefty and wide-reaching piece of legislation.[151] It was intended to address a number of issues perceived to be at the root of the financial crisis and subsequent recession. Chief among those causes was the explosive growth of the unregulated market for OTC derivatives, including credit-default swaps and collateralized debt obligations.[152] Major parties that traded in these instruments had been largely exempt from regulation under U.S. law for roughly a decade.[153] This under-regulation was blamed for creating a situation in which risk was over-concentrated in certain institutions.[154] These included Lehman Brothers, whose spectacular collapse in September 15, 2008, marked the beginning of the crisis.[155]

Senator Christopher Dodd of Connecticut, who authored the Dodd-Frank Act with Representative Barney Frank of Massachusetts, connected the dots between the G-20's recommendations and his own legislation at a presentation to the Atlantic Council in August 2010. Dodd, who was chairman of the Senate Banking Committee, described a meeting with President Barack Obama in January 2009, roughly two months following the G-20's summit in Washington. At the President's request, Dodd completed a draft of the legislation before the G-20's summit in London in April of that year. Dodd explained:

> I was looking back and the date of April of '09, obviously, when the G-20 met. When I met with the president in January of '09 as the new president, along with Barney Frank and the economic team as it was in the White House in those days, the request was can you have a bill ready for the April '09 summit meeting of the G-20? . . . . And if you track what we did in the bill and track it next to the principles outlined by the G-20 [in 2008], you'll find that very much we follow them very much almost to the letter. So if you're looking for any model of our legislation, it is in fact the principles laid out by the G-20.[156]

151. Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5301 (2011).

152. *See supra* note 80 and accompanying text.

153. Credit default swaps were exempt from U.S. securities regulations by the Commodity Futures Modernization Act of 2000. 7 U.S.C. § 105 (2012). Other types of derivatives, including options and futures contracts, were always and still are subject to extensive regulation. *See generally* Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (2006).

154. *See* Senate Report, *supra* note 80 (offering case studies, including one on Washington Mutual Bank demonstrating how exposure to sub-prime mortgage risks led to the bank's demise in 2008); Shadab, *supra* note 152, at 441–47 (discussing the overconcentration of CDS risk in certain companies, including insurers such as American International Group).

155. *See supra* Part II.A.

156. Senator Christopher Dodd, Remarks at the Atlantic Council of the United States: Reforming Global Finance for the Economic Recovery (Aug. 4, 2010), *available at* http://www.acus.org/event/reforming-global-finance-economic-recovery-transcript.

Congress approved the Dodd-Frank Act on July 15, 2010, and President Barack Obama signed it into law on July 21, 2010.[157] The Act touched on nearly every facet of the financial services industry in the United States and called for increased regulation of industries including hedge funds, broker-dealers, and banks, as well as the formation of a new Consumer Financial Protection Agency and the Financial Stability Oversight Council, which would evaluate and coordinate regulatory efforts among U.S. agencies as well as international counterparts.[158]

The Act required the promulgation of hundreds of new financial rules and directed agencies to complete more than sixty studies on a plethora of regulatory subjects.[159] For derivatives, the Act's major provisions included the introduction of mandatory clearing and trading with increased regulatory oversight, the establishment of "swap dealers and major swap participants" who would face new registration requirements, and the limitation of swaps trading by banks and affiliates.[160]

Importantly, most elements of the Act were not effective upon its adoption by the U.S. Congress. Instead, the Act delegated most rulemaking tasks to a host of administrative agencies, notably the CFTC and the SEC.[161]

B. Gaps in Theory

There are aspects of this history of the Dodd-Frank Act that do not line up with the transgovernmental theory offered in Part III. Although there is an obvious correlation between the G-20's proposal and the Dodd-Frank Act's provisions, that in and of itself does not show that the Dodd-Frank Act is the outcome of a transgovernmental process. The narrative provided by Senator Dodd helps to connect the dots and proves that the Act was modeled on the G-20's recommendations; however, aspects of the story also hint at limits to transgovernmentalism and raise questions about the description of the G-20's activities offered by some scholars.

The first observation that can be made is that the G-20 itself does not fit the model of a transgovernmental regulatory network given by some scholars.[162] If the

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157. Victoria McGrane, *Obama Signs Financial Regulation Bill*, Wall St. J. (July 21, 2010), http://online.wsj.com/article/SB10001424052748704684604575381120852746164.html.

158. For a summary of the Act's major provisions, see Davis Polk & Wardwell, Summary of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Enacted into Law on July 21, 2010, 52–63 (2010), *available at* http://www.davispolk.com/files/Publication/7084f9fe-6580-413b-b870-b7c025ed2ecf/Presentation/PublicationAttachment/1d4495c7-0be0-4e9a-ba77-f786fb90464a/070910_Financial_Reform_Summary.pdf; Joanne Hindle, *Global Financial Regulatory Reforms Implications for U.S. Market Participants*, 24 J. Tax'n & Reg. Fin. Institutions 35, 35 (2011).

159. Davis Polk & Wardwell, *supra* note 158, at i; Rules and Studies Mandated by the Dodd-Frank Act, Booz Allen Hamilton (2010), http://www.boozallen.com/media/file/Financial_Services_Agency_Rule-Study_Breakout.pdf.

160. Davis Polk & Wardwell, *supra* note 158, at 53.

161. *See id.* at 52–53.

162. *But see, e.g.*, Sungjoon Cho & Claire R. Kelly, *Promises and Perils of the New Global Governance: A Case of The G-20*, 12 Chi. J. Int'l L. 491 (2012) (referring to the G-20 as playing the role of "an executive coordinator over pre-existing transgovernmental regulatory networks").

theory is meant to apply only to interactions between "appointed top officials or career civil servants who possess a special expertise in a particular subject,"[163] then the G-20 is not a regulatory network by virtue of the participation of heads of state.[164] Moreover, the G-20 does not include participation by securities regulators themselves, making the definition even more improper.[165] Therefore, this paper argues that theories of convergence will not apply, or will apply only in part.

The second observation is that even if the G-20 is a valid example of a regulatory network, its recommendations for OTC derivatives are outside the scope of its authority as a regulator.[166] One of the key premises of transgovernmental regulatory theory is that regulators are operating within the limits of previously assigned mandates. It is in this "decentralized regulatory space"[167] that they are able to do their work freely and without interference from "uninformed political elites."[168] The power of the transgovernmental network breaks down when participants must go outside of it to seek new authorization for their activities. Tai-Heng Cheng acknowledges this when he explains:

> [i]nternational regulatory prescriptions are most likely to be effective when they do not require national policies to change. Prescriptions that require adjustments to national policies are less likely to be effective unless government officials believe that these changes directly benefit their constituencies and would have been made absent the prescription, or that the prescriptions are necessary tradeoffs to obtain other benefits.[169]

However, the G-20's recommendations for OTC derivatives regulation did require a change in policy. In the United States, the Dodd-Frank Act carried out this change. Scholars who have written about the G-20's activities during and after the financial crisis either overlook this discrepancy or attempt to address it obliquely by arguing that heads of state wield the necessary influence in their home countries to ensure that agreements are implemented.[170]

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163. *See supra* text accompanying note 124.

164. *See* Brummer, *supra* note 43, at 357–58. Brummer also seems to suggest at times that the participation of heads of state distinguishes traditional modes of international law from networks. *See* Brummer, *supra* note 56, at 274 ("That regulators engage in such activities demonstrates a significant departure from traditional public international law models of diplomacy, where political elites and heads of state participate.").

165. *See* Brummer, *supra* note 43, at 359.

166. Alternatively, it could be that scholars have not yet focused in detail on the unique problems being addressed by the G-20. *See, e.g.*, Pan, *supra* note 32, at 246 ("Specifically, financial law scholars focused their attention on the coordination and harmonization of rules and standards in areas of accounting, securities, and capital adequacy, but left unresolved the problems of prudential supervision of cross-border financial institutions and systemic risk regulation.").

167. *See supra* note 128 and accompanying text.

168. *See supra* note 126 and accompanying text.

169. Cheng, *supra* note 24, at 198.

170. Brummer, *supra* note 43, at 361; *see also id.* at 361–62 ("Additionally, by engaging political actors with the authority to negotiate a wide variety of issues, the G-20 allows the negotiation space to involve a greater range of issues than would be possible among regulators with narrow mandates.").

This view, however, overstates the amount of power that these individuals actually wield under ordinary circumstances. The problem with using the G-20 in 2009 as an example of how transgovernmentalism works—at least where derivatives regulation is concerned—is that its activities were taking place under extremely atypical conditions. At the time, U.S. President Barack Obama was at the height of his influence, having recently won his first term to office while enjoying the support of a mostly Democratic Congress. As events have demonstrated, that influence can quickly wane.[171] Senator Dodd himself acknowledged that

> but for the crisis, this never would have happened. Candidly, people have been talking about reforming the financial structures of our country for decades. But there's never been the energy behind it . . . . I think we had a window to operate in this bill and we came precariously close to losing it. In fact, I never had a single vote I could lose. Despite all of those amendments, I never had one vote to give in the Senate. I had to get to 60 . . . the wrong vote on any one of those [amendments] that would have lost one vote either to the left or the right ideologically would have caused the bill to fail.[172]

Additionally, it is wrong to credit the G-20's recommendations with providing the impetus for major revisions to the U.S. regulatory system. In fact, efforts to overhaul the system began in earnest in 2008, with the release of the Treasury Department's *Blueprint for a Modernized Financial Regulatory Structure*.[173] But as Pan remarks, the blueprint never made it into law.[174] The Dodd-Frank Act represented a significantly watered down proposal that signaled an absence of political will, not an excess. Finally, one ought to question whether there should be any expectation of legislative compliance at all with an executive's hastily forged agreement with another nation—and whether such an agreement should instead go through the formal treaty-making process.[175]

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171. Republicans won nearly sixty seats in the House of Representatives during congressional elections in late 2010, handedly obtaining a majority. However, Democrats maintained a narrow lead in the Senate. Naftali Bendavid, *Republicans Win Control of House*, Wall St. J. (Nov. 3, 2010, 8:01 AM), http://online.wsj.com/article/SB10001424052748703506904575591701435850306.html; *see also* Jon Cohen & Dan Balz, *Obama Ratings Sink to New Low as Hope Fades*, Wash. Post (Sept. 6, 2011), http://www.washingtonpost.com/politics/obama-ratings-sink-to-new-lows-as-hope-fades/2011/09/05/gIQAIytZ5J_story.html.

172. Dodd, *supra* note 156.

173. U.S. Dep't of Treasury, The Department of the Treasury Blueprint for a Modernized Financial Regulatory Structure (2008).

174. Pan, *supra* note 2, at 750.

> The Obama Administration also faced the problem of winning congressional support for its reform proposal while seeking congressional support for a number of its other major legislative initiatives—most notably health care reform. As a result, the Obama White Paper can best be described as a product of political realism rather than an ideal roadmap for financial regulatory reform.

Id. at 754–55.

175. *See* Pan, *supra* note 32, at 281–82 ("A common criticism of transgovernmental networks and global administrative law is that they lack accountability and legitimacy. Traditionally, legitimacy of international norms arises from the consensual nature of international law—international rules apply

The lessons from the G-20's successes, as far as transgovernmentalism is concerned, is that "cross-functional networks" are most effective when the participants are in a politically advantageous position in their home countries. If this is the case, then the theory may only be applicable in times of unusual political circumstance or crisis.

VI. ACT THREE: MUTUAL RECOGNITION AND DERIVATIVES

Traditional soft-law approaches to regulatory convergence may be falling short in the years following the financial crisis.[176] The final Part of this paper will consider what is needed to enhance the current scheme of transgovernmental networks, particularly as it relates to the G-20's recommendations for OTC derivatives regulation. It will show how mutual recognition could create a new set of incentives that could spur greater coordination by appealing to the interests of a more inclusive range of participants.

A. Delays in International Derivatives Regulation

At the time of this writing, U.S. and European regulators are still at odds over how derivatives regulation should be applied. While the concept of using CCPs and exchanges is simple enough, deciding who will be required to use them and when is far more difficult. For example, derivatives users in the United States and Europe may face different capital and margin requirements, which could affect the cost of doing business in either market and limit the number of entities that could participate.[177] In a report to clients, Shearman & Sterling LLP notes that such discrepancies "may lead to the possibility of regulatory arbitrage" as well as "extraterritorial effects," while some "market participants may be caught by conflicting or inconsistent requirements."[178]

Private parties as well as public officials have been urging regulators to work together to harmonize their standards in order to limit these risks. One of the areas of greatest concern has been the extraterritorial consequences of the Dodd-Frank

only if there is state consent. Transgovernmental networks undermine this process of legitimatization in two ways. First, the participants in the networks are generally sub-state actors who themselves may not be directly accountable to the public at home. Second, when transgovernmental networks generate a strong norm for states to implement any decisions made at the international level into domestic law, then states can no longer rely on procedural and judicial protections at home to ensure there is domestic accountability and legitimacy.") (footnotes omitted).

176. *See, e.g.*, Pan, *supra* note 32, at 263–64 ("[T]he vast majority of international regulatory activity takes place through networks of regulators and market participants, meeting on a regular basis in organized forums . . . . [W]hile transgovernmental networks have been critical in producing financial regulation, they do not actually regulate the international financial system . . . . [G]iven their limitations, transgovernmental networks cannot assist in one of the most pressing problems of financial regulation: the supervision of financial institutions . . . . Finally, crisis management remains entirely in the hands of state-to-state contact groups.").

177. *See, e.g.*, Shearman & Sterling LLP, Proposed US and EU Derivatives Regulations: How They Compare 8–9 (2010), *available at* http://www.shearman.com/Proposed-US-and-EU-Derivatives-Regulations--How-they-Compare-11-10-2010/.

178. *Id.* at 1.

Act.[179] For instance, it is unclear whether U.S. regulators will require foreign swaps participants to register in the United States before doing business with a U.S. entity, even if the transaction occurs overseas.[180] Critics warn that requiring foreign entities to register in the United States and submit to oversight by U.S. regulators would discourage them from doing business with U.S. companies and would encourage more companies to conduct transactions elsewhere.[181]

For example, in 2011, a coalition of eight associations, including the Global Financial Markets Association, Investment Management Association, and the ISDA, sent a joint-letter to European Commissioner Michel Barnier and U.S. Treasury Secretary Timothy Geithner warning that regulators' current approaches were threatening the industry and undermining the G-20's efforts to create more comprehensive oversight.[182] The group's solution, however, was not for regulators simply to increase their efforts to adopt similar rules, as would be expected by transgovernmental theory. Instead, the group urged "global regulators to enter into mutual recognition arrangements where each would limit the extra-territorial reach of their regulation so long as a firm complies with their home country regulations."[183] The remaining Parts will explain why this approach is appropriate.

B. What Is Mutual Recognition?

Mutual recognition—a mode of convergence—is an arrangement in which regulators from two or more nations accept, by formal agreement, the adequacy of each other's regulatory prescriptions "as a substitute for their own."[184] As Eric Pan describes, "Mutual recognition requires that each country recognize the adequacy of the rules and regulations of another country to permit a regulated entity to do business in both jurisdictions."[185] Moreover, "[i]f there is true mutual recognition, the host country will not impose additional requirements on the entity regulated by the foreign jurisdiction, and the entity should have complete access to the host country's

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179. *See, e.g.*, Shearman & Sterling LLP, OTC Derivatives Regulation and Extraterritoriality (2011), *available at* http://www.shearman.com/files/Publication/e569f609-f1d7-462d-b714-cf078933b3f9/Presentation/PublicationAttachment/db29c23c-4e8e-4d92-8a05-f7d66442d81b/FIA-101011-OTC-Derivatives-Regulation-and-Extraterritoriality.pdf ("In the absence of agreement between the US and EU regulators, extraterritoriality has the potential to cause intractable and irreconcilable conflicts for the derivatives industry.").

180. *See* Linklaters, Key Lawmakers Write Letter to U.S. Regulators Raising Concerns About Implementation of Swaps Reform Under Title VII of the Dodd-Frank Act (2011), *available at* http://www.linklaters.com/pdfs/mkt/newyork/A14081495.pdf.

181. *See id.*

182. Voldstad Letter, *supra* note 5.

183. *Id.*

184. Pierre-Hughes Verdier, *Mutual Recognition in International Finance*, 52 Harv. Int'l L.J. 55, 57 (2011). For a recent and thorough analysis of mutual recognition and its application in various contexts, see generally *id.*

185. Eric J. Pan, *A European Solution to the Regulation of Cross-Border Markets*, 2 Brook. J. Corp. Fin. & Comm. L. 133, 140 (2007).

market."[186] The scheme would benefit not only the regulated entities, but also customers who enjoy more competitive services and a wider range of investment options.[187]

Mutual recognition is most commonly associated with the European Union, where entities enjoy a great deal of mobility between member nations, but are subject to the regulatory authority of only their home state.[188] The European Union is an example of a "passport" system in which regulated entities are allowed to move freely within member nations.[189] For the United States, adopting this approach to cross-border regulation would be a shift from the current situation in which the "U.S. regulatory regime tightly controls how exchanges operate, who can conduct business on the exchanges and what are the responsibilities of exchanges to regulate market participants."[190]

Mutual recognition is not an unheard of concept to U.S. regulators.[191] In 2007, Ethiopis Tafara and Robert J. Peterson, both SEC staff members, floated a proposal for how mutual recognition could help improve financial regulation.[192] The proposal envisioned memoranda of understanding between the United States and foreign authorities requiring that the foreign jurisdiction adopt certain minimum standards and that their compliance with the agreement would be subject to periodic review.[193] Tafara and Peterson suggested that the opportunity to provide more open access to the U.S. market would incentivize foreign countries to adopt regulatory standards consistent with those of the United States.[194] One such memorandum was adopted in 2008 between the United States and Australia, which

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186. *Id.* at 141. A parallel can be drawn to U.S. corporate law. *See* Howell E. Jackson & Eric J. Pan, *Regulatory Competition in International Securities Markets: Evidence from Europe in 1999—Part I*, 56 Bus. Law. 653, 657 (2000) ("These proposals for issuer choice in securities regulation represent an extension of a familiar argument in U.S. corporate law scholarship: the debate over whether corporations in the United States should be allowed to choose the state law under which to organize themselves.").

187. *See* IBA Task Force, *supra* note 38, at 277 ("Retail investors are guided by a desire to invest in a diversified portfolio of securities, yet most national systems make it burdensome and costly for retail investors to invest in foreign securities."); *see also* Jerry Ellig & Houman B. Shadab, *Talking the Talk, or Walking the Walk? Outcome-Based Regulation of Transnational Investment*, 41 N.Y.U. J. Int'l L. & Pol. 265 (2009).

188. *See, e.g.*, Jackson & Pan, *supra* note 186, at 653.

189. *Id.* at 662. Canada has also adopted a similar approach to allowing firms to conduct business throughout the provinces. *See* Pan, *supra* note 64.

190. *See* Pan, *supra* note 186, at 137.

191. *See* IBA Task Force, *supra* note 38, at 280 ("Since April 2007, however, and as part of a larger US agenda of regulatory modernisation caused by a number of factors discussed above, mutual recognition has suddenly become a topic high on the discussion agenda of US regulatory and administration officials.").

192. Ethiopis Tafara & Robert J. Peterson, *A Blueprint for Cross-Border Access to U.S. Investors: A New International Framework*, 48 Harv. Int'l L.J. 31 (2007).

193. *See id.*

194. *See id.*

> provides a framework for the SEC, the Australian government, and [the Australian Securities and Investment Commission] to consider regulatory exemptions that would permit U.S. and eligible Australian stock exchanges and broker-dealers to operate in both jurisdictions, without the need for these entities (in certain aspects) to be separately regulated in both countries.[195]

As Pan observes, "One of the main difficulties in eliminating the regulatory barriers that prevent the provision of cross-border financial products and services is determining whether financial regulatory systems are comparable to each other."[196] To this point, Professors Jerry Ellig and Houman Shadab have argued that mutual recognition agreements should be "outcome-based."[197] Under this approach, domestic regulators would not focus on the similarity of regulatory prescriptions, but on whether foreign regulatory systems achieve comparable outcomes (such as investor protection). This approach has the benefit of acknowledging that there is no one-size-fits-all solution to complex problems.[198] It is also a practical way to employ mutual recognition considering the diverse regulatory arrangements found around the world and the many factors that go into regulatory design and decisionmaking.[199]

Critics of mutual recognition argue that it could lead to a "race to the bottom" in which regulators compete to offer the most attractive regulatory environment within the parameters of their agreements.[200] Proponents, however, counter that mutual recognition would have the opposite effect and would in fact lead to a "race to the middle"[201] or as Ellig and Shadab suggest, a "race to optimality."[202] There are two reasons for this. The first is that mutual recognition agreements would impose a minimum requirement for entry that would incentivize parties to agree to a floor and harmonize the basic aspects of their systems.[203] Second, market forces will encourage firms to adopt practices in response to stakeholder demands that are often more

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195. Press Release, Sec. & Exch. Comm'n, SEC, Australian Authorities Sign Mutual Recognition Agreement (Aug. 25, 2008), *available at* http://www.sec.gov/news/press/2008/2008-182.htm.

196. Eric J. Pan, *Understanding Financial Regulation* 46 (Benjamin N. Cardozo Sch. of L. Working Paper No. 329, 2011), *available at* http://ssrn.com/abstract=1805018.

197. Ellig & Shadab, *supra* note 187.

198. *Id.* The authors envision the practice of mutual recognition would result in a "race to optimality" as opposed to a race to the bottom. *Id.* at 268.

199. *See generally* Pan, *supra* note 196.

200. Ellig & Shadab, *supra* note 187, at 323.

201. Pan, *supra* note 64, at 813 ("A 'race to the bottom' is often more accurately a race to the middle.").

202. Ellig & Shadab, *supra* note 187, at 268. *See* IBA Task Force, *supra* note 38, at 288 ("In some areas, national differences may be of little practical significance. For example, academic research to date has found little difference in the quality of financial market oversight in jurisdictions that have consolidated their financial regulation into unitary agencies, such as the UK Financial Services Authority, as compared to the more traditional divisions of authority found in the United States.").

203. *See* Jackson & Pan, *supra* note 186, at 661–62 ("Within the European Union, member states are required to implement and maintain national securities regulations that incorporate the minimum standards articulated in the E.U. directives. These standards, however, serve only as a floor, and member states are free to impose more stringent requirements if they choose.").

stringent than the weakest regulatory requirement.[204] For example, in the European Union many issuers choose, but are not required, to use U.S.-style offering disclosures because that is what investors want.[205] Over time, E.U. disclosure requirements have become more like those in the United States.[206]

This is consistent with the description of *lex financiaria* given by Brummer, who writes that "[i]f a capital market is significant enough to the global economy, its rules can become *lex financiaria*—not necessarily the formal international law of finance per se, but international financial law complied with by firms."[207] For the United States, this presents an opportunity to retake a leadership position in the movement towards convergence. The benefit would be regaining influence over the content of regulations at a time when U.S. capital markets are becoming a smaller part of the overall global economy.

Finally, proponents of mutual recognition suggest it is attractive because it has a greater incentivizing effect than transgovernmental modes of convergence alone.[208] Brummer summarizes, without endorsing, this view:

> [m]utual recognition would . . . [provide] de facto preferential access to its securities markets, a carrot which makes bilateralism all the more theoretically appealing . . . . If, for example, the United States and the European Union were to enter into a mutual recognition arrangement, such an arrangement could significantly reduce barriers between the two countries for capital and firms on both sides of the Atlantic could enjoy vastly increased access to capital. In this dynamic, one would expect either greater concessions from both countries or a greater interest in a purer form of mutual recognition where one another's regimes are recognized and fewer reforms are required.[209]

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204. *See id.* at 664 ("In particular, they cite reports that European issuers have tended to comply voluntarily with U.K. securities laws, which are considered to be the most stringent in the European Union, rather than the minimal requirements of other member states.").

205. *See id.* at 656 ("European issuers have not migrated either to the most lenient or to the most protective system of public laws governing securities regulation. Rather, at least as far as the vast majority of pan-European offerings are concerned, standards set by market forces and roughly comparable to practices developed in U.S. private placement transactions have been the most influential determinants of disclosure and due diligence practices.").

206. Howell E. Jackson & Eric J. Pan, *Regulatory Competition in International Securities Markets: Evidence from Europe—Part II*, 3 Va. L. & Bus. Rev. 207, 270 (2008) ("Second, the gap distinguishing U.S. and European disclosure standards, which was already closing in the late 1990s, has become even narrower and is on course to disappear over the next few years. One of the recurring themes of our interviews was that disclosure practices in Europe in 1999 were fast approaching U.S. public disclosure requirements, both in terms of content and in terms of costs.").

207. Chris Brummer, *Territoriality as a Regulatory Technique: Notes from the Financial Crisis*, 79 U. Cin. L. Rev. 499, 512 (2011).

208. *See id.* at 523 ("Although the SEC's mutual recognition program could, if ultimately implemented, significantly liberalize U.S. markets, the architects of the program ultimately view the program as providing key incentives for foreign counterparts to adopt U.S.-style regulations."); *see also* IBA Task Force, *supra* note 38, at 274 (noting that a study by Deutsche Bank concluded that integration of the EU-US trading markets would create $48 billion in trading annually).

209. Brummer, *supra* note 43, at 371. Brummer notes that mutual recognition has limits. *See id.*

C. *The Benefits of Applying Mutual Recognition to International Derivatives Regulation*

Mutual recognition would encourage greater regulatory cooperation by appealing to the interests of a broader range of constituents than other modes of convergence. Transgovernmental approaches to convergence are limited because they operate within the narrow and insular community of regulators. As described above, this approach works fine for addressing that call for a swift and flexible means of reaching consensus of a technical nature.[210] However, it is inadequate—both theoretically and practically—for achieving the agreement necessary to affect broad legislative changes. Proponents of regulatory change must find more effective means of aligning the interests of key decisionmakers.

As Cheng points out, regulatory "prescriptions are unlikely to be effective unless they adequately harmonize and accommodate the vital interests of relevant decisionmakers and their constituents."[211] In the case of derivatives regulation, the interests of the financial industry, regulators, and elected lawmakers would be best served through mutual recognition because it would eliminate barriers to global business and clear up uncertainty about how laws apply in different jurisdictions. For lawmakers and regulators mutual recognition is appealing because it creates tangible incentives for making regulatory improvements while easing the burden to find a one-size-fits-all approach to regulatory problems. It also decreases the risk of arbitrage by allowing firms to conduct business across markets more fluidly and with less regulatory uncertainty. Moreover, by assigning regulatory responsibility to the authority of a firm's home state regulators would be able to conserve resources and improve efficiency.

Derivatives, and especially swaps, offer a good subject for mutual recognition. While it is easy to agree in principle on their regulation, the details of how to regulate swaps has created a sticking point, as demonstrated by U.S. and European regulators following the adoption of the Dodd-Frank Act and EMIR. In January 2012, the CFTC and the SEC issued a joint report outlining some of the differences between the U.S. and European approaches under the Dodd-Frank Act and EMIR, including disagreements over the technical standards for membership in clearinghouses and exchanges (i.e., who should be allowed "in the club") and how to account for end users.[212] The report also found that regulators in countries, notably in Asia, are

210. *See supra* Part IV.B.

211. Cheng, *supra* note 24, at 198.

212. *See* Commodity Futures Trading Comm'n & Sec. & Exch. Comm'n, Joint Report on International Swap Regulation (2012), *available at* http://www.cftc.gov/ucm/groups/public/@swaps/documents/file/dfstudy_isr_013112.pdf [hereinafter Joint Report]. In late April, U.S. regulators finalized rules including a key definition for "swap dealer." *See, e.g.*, Jamila Trindle & Andrew Ackerman, *Swap-Dealer Bar Set at $8 Billion*, Wall St. J., Apr. 18, 2012, at C3, *available at* http://online.wsj.com/article/SB10001424052702303425504577351772534862092.html. European regulators continued to express concern over the extraterritorial effects of the Dodd-Frank Act. *See* Jim Brunsden, *EU Urges U.S. to Delay Imposing Derivatives Rules on Its Banks*, Bloomberg (Apr. 23, 2012), http://www.bloomberg.com/news/2012-04-23/eu-urges-u-s-to-delay-imposing-derivatives-rules-on-its-banks.html. Meanwhile, a

falling behind, creating new risks for regulatory arbitrage.[213] Under a scheme of strict harmonization, regulators would have to agree on issues such as how much margin participants would be required to post or how much capital—and what type—should be on their balance sheets. Mutual recognition would permit regulators to agree only to basic, minimum standards, while adopting their own detailed answers to these and other questions to suit their domestic policy preferences and the demands of domestic constituents. The CFTC and SEC's report makes only one reference to mutual recognition, in response to a comment letter.[214]

As noted, industry groups are already calling for mutual recognition for derivatives as nations implement the G-20's recommendations.[215] As for elected legislators—who wield ultimate formal authority—the idea appears to be catching on. For example, in November 2011, two U.S. lawmakers voiced their support for mutual recognition by introducing the Swap Jurisdiction Certainty Act, which would allow swaps dealers from other countries to conduct business in the United States without having to submit to U.S. capital requirements—so long as their home states' requirements were comparable.[216]

VII. CONCLUSION

The financial crisis of 2008 hastened the movement towards greater international legal convergence. International legal theories such as transgovernmentalism help explain, in part, decisionmakers' efforts to improve financial regulations—specifically in the OTC derivatives market—following the crisis. At the same time, these events reveal opportunities for improving descriptions of transgovernmental legal processes. This note suggests that in doing so, scholars should consider how incentives for regulatory convergence affect outcomes and propose ways for strengthening those incentives. It concludes by suggesting that U.S. regulators ought to adopt a policy of mutual recognition towards other nations. Doing so would facilitate international financial regulations and convergence, discourage regulatory arbitrage, and promote the competitiveness of U.S. capital markets by better aligning the interests of diverse groups.

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veritable cottage industry has sprung up among major law firms providing updates on the implementation of Dodd-Frank and EMIR and their probable effects on clients. *See e.g.*, *U.S. and EU OTC Derivatives Regulation—A Comparison of the Regimes*, Sidley Austin LLP (Apr. 23, 2012), http://www.sidley.com/SidleyUpdates/Detail.aspx?news=5166; *Dodd-Frank Progress Report*, Davis Polk & Wardwell LLP (May 2012), http://www.davispolk.com/Dodd-Frank-Rulemaking-Progress-Report/ (reporting that only 33% of rules mandated under the Dodd-Frank Act had been adopted by their deadlines).

213. *See* Joint Report, *supra* note 212, at 98.

214. *Id.* at 108.

215. *See* Voldstad Letter, *supra* note 5.

216. Press Release, Congressman Jim Himes, Himes, Garret to Introduce Bipartisan Bill to Protect U.S. Competitiveness (Oct. 31, 2011), *available at* http://himes.house.gov/press-release/himes-garret-introduce-bipartisan-bill-protect-us-competitiveness.