

# Transnational Legal Ordering and Regulatory Conflict: Lessons From the Regulation of Cross-Border Derivatives

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I. Introduction .....	91
II. Capital Market Regulation and the Challenges of Globalization.....	93
A. Unilateral Action at the National Level.....	95
B. International Enforcement Cooperation.....	96
C. Standard Setting at the National and International Levels.....	97
III. Derivatives Regulation: A Case Study of Transnational Ordering.....	101
A. Progress Toward a Transnational Approach.....	102
B. Obstacles to the Formation of a TLO.....	106
1. Issue alignment .....	106
2. The return of unilateralism .....	108
3. Diagnostic issues and the political economy of capital markets .....	111
IV. Transnational Legal Orders in the Regulation of Securities Markets...	112

## I. INTRODUCTION

Securities markets today constitute a truly transnational economic order. Both issuers and investors routinely participate in capital markets outside their home jurisdictions; broker-dealers, investment managers, and other market participants frequently operate across geographic boundaries; and cross-border transactions have reached a staggering daily volume. The legal order that regulates these markets, however, operates predominantly at the national scale. The substantive norms

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governing securities markets are for the most part produced by individual states and applied by domestic institutions. Moreover, while there may be consensus regarding the general objectives of securities regulation (and regarding the challenges that the transnationalization of markets creates), significant divergence persists across regulatory systems regarding the content of those norms. The resulting gap between the global scale of the markets and the domestic scale of regulation poses significant challenges to regulators as well as market participants.

This paper is about the theory and practice of transnational legal ordering.<sup>1</sup> It seeks to gain insight into how transnational legal orders (TLOs) advance by examining one particular problem: the regulation of over-the-counter (OTC) derivative securities.<sup>2</sup> It focuses on events following the global financial crisis, which exposed the deficiencies of the existing regulatory order in identifying and containing the risks created by trading in those securities.<sup>3</sup> In the aftermath of the crisis, the cross-border systemic risk created by OTC derivatives trading was characterized as a problem of global dimension that necessitated a global response. A wide array of actors and institutions, both domestic and international, mobilized quickly to craft a legislative and regulatory response. Given the catastrophic nature of the crisis, and the general manifestation of political will to address the problem, one might have predicted the successful development and institutionalization of shared norms regulating derivatives trading.<sup>4</sup> That move, however, has been limited.

The paper begins by outlining the regulatory challenges resulting from the globalization of securities markets and describing the evolution of the international regulatory regime (Part II). It suggests that to the extent a transnational order has emerged in that area, it is characterized not by substantive norms that have settled across multiple national systems, but rather by conflicts norms guiding the allocation of regulatory authority among national systems. Part III turns to the actions of regulators in the aftermath of the financial crisis. It analyzes the

1. See Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders*, in *TRANSNATIONAL LEGAL ORDERS* 5 (Terence C. Halliday & Gregory Shaffer eds., 2014) (defining a transnational legal order as “a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions”).

2. Financial derivatives are instruments whose value is derived from some underlying instrument, asset, or interest. They include instruments traded on securities exchanges (including standardized futures and options contracts), as well as instruments traded over-the-counter (including swaps and other privately negotiated contracts). See generally Frank Partnoy, *Financial Derivatives and the Costs of Regulatory Arbitrage*, 22 J. CORP. L. 211, 212 n. 2 (1997) (providing a brief introduction to derivatives). Prior to the recent reforms discussed *infra*, OTC transactions were not subject to the reporting and margin requirements applicable to exchange-based trading in derivatives. In addition, they were settled between the counterparties rather than through central clearinghouses, presenting the risk of counterparty default. See Frank D’Souza, Nan S. Ellis & Lisa M. Fairchild, *Illuminating the Need for Regulation in Dark Markets: Proposed Regulation of the OTC Derivatives Market*, 12 U. PA. J. BUS. L. 473, 482-483 (2010) (outlining these characteristics of the OTC market).

3. See Eric J. Pan, *Challenge of International Cooperation and Institutional Design in Financial Supervision: Beyond Transgovernmental Networks*, 11 CHI. J. INT’L L. 243, 246 (2010) (exploring reasons for the failure of international institutions to prevent the crisis).

4. As Halliday and Shaffer note, financial crises are among the types of “precipitating conditions” that often catalyze the formation of TLOs. Halliday & Shaffer, *supra* note 1, at 35-36.

rulemaking process in the United States and elsewhere, considering the various actors and organizations involved in that process—from national regulatory agencies to international standard-setting bodies to multinational regulatory networks. This section investigates whether the financial crisis has precipitated the implementation of shared substantive norms within multiple legal systems. It concludes that it has not, and explores certain obstacles that have impeded the development of an effective transnational legal order in this area. The paper concludes with some observations about how the political economy of particular regulatory regimes intersects with the theory of transnational legal ordering.

## II. CAPITAL MARKET REGULATION AND THE CHALLENGES OF GLOBALIZATION

With certain limited exceptions, the laws governing securities markets, market participants such as broker-dealers, and individual transactions in securities are enacted at the national level. Domestic regulatory systems around the world are at different levels of maturity; for instance, while the United States adopted a comprehensive regulatory scheme in the first half of the twentieth century, many other countries have systems that are fewer than twenty years old.<sup>5</sup> They also reflect a variety of different philosophies regarding the purpose and extent of regulation.<sup>6</sup> As a result, applicable norms on a range of issues—from the extent and type of disclosure that issuers must provide to anti-fraud rules to registration requirements for certain market participants—vary significantly from country to country.

The markets these laws regulate have become increasingly international. The range of listing options available to issuers has expanded significantly, and many issuers choose to list their securities on exchanges outside their home jurisdiction.<sup>7</sup> Electronic trading has made it more practical for traders to invest in foreign markets, facilitating capital mobility.<sup>8</sup> The rise of multinational exchange groups is also noteworthy, as such groups can use common trading platforms that enable the trading of particular forms of cross-border securities.<sup>9</sup> As a result of these and other

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5. See CALLY JORDAN, *INTERNATIONAL CAPITAL MARKETS: LAW AND INSTITUTIONS* 10 (2014) (outlining the evolution of capital markets regulation and noting that many markets “demonstrated surprising diversity and resistance to formal regulation”).

6. *Id.* at 4.

7. This is due partly to the creation of additional exchanges in emerging markets, but also to the fact that the increased liquidity in smaller and regional markets has made more of them attractive to issuers. See Chris Brummer, *Stock Exchanges and the New Markets for Securities Laws*, 75 U. CHI. L. REV. 1435, 1464-67 (2008) [hereinafter *Stock Exchanges*] (describing the success of various markets in competing with the historically largest markets, as well as the rise of regional financial hubs). Significant numbers of issuers choose to list their securities on markets outside their home jurisdictions; the New York Stock Exchange, for instance, currently lists almost 500 non-U.S. companies. NYSE Non-U.S. Listed Company Directory, <https://www.nyse.com/get-started/international/documents-reports>.

8. *Stock Exchanges*, *supra* note 7, at 1460-61.

9. Intercontinental Exchange (ICE), for instance, is an American network of exchanges and clearing houses for financial and commodity markets. ICE owns and operates eleven regulated exchanges, including the New York Stock Exchange as well as futures exchanges in Canada, Europe and Singapore. It also owns and operates two over-the-counter markets, along with six central clearing houses, again including a number outside the United States. *About Us*, INTERCON. EXCH.,

factors, international debt,<sup>10</sup> equity,<sup>11</sup> and, particularly, derivatives markets<sup>12</sup> have become vast.

The gap between the global scale of the markets and the domestic scale of regulation poses significant challenges to the transnational economic order. Issuers seeking to raise capital in more than one market confront “duplicative, inconsistent and conflicting requirements which lead to significant compliance burdens and unnecessary barriers to cross-border trading and investment.”<sup>13</sup> The same is true of market participants such as investment managers and brokers who are active in multiple jurisdictions. Similarly, investors considering investments outside their home markets face difficulties in accessing financial and other disclosure that would permit cross-market comparison of investments, and bear increased transaction costs. Of course, the gap in scale also creates significant challenges for domestic regulators. The primary mandate of each regulator is to ensure the stability and soundness of domestic markets and to protect domestic investors. But as markets become more interconnected, and as issuers and investors participate in more transactions outside their own jurisdiction, regulators routinely confront territorial limits on their authority to reach actors and activity that affect their markets.<sup>14</sup>

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<https://www.intercontinentalexchange.com/about/overview> (last visited Jul. 20, 2016). *See also Stock Exchanges*, *supra* note 7, at 1460-61 (noting the possibility of devising new forms of securities that would draw on global investor pools).

10. As of year-end 2015, there was over \$20 trillion outstanding in international debt securities (bonds issued in a market other than that of the issuer’s residence). *Statistics, Summary of debt securities outstanding*, BANK FOR INT’L SETTLEMENTS, [www.bis.org/statistics](http://www.bis.org/statistics) (last visited Jul. 20, 2016) (reporting the figure as \$21,121 billion).

11. In the United States, for instance, U.S. holdings of foreign equity securities at year-end 2014 amounted to over \$6.5 trillion in market value. DEP’T OF THE TREAS., U.S. PORTFOLIO HOLDINGS OF FOREIGN SECURITIES AS OF DECEMBER 31, 2014 4 (Jan. 2016), available at <https://www.treasury.gov/resource-center/data-chart-center/tic/Pages/fpis.aspx> (reporting portfolio investment of U.S. residents in equity securities issued by non-U.S. entities as \$6.762 trillion as of that date). Foreign holdings of equity securities issued by U.S. entities also exceeded \$6 trillion. DEP’T OF THE TREAS., FOREIGN PORTFOLIO HOLDINGS OF U.S. SECURITIES AS OF JUNE 30, 2015 3 (May 2016), available at <https://www.treasury.gov/resource-center/data-chart-center/tic/Pages/fpis.aspx> (reporting foreign holdings in U.S. equity securities as \$6.665 trillion as of that date).

12. As of the end of 2015, the total notional value of outstanding OTC derivatives contracts was \$493 trillion. *Statistical Release: OTC derivatives statistics at end-December 2015*, BANK FOR INT’L SETTLEMENTS 2, [http://www.bis.org/publ/otc\\_hy1605.htm](http://www.bis.org/publ/otc_hy1605.htm) (last visited July 3, 2016). The gross credit exposure related to those derivatives was \$2.9 trillion. *Id.* Importantly, the substantial majority of those instruments are cross-border—in other words, the counterparty is located in a different country than the dealer. *See* Cross-Border Security-Based Swap Activities, 78 Fed. Reg. 30,968, 30,976 (May 23, 2013) (to be codified at 17 C.F.R. pts. 240, 242, 249) (describing cross-border transactions as “the norm, not the exception.”). The BIS reports that less than 24% of notional credit default swaps outstanding at year-end 2015, for instance, were entered into with a counterparty based in the dealer’s home country. *Statistical Release: OTC derivatives statistics*, at 5.

13. INT’L ORG. OF SEC. COMM’NS, IOSCO TASK FORCE ON CROSS-BORDER REGULATION CONSULTATION REPORT 43 (2014) [hereinafter IOSCO 2014 CONSULTATION REPORT].

14. Specific regulatory challenges include how to regulate participants active in multiple markets (e.g., licensing requirements for investment advisors; broker-dealer registration requirements; reporting requirements for swaps dealers); how to facilitate cross-border securities settlement (trading hours, clearance and settlement systems); and how to resolve differences in accounting and disclosure requirements that affect issuers active in multiple markets as well as investors seeking to invest abroad.

One might expect these forces to lead to greater convergence in the laws governing securities markets. Importantly, however, the internationalization of capital markets also creates the conditions for regulatory competition. States have an interest not only in regulating their markets, but also in attracting capital.<sup>15</sup> Lawmakers therefore face continuing tension between the need to strengthen regulation in the cross-border sphere and the desire to maintain the competitiveness of their markets.<sup>16</sup> As a result, the steps taken toward transnational securities regulation have been tentative, and divergence across regulatory regimes persists as a feature of the regulatory system.

In recent decades, much has been made of the internationalization of securities regulation. Significant efforts have been devoted to the development of harmonized rules in certain areas, including financial reporting and issuer disclosure. On the enforcement front, bilateral and multilateral agreements among regulatory agencies have established a framework for cross-border cooperation. In addition, as explored in the extensive literature on transgovernmentalism, transnational networks have developed with a view to facilitating more effective regulation of the global markets.<sup>17</sup> And in certain areas, standard setting by private international bodies plays a role in shaping market activity.<sup>18</sup> The following section outlines these trends in the regulation of capital markets.

#### A. Unilateral Action at the National Level

The primary regulatory response to the internationalization of securities markets is the projection of domestic law beyond the borders of the regulating state.<sup>19</sup> In many substantive areas, legislatures and rule makers simply widened the scope of local norms to reach particular actors, or particular transactions, even when the activity in question was centered in a foreign country. The U.S. Sarbanes-Oxley Act, for instance, introduced a number of requirements relating to corporate governance (including provisions relating to the constitution and function of audit

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15. Joel P. Trachtman, *International Regulatory Competition, Externalization and Jurisdiction*, 34 HARV. INT'L L.J. 47, 51-52 (1993) (pointing out that “[s]tates compete, like firms, for capital and other economic factors”).

16. For a report highlighting this tension, see COMMISSION ON THE REGULATION OF U.S. CAPITAL MARKETS IN THE 21<sup>ST</sup> CENTURY, REPORT AND RECOMMENDATIONS (2007). The report notes the need “to strike the right balance between two statutory mandates: protecting investors and promoting capital formation.” *Id.* at 11.

17. See, e.g., ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1 (2002); David Zaring, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*, 33 TEX. INT'L L.J. 281 (1998) (accounts of transgovernmental networks as a key development in international governance).

18. See *infra* Part II.C (discussing the role of private standard-setting bodies).

19. See Pierre-Hugues Verdier, *The Political Economy of International Financial Regulation*, 88 IND. L.J. 1405, 1437-38 (2013) (identifying regulatory unilateralism as “the baseline,” and stating that “[i]nstead of systematically looking for cooperative solutions, [states] first attempt to address new cross-border challenges by applying their own laws, even if the relevant activities also have connections to other states.”).

committees) that were applied even to foreign companies, as long as their securities were publicly listed on U.S. exchanges.<sup>20</sup> This law simply expanded the geographic reach of U.S. securities law, imposing local norms on companies active within U.S. markets. In Europe, too, regulators applied various financial requirements to foreign companies whose activities affected their markets.<sup>21</sup>

Such maneuvers are often accompanied by pullbacks that exempt—either entirely or almost entirely—foreign activity that has minimal effect in the regulating country. In the United States, for example, the law requiring registration of securities has extraterritorial scope, applying to offers and sales of securities that occur outside the United States if they have a jurisdictional nexus within the country.<sup>22</sup> Regulation S, however, exempts from these registration requirements offshore offerings that are structured to preclude U.S. investment.<sup>23</sup> Similarly, a number of countries provide exemptions from registration requirements for foreign broker-dealers engaged in only limited activity within their borders.<sup>24</sup>

### B. *International Enforcement Cooperation*

Other efforts have focused directly on the challenge of enforcing domestic norms in the cross-border context. Beginning in the 1980s, securities regulators in a number of countries developed bilateral memoranda of understanding supporting mutual assistance and cooperation in the enforcement of national laws. Under these agreements, regulators undertook to assist each other in various investigation and enforcement functions such as evidence gathering.<sup>25</sup> Second-generation agreements of this type also provided for cooperation in supervisory functions.

Transnational networks of domestic regulators have developed to support these efforts. The most prominent is the International Organization of Securities Commissions (IOSCO). IOSCO was formed in 1983 by securities regulators from North and South America as an expansion of their inter-American regional consortium. Regulators from other continents soon joined the organization, and it created a permanent General Secretariat in 1986. The organization now includes 124 ordinary members (national securities commissions or similar entities with authority over securities or derivatives markets), as well as 15 associate members (supra- or sub-national governmental regulators and international organizations

20. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified at 15 U.S.C. §§ 7201-7266).

21. Verdier, *supra* note 19, at 1438-39.

22. 15 U.S.C. § 77e prohibits the use of “any means or instruments of transportation or communication in interstate commerce or of the mails” to sell an unregistered security.

23. Offshore Offers and Sales, SEC Release Nos. 33-6863, 34-27942 (April 24, 1990), 55 Fed. Reg. 18306 (May 2, 1990). See IOSCO 2014 CONSULTATION REPORT, *supra* note 13, at 11-13 (providing additional examples of this sort of accommodation to foreign entities or transactions).

24. IOSCO 2014 CONSULTATION REPORT, *supra* note 13, at 12.

25. See generally Joel P. Trachtman, *Unilateralism, Bilateralism, Regionalism, Multilateralism, and Functionalism: A Comparison with Reference to Securities Regulation*, 4 TRANSNAT’L L. & CONTEMP. PROBS. 69, 86-87 (1994) (describing this form of agreement).

with an interest in securities regulation).<sup>26</sup> Other securities-specific network organizations include regional bodies such as the Asia Securities Forum, the Council of Securities Regulators of the Americas, and the Committee of European Securities Regulators. Securities regulators also maintain official “dialogues” with each other whose goals include identifying regulatory risks, strengthening cooperation, and enhancing technical assistance efforts.<sup>27</sup>

Overall, the general consensus is that the level of cooperation among securities regulators is high, and that these instruments have helped to resolve some of the challenges—with respect both to enforcement and to supervision of market participants—posed by the transnationalization of the securities markets. One of the greatest success stories is practice under the Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (MMoU) developed by IOSCO in 2002. The MMoU establishes requirements regarding “how [members] should consult, cooperate, and exchange information for the purpose of regulatory enforcement regarding securities markets.” It now has over 100 signatories. IOSCO reports high utilization of the information sharing mechanism established in the MMoU, with requests increasing from 56 in 2003 (shortly after its adoption) to 3,203 in 2015.<sup>28</sup>

### C. Standard Setting at the National and International Levels

During the period in which investment activity was concentrated in a few markets, regulators in those markets were able to insist that foreign participants comply with their rules or lose market access.<sup>29</sup> As a result, standard setting in the area of securities regulation was conducted primarily through the export of local norms by dominant market regulators.<sup>30</sup> Regulators in established markets also regularly provided technical assistance to regulators in developing markets, with the aim of elevating the level of regulation.<sup>31</sup> These programs were often conducted within the framework of bilateral memoranda of understanding between particular agencies.

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26. *About IOSCO*, INT'L ORG. OF SEC. COMM'NS, [https://www.iosco.org/about/?subsection=about\\_iosco](https://www.iosco.org/about/?subsection=about_iosco) (last visited Feb. 11, 2015).

27. *Office of International Affairs, International Regulatory Policy*, U.S. SEC. AND EXCH. COMM'N, [www.sec.gov/oia](http://www.sec.gov/oia) (last visited Jul. 20, 2016).

28. *Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (MMoU)*, INT'L ORG. OF SEC. COMM'NS, <http://www.iosco.org/about/?subsection=mmou> (last visited Jul. 20, 2016) (showing MMoU Information Requests).

29. See David Bach, *Varieties of Cooperation: The Domestic Institutional Roots of Global Governance*, 36 REV. INT'L STUDIES 561, 576-77 (2010).

30. See Roberta S. Karmel & Claire R. Kelley, *The Hardening of Soft Law in Securities Regulation*, BROOK. J. INT'L L. 883, 886 (2009); Beth A. Simmons, *The International Politics of Harmonization: The Case of Capital Market Regulation*, 55 INT'L ORG. 589 (2001).

31. See *Securities and Exchange Commission's International Technical Assistance Program*, U.S. SEC. AND EXCH. COMM'N, [www.sec.gov/about/offices/oia/oia\\_emergtech.shtml](http://www.sec.gov/about/offices/oia/oia_emergtech.shtml) (describing the SEC's work with over 100 countries).

As capital market activity became more dispersed, the ability of individual historically strong financial centers (including the United States) to insist on compliance with their own particular regulations was compromised.<sup>32</sup> Increasingly, the work of standard setting has shifted to the transnational plane, where it is conducted primarily by international organizations.<sup>33</sup> This is not to say that dominant market regulators do not exert significant influence over the content of the relevant standards<sup>34</sup>—but the process has become a more multilateral one. The preeminent securities organization involved in this work is IOSCO, whose mission statement includes the goal to be “the global standard setter for the securities sector.”<sup>35</sup>

In 1998, IOSCO published its “Objectives and Principles of Securities Regulation.”<sup>36</sup> This document, as revised most recently in 2010, sets forth three objectives of securities regulation: protecting investors; ensuring that markets are fair, efficient and transparent; and reducing systemic risk.<sup>37</sup> From these objectives 38 principles are derived. These principles operate at a high level—for instance, they include the principles that the regulator should be “operationally independent and accountable in the exercise of its functions and powers,”<sup>38</sup> that investors should have access to timely and accurate disclosure from issuers,<sup>39</sup> and that “there should be ongoing regulatory supervision of exchanges and trading systems which should aim to ensure that the integrity of trading is maintained through fair and equitable rules...”<sup>40</sup> While consensus on the fundamental objectives and scope of effective securities regulation is fairly broad, implementation remains a struggle. The fact that these principles were adopted by an organization whose membership includes securities regulators from over 100 different jurisdictions—most of them representing emerging markets—is itself some evidence of broad acceptance of these goals.<sup>41</sup> Implementation of the relevant principles, however, varies across

32. See Chris Brummer, *Post-American Securities Regulation*, 98 CAL. L. REV. 327, 328 (2010) (noting that U.S. regulators must address “how to export [their] preferred safeguards and reforms in a time of declining U.S. economic and financial influence.”).

33. See Karmel & Kelley, *supra* note 30, at 886 (“In a world where there is no economic hegemony by any one country, it is necessary for all of the major players in the global capital markets to agree upon the regulation of these markets. The development of standards through soft law is probably the only realistic method of doing so.”).

34. See Verdier, *supra* note 19, at 1443 (noting that the “great powers. . . are in a strong position to shape the international standards.”).

35. *About IOSCO*, *supra* note 26.

36. See JORDAN, *supra* note 5, at 35 (discussing the history of this document) and at 46-47 (discussing the most recent version).

37. *Objectives and Principles of Securities Regulation*, INT’L ORG. OF SEC. COMM’NS 3 (2010), <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD323.pdf>.

38. *Id.* at 4 (Principle 2).

39. *Id.* at 8 (Principle 16).

40. *Id.* at 12 (Principle 34).

41. However, membership in the Technical Committee, which is responsible for developing the standards, is limited to a smaller group of members.



jurisdictions,<sup>42</sup> and consensus on the content of individual regulatory norms is low. The few examples of progress toward convergence—where the relevant norms have penetrated domestic regulatory systems—include international accounting standards and prohibitions against insider trading.<sup>43</sup>

Administrative mechanisms within IOSCO seek to translate these principles into national law.<sup>44</sup> For instance, IOSCO’s Assessment Committee conducts country reviews that provide national regulators, particularly in developing economies, with road maps setting out areas for improvement. In addition, the Financial Sector Assessment Program initiative of the International Monetary Fund and the World Bank uses the Assessment Committee’s standards as benchmarks when monitoring the compliance of member countries, further supporting the penetration of the relevant norms into national legal systems.<sup>45</sup> Nevertheless, some commentators have concluded that “consensus-based international standards coming out of IOSCO are too compromised, too ethereal to be of great use in the complex and technical world of capital markets regulation.”<sup>46</sup>

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As the account above indicates, securities law—the legal regime governing transactions and participants in capital markets—has not been “authoritatively order[ed]” by substantive norms that operate across national jurisdictions<sup>47</sup> in more than a very spotty sense. However, this is not to conclude that no transnational legal order can be identified at work in this area. The domestic legislatures and agencies responsible for producing securities laws work within, and are arguably confined by, a framework of different transnational norms: those relating to the allocation of jurisdictional authority within the international system. This framework imposes its own form of transnational order on the regulation of global capital markets—an order sourced in conflict of laws rules.<sup>48</sup> It also brings its own set of normative

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42. See Ana Carvajal & Jennifer Elliott, *The Challenge of Enforcement in Securities Markets: Mission Impossible?* 4 (IMF Working Paper No. 09/168, 2009) (in a study of enforcement, concluding that many countries have failed to implement “credible and effective” enforcement programs despite their general commitment to the relevant IOSCO principles).

43. Amir N. Licht, *International Diversity in Securities Regulation: Roadblocks on the Way to Convergence*, 20 CARDOZO L. REV. 227, 231-33 (1998) (describing progress in these areas).

44. See Kern Alexander, *Global Financial Standard Setting, The G10 Committees, and International Economic Law*, 34 BROOK. J. INT’L L. 861, 869 (2009) (the goal of international standard setting of this type is “not to adopt legally binding international standards. . . , but rather to influence domestic regulatory law, practices and standards.”); see also Halliday & Shaffer, *supra* note 1, at 13 (identifying as one attribute of a transnational legal order the engagement of “legal institutions within multiple nation-states, whether in the adoption, recognition, or enforcement of the [relevant] norms.”).

45. See *Methodology for Assessing Implementation of the IOSCO Objectives and Principles of Securities Regulation*, INT’L ORG. OF SEC. COMM’NS (2008), <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD266.pdf>. See also Alexander, *supra* note 44, at 877 (noting this form of benchmarking).

46. JORDAN, *supra* note 5, at 52.

47. See *supra* note 1 (defining the attributes of a “transnational legal order”).

48. See Annelise Riles, *Managing Regulatory Arbitrage: A Conflict of Laws Approach*, 47 CORNELL INT’L L.J. 63, 89 (2014) (“When regulators or market participants make a claim about the application of one or another body of law to a given party or transaction, they are already making an implicit claim

assumptions. First, fundamentally, securities-related activity in (or affecting) any given market is best regulated by national law—whose scope is defined by connecting factors such as the domicile of an investor or the location of a particular transaction.<sup>49</sup> Second, on the whole, competition among legal regimes (in offering different forms of substantive regulation) is desirable, and divergence among national norms will therefore be tolerated. Third, cooperation and coordination mechanisms can be used to address whatever challenges arise as a result of transnational market activity and to preserve the effectiveness of domestic regulation in the face of those challenges. (In the following part, we will address ways in which the global financial crisis complicated these assumptions.)

With respect to derivative securities in particular, this conflicts regime exists alongside a strong private ordering regime shaped by the International Swaps and Derivatives Association (ISDA). The ISDA is a trade association whose members include not only derivatives dealers, but also end users (such as hedge funds) and certain services providers (such as accounting firms).<sup>50</sup> Over the past several decades, the ISDA has been active in standard-setting, filling the gap created by earlier legislative reforms that left many derivatives markets essentially unregulated.<sup>51</sup> Its Master Agreement and related schedules<sup>52</sup> provide standardized documentation for OTC derivatives transactions that has become the “market norm,” governing the vast majority of transactions in those securities.<sup>53</sup> The ISDA also publishes supporting documents such as users’ guides and statements of best practices that are intended to create a shared framework for the interpretation of

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about what the scope of their national law should be. Whether they recognize it or not, they are making a Conflicts argument.”)

49. *Id.* at 89-90. This approach preserves the “inherent focus on domestic markets among regulators[,] as they generally have as their primary responsibility the regulation of their domestic territory and are explicitly required by national law to consider the impact of their rule-making, supervision and enforcement on their domestic market as a priority, rather than consider any effect outside their jurisdiction.” IOSCO 2014 CONSULTATION REPORT, *supra* note 13, at 43.

50. ISDA describes its membership as follows:

These members comprise of [sic] a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers.

*About ISDA*, INT’L SWAPS AND DERIVATIVES ASS’N, <http://www2.isda.org/about-isda/> (last visited Jul. 20, 2016). See also John Biggins, *Targeted Touchdown’ and ‘Partial Liftoff’: Post-Crisis Dispute Resolution in the OTC Derivatives Markets and the Challenge for ISDA*, 13 GERMAN L.J. 1297, 1311 (2012) (providing a brief description of the history and membership of the association).

51. GEOFFREY P. MILLER & FABRIZIO CAFAGGI, *THE GOVERNANCE AND REGULATION OF INTERNATIONAL FINANCE* 41 (2013). See also Sue R. Faerman et al., *Understanding Interorganizational Cooperation: Public-Private Collaboration in Regulating Financial Market Innovation*, 12 ORG. SCI. 372 (2001) (providing an account of the role another trade group, the Derivatives Policy Group, played in shaping financial regulation pre-global crisis).

52. For a description of the development of these instruments, see Gabriel V. Rauterberg & Andrew Verstein, *Assessing Transnational Private Regulation of the OTC Derivatives Market: ISDA, the BBA, and the Future of Financial Reform*, 54 VA. J. INT’L L. 9, 20-23 (2013).

53. *Id.* at 13.

resulting agreements. In addition to channeling the structure of private derivatives transactions in this way, the standards articulated in the ISDA agreements have also penetrated national legal systems—for instance, more than forty countries have adopted netting legislation intended to secure predictable treatment for derivatives under insolvency laws.<sup>54</sup> The resulting system has been described as a “highly successful transnational private regulatory regime.”<sup>55</sup>

### III. DERIVATIVES REGULATION: A CASE STUDY OF TRANSNATIONAL ORDERING

As many recent studies have concluded, various pathologies in the market for over-the-counter (OTC) derivative securities contributed to the global financial crisis.<sup>56</sup> In particular, many large financial institutions had entered into credit default swaps<sup>57</sup> that were linked to collateralized debt obligations backed by home mortgages. When the U.S. housing market collapsed, the resulting defaults on those mortgages triggered massive payment obligations under the swaps.<sup>58</sup> The swap sellers were not able to honor their commitments to counterparties; some failed, and others were rescued by government intervention intended to forestall the further spread of defaults.<sup>59</sup> Unsurprisingly, regulators in the aftermath of the crisis called for comprehensive regulation of OTC derivatives.<sup>60</sup>

The following narrative examines the legislative and rulemaking processes that have unfolded in the area of derivatives regulation. It describes the various actors involved in these processes (including national agencies, international bodies, and network organizations) and their progress toward the development and implementation of particular substantive norms. The goal of this overview is not to

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54. John Biggins & Colin Scott, *Public-Private Relations in a Transnational Private Regulatory Regime: ISDA, the State and OTC Derivatives Market Reform*, 13 EUR. BUS. ORG. L. REV. 309, 327-29 (2012) (exploring ISDA’s strategy of “seek[ing] public incorporation of private norms within national legislation”). See also Frank Partnoy, *Second-Order Benefits from Standards*, 48 B.C. L. REV. 169, 187 (2007) (stating that “numerous statutes and regulations rely on certain provisions that are incorporated into standard form OTC derivatives counterparty contracts, even though they do not explicitly reference ISDA.”).

55. Biggins, *supra* note 50, at 1297. See also Riles, *supra* note 48, at 81 (stating that the norms and practices of the ISDA and similar organizations “are now an integral part of the transnational legal culture of the financial markets”).

56. See Biggins & Scott, *supra* note 54, at 321.

57. A swap is “a private agreement between two parties to exchange cash flows at certain times according to a prearranged formula.” Partnoy, *supra* note 2, at 219. The formula may reference different underlying indices, including interest rates (in the case of interest rate swaps) and currency exchange rates (in the case of currency swaps). A credit default swap references “the credit or creditworthiness of a borrower (debt issuer).” D’Souza, Ellis & Fairchild, *supra* note 2, at 483. It functions like insurance against the non-payment of the underlying obligation: the seller of the swap agrees that if a default event occurs with respect to the referenced obligation, the seller will pay the buyer. *Id.* at 483-84.

58. See D’Souza, Ellis & Fairchild, *supra* note 2, at 482-84 (describing this chain of events).

59. *Id.* See also Chris Brummer, *How International Financial Law Works (and How It Doesn’t)*, 99 GEO. L.J. 257, 265 (2011).

60. In a sense, the call was for re-regulation of these securities, as it was relatively recent legislative reform that had removed the OTC markets from regulatory oversight. See Brooksley Born, *Foreword: Deregulation: A Major Cause of the Financial Crisis*, 5 HARV. L. & POL’Y REV. 231 (2011).

provide a comprehensive analysis of this episode, but rather to use it as a vehicle to examine the characteristics of capital market regulation as a transnational legal order.<sup>61</sup> Ultimately, it aims to identify the political and economic aspects of securities regulation that impede progress toward an effective transnational legal order in that area.

#### *A. Progress Toward a Transnational Approach*

Early accounts following the crisis highlighted the fact that speculative trading in OTC derivatives had created not just systemic risk but cross-border systemic risk.<sup>62</sup> As a result, the regulatory challenge was framed as a “global and international collective action problem.”<sup>63</sup>

Many OTC derivatives markets are global, with the same products traded in multiple jurisdictions and by multinational institutions. Given that these markets function on a cross-border basis, it is important that there is international cooperation and coordination to fulfil enforcement and supervision responsibilities [and] minimise the potential for regulatory arbitrage...<sup>64</sup>

The shared assumption, in other words, was that only adopting uniform rules across national systems could prevent regulatory arbitrage and thereby contain the systemic risks presented by OTC derivatives.<sup>65</sup>

The G20 emerged as the locus for developing new regulatory standards.<sup>66</sup> Consensus at the general level—as to the fundamental goals of mitigating systemic risk, improving market transparency, and protecting against market abuse—was

61. There are many excellent and detailed accounts of the role of derivatives in the financial crisis and of the regulatory steps taken in its aftermath. See, e.g., John C. Coffee, Jr., *Extraterritorial Financial Regulation: Why E.T. Can't Come Home*, 99 CORNELL L. REV. 1259 (2013); David McCaffrey, *Private and Public Controls in the Over-the-Counter Derivatives Market, 1984-2015* (Oct. 10, 2015) (unpublished manuscript), <http://ssrn.com/abstract=2642216>; Eric Helleiner, *Towards Cooperative Decentralization? The Post-Crisis Governance of Global OTC Derivatives*, in TRANSNATIONAL FINANCIAL REGULATION AFTER THE CRISIS 132 (Tony Porter ed. 2014); MILLER & CAFAGGI, *supra* note 51.

62. See Steven L. Schwarcz, *Systemic Risk*, 97 GEO. L.J. 193 (2008) (providing a definition of systemic risk in general, and, at Part III, discussing cross-border risk); Mario Giovanoli, *The Reform of the International Financial Architecture After the Global Crisis*, 42 N.Y.U. J. INT'L L. & POL. 81, 87 (2009) (describing the crisis as “a perfect illustration of systemic risk at the international level—the contamination of other markets, sectors, or jurisdictions following defaults in a given domestic economy”). See also Tech. Comm., *Mitigating Systemic Risk: A Role for Securities Regulators*, INT'L ORG. OF SEC. COMM'NS (2011), <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD347.pdf>.

63. MILLER & CAFAGGI, *supra* note 51, at 53.

64. *Implementing OTC Derivatives Market Reforms*, FIN. STABILITY BD. 7 (2010), [http://www.fsb.org/wp-content/uploads/r\\_101025.pdf](http://www.fsb.org/wp-content/uploads/r_101025.pdf) [hereinafter *Implementing Market Reforms*].

65. See *id.* at 2 (“Given the global nature of the OTC derivatives markets, continued international coordination in dealing with ongoing implementation of the G20 commitments is critical. Work should be taken forward by the relevant standard setters and authorities to achieve international consistency.”).

66. The G20 is the forum in which finance ministers from the world’s leading economies meet to consider matters of economic and monetary policy. See generally Brummer, *Post-American Securities Regulation*, *supra* note 32, at 357-58 (providing a brief description and history of the group).

easy to reach.<sup>67</sup> And at a meeting held in Pittsburgh at the end of 2009, the leaders of the G20 agreed to three core regulatory commitments: (1) 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;<sup>68</sup> (2) OTC derivative contracts should be reported to trade repositories; and (3) non-centrally cleared contracts should be subject to higher capital requirements.<sup>69</sup>

The task of coordinating efforts to implement these core commitments fell primarily to the Financial Stability Board (FSB).<sup>70</sup> This organization, founded in 1999 but whose operations expanded following the 2008 financial crisis,<sup>71</sup> has been described as a “network of networks” where standard setters, financial ministries, and central banks all interact[.]”<sup>72</sup> The FSB articulates its composition and mission in the following terms:

The FSB has a unique composition among international bodies, because it brings together senior policy makers from ministries of finance, central banks, and supervisory and regulatory authorities, for the G20 countries, plus four other key financial centres – Hong Kong, Singapore, Spain and Switzerland. In addition, it includes international bodies, including standard-setters and regional bodies like the European Central Bank and European Commission. This means it has all the main players who set financial stability policies across different sectors of the financial system are [sic] at one table. So when policies are agreed, they also have the authority to carry it out.

Policies agreed by the FSB are not legally binding, nor are they intended to replace the normal national and regional regulatory process. Instead, the FSB acts as a coordinating body, to drive forward the policy agenda to strengthen financial stability. It operates by moral suasion and peer pressure, to set internationally agreed policies and minimum standards that its members commit to implement at national level [sic].<sup>73</sup>

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67. Elisse Walter, Address at the American Bar Association Spring Meeting, Washington D.C.: Regulation of Cross-Border OTC Derivatives Activities: Finding the Middle Ground (Apr. 6, 2013).

68. This commitment therefore ensured that standard margin requirements would be in place for these securities, reducing counterparty risk.

69. *Implementing Market Reforms*, *supra* note 64, at 8; *see also* Coffee, *supra* note 61, at 1273; Sean J. Griffith, *Substituted Compliance and Systemic Risk: How to Make a Global Market in Derivatives Regulation*, 98 MINN. L. REV. 1291, 1310-11 (2014) (providing accounts of this meeting).

70. *See generally* Stavros Gadinis, *The Financial Stability Board: The New Politics of International Financial Regulation*, 48 TEX. INT'L L.J. 157 (2013) (describing the FSB and its role in derivatives reform).

71. JORDAN, *supra* note 5, at 48 (discussing the history of the FSB as successor organization to the Financial Stability Forum, which emerged following the Asian financial crisis).

72. Brummer, *Post-American Securities Regulation*, *supra* note 32, at 359. *See also* Gadinis, *supra* note 70, at 163 (describing the FSB as “an umbrella organization that comprises the diverse players active in international financial policymaking – international institutions, regulatory networks, private associations, and domestic regulators” as well as representatives from the G20 governments).

73. *What We Do*, FIN. STABILITY BD., <http://www.financialstabilityboard.org> (last visited Jul. 20, 2016). *See also* Griffith, *supra* note 69, at 1366; Eric Helleiner, *Regulating the Regulators: The Emergence*

The FSB is used both to initiate policymaking, through special committees and with the support of existing networks under its umbrella, and also to coordinate domestic implementation of transnational standards.<sup>74</sup> Both of these functions came into play in the area of derivatives regulation; a working group was created to develop regulatory recommendations,<sup>75</sup> after which a formal review mechanism was put in place to ensure the implementation of those recommendations in FSB member states.<sup>76</sup>

Progress on the national level toward implementing specific legislation and rules has been slow, and to date reflects only moderate international consensus. Some major markets have adopted (or are in the process of adopting) comprehensive regulatory schemes governing transactions in over-the-counter derivatives. In the European Union, for example, the Market Infrastructure Regulation (EMIR) adopted in 2012 introduced rules governing central counterparties, and imposed certain clearing and reporting obligations for transactions in OTC derivatives.<sup>77</sup> A number of subsequent regulations issued within the EMIR framework set forth implementing rules and standards.<sup>78</sup> In 2014, the Markets in Financial Instruments Directive followed, laying out the framework within which member states will regulate trading venues, including those for derivatives.<sup>79</sup> In the United States, similarly, Title VII of the Dodd-Frank Act<sup>80</sup> introduced provisions consistent with the G20 commitments.<sup>81</sup> The Act also required the promulgation of both “entity-level” regulations applicable to swaps dealers (for instance, capital adequacy and reporting requirements) and “transaction-level” regulations applicable to the transactions they conduct (for instance, margin requirements and requirements relating to the confirmation,

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*and Limits of the Transnational Financial Legal Order*, in *TRANSNATIONAL LEGAL ORDERS*, *supra* note 1, at 239-40 (discussing the composition and objectives of the FSB).

74. See Gadinis, *supra* note 70, at 169 (describing these functions).

75. See Part III.B.1 *infra* for further discussion of this working group.

76. See Gadinis, *supra* note 70, at 174-75 (outlining the peer review-based process put in place by the FSB).

77. Regulation 648/2012 of the European Parliament and of the Council of 4 July, 2012 on OTC Derivatives, Central Counterparties and Trade Repositories, 2012 O.J. (L 201) 1.

78. See, e.g., Commission Delegated Regulation (EU) No 149/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on indirect clearing arrangements, the clearing obligation, the public register, access to a trading venue, non-financial counterparties, and risk mitigation techniques for OTC derivatives contracts not cleared by a CCP, 2013 O.J. (L 52/11); Commission Delegated Regulation (EU) No 152/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on capital requirements for central counterparties, 2013 O.J. (L 52/37). For an overview of this implementing legislation, see JONES DAY, *THE EUROPEAN MARKET INFRASTRUCTURE REGULATION AND TRANSPARENCY IN THE OTC DERIVATIVES MARKET* (2013), [http://www.jonesday.com/files/upload/EMIR\\_and\\_Transparency.pdf](http://www.jonesday.com/files/upload/EMIR_and_Transparency.pdf).

79. Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments, 173 O.J. L 349 (2014).

80. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of 7, 12 and 15 U.S.C.).

81. See McCaffrey, *supra* note 61, at 37.

clearing and documentation of swaps). Pursuant to these dictates, both the Commodity Futures Trading Commission (CFTC) and the Securities and Exchange Commission (SEC) promulgated initial rules regulating markets in OTC derivatives.<sup>82</sup> For instance, the CFTC issued rules requiring mandatory clearing for most interest rate swaps and for many credit default swaps.<sup>83</sup> Both Commissions adopted margin and collateral requirements applicable to derivatives clearinghouses.<sup>84</sup> For swaps that are not cleared through a derivatives clearing organization (and are therefore not subject to that organization's margin requirements), both Commissions established bilateral margin requirements.<sup>85</sup>

Progress has been slower in some other systems, even within the group of FSB member states.<sup>86</sup> A report issued by the FSB in 2015, for instance, notes that most had yet to develop margin requirements for non-centrally cleared derivatives.<sup>87</sup> Outside that group, the picture is cloudier; some countries are simply on a slower time schedule, but others appear disinterested in adopting comprehensive regulations.<sup>88</sup> Moreover, the reforms vary in substance across jurisdictions—on issues such as exemptions from regulation for certain swaps dealers, specific reporting requirements, and the procedural aspects of margin requirements.<sup>89</sup> One recent study of clearinghouses, for example, concludes that “E.U. and U.S. legislators, while giving effect to the internationally agreed consensus, differ on granular questions concerning the regulation of derivatives clearinghouses”<sup>90</sup>—questions including matters such as margin requirements, collateral requirements, and investment policy requirements.<sup>91</sup> In other words, the high-level regulatory commitments agreed upon at the transnational level are not settling uniformly in national legal systems.<sup>92</sup>

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82. For a full description of this rulemaking, see Coffee, *supra* note 61, at 1275-77.

83. 17 C.F.R. § 50.4.

84. See Derivatives Clearing Organization General Provisions and Core Principles, 76 Fed. Reg. 69, 334, 69, 334-45 (Nov. 8, 2011) (codified at 17 C.F.R. pts. 1, 21, 39, 140) (CFTC requirements); Clearing Agency Standards for Operation and Governance, Exchange Act Release No. 64,017, 76 Fed. Reg. 14,472, 14,479 (Mar. 16, 2011) (to be codified at 17 C.F.R. pt. 240) (SEC requirements).

85. Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 81 Fed. Reg. 636 (Jan. 6, 2016) (to be codified at 17 C.F.R. pts 23, 140).

86. Useful information regarding progress in different systems toward the adoption of derivatives regulations can be found on the website of the Financial Stability Board, where ten progress reports have been posted.

87. *OTC Derivatives Market Reforms, Tenth Progress Report on Implementation*, FIN. STABILITY BD. (2015), <http://www.fsb.org/wp-content/uploads/OTC-Derivatives-10th-Progress-Report.pdf>.

88. See Griffith, *supra* note 69, at 1322-23.

89. See Heikki Marjosola, *Regulate Thy Neighbor: Competition and Conflict in the Cross-Border Regulatory Space for OTC Derivatives* 10 (EUI Working Paper No. 2016/01, 2016), <http://ssrn.com/abstract=2733138> (outlining some of these differences).

90. Yesha Yadav & Dermot Turing, *The Extra-Territorial Regulation of Clearinghouses*, 2 J. FIN. REG. 21, 23 (2016).

91. *Id.* at 34-45 (outlining differences between the two regimes).

92. See Marjosola, *supra* note 89, at 9 (concluding that “[m]uch of the consensus that has been reached under the G20 umbrella has been lost in implementation, where soft principles and policy goals have been translated into hard rules.”).

More critically, cross-border transactions (which, as noted above, account for the vast majority of derivatives trading)<sup>93</sup> have become more complicated as a result of differences in the pace and substance of national reform efforts.<sup>94</sup> In a 2015 report, the ISDA observed the consequence of uncertainty regarding applicable law:

Rather than being subject to multiple, potentially inconsistent requirements, derivatives users are increasingly choosing to trade with counterparties in their own jurisdictions. The result is a fragmentation of liquidity pools along geographic lines, which reduces choice, increases costs, and will make it more challenging for end users to enter into or unwind large transactions, particularly in stressed markets.<sup>95</sup>

In this respect, the process has not yielded the sort of uniform and collective response desired.

The following section investigates more closely some of the challenges that have impeded transnational reform in derivatives regulation.

## B. *Obstacles to the Formation of a TLO*

### 1. *Issue alignment*

In the United States, Dodd-Frank allocated regulatory authority over swap agreements to both the Securities and Exchange Commission (as to “security-based swaps”<sup>96</sup>) and the Commodity Futures Trade Commission (as to all other swaps).<sup>97</sup> Consistent with the international orientation described above, it required the agencies not only to work in collaboration with each other, but also to consult with foreign regulators in establishing consistent international standards.<sup>98</sup> However, the agencies worked independently in developing rules to satisfy these requirements. They proceeded on different time schedules and arrived at different substantive regulations.<sup>99</sup> In particular, the SEC adopted a somewhat less aggressive approach

93. See *supra* note 12.

94. See *FSB Tenth Progress Report* at 13 (“[U]niveness in the pace of implementation of reforms, as well as inconsistencies or gaps in the application of requirements to cross-border transactions, can result in duplicative or overlapping requirements or lead to opportunities for regulatory arbitrage.”)

95. *Briefing Notes, The Dodd Frank Act: Five Years On*, INT’L SWAPS AND DERIVATIVES ASS’N 8 (2015), <http://www2.isda.org/dodd-frank/> (last visited Jul. 20, 2016).

96. “Security-based swap” is defined as any agreement, contract, or transaction that is a swap based on a narrow-based security index, a single security or loan, or event relating to the issuer of either. 15 U.S.C. § 78c(a)(68)(A) (2012). The Dodd-Frank Act amended the securities laws to bring security-based swaps within the definition of “security.” Dodd-Frank Act § 761(a). The Dodd-Frank Act also gave the SEC anti-fraud enforcement authority over “security-based swap agreements.” Dodd-Frank Act § 712(d).

97. Dodd-Frank Act § 721(a)(21), 7 U.S.C. § 1a (amending CEA section defining swaps).

98. Section 752(a). See U.S. GOV’T ACCOUNTABILITY OFF., *DODD-FRANK REGULATIONS: REGULATORS’ ANALYTICAL AND COORDINATION EFFORTS* 15 (2014) (explaining that the purpose of this requirement was to enhance coordination in arriving at “consistent international standards regarding the regulation of swaps, security-based swaps, swap entities, and security-based swap entities”).

99. For an exhaustive treatment of interagency coordination issues, see *id.* at 35-41.



than the CFTC regarding the extraterritorial reach of its rules.<sup>100</sup> Conflict internal to the domestic regime therefore slowed progress and (as discussed further below) interfered with international negotiations.

Another alignment issue arose due to the assignment of the problem at the international level. Both before and immediately following the financial crisis, international network organizations were created that were dedicated to the issue of OTC derivatives regulation. They included the OTC Derivatives Supervisors Group (ODSG), chaired by the New York Fed,<sup>101</sup> and the OTC Derivatives Regulators' Forum (ODRF), created in 2009 "to provide authorities interested in OTC derivatives markets and their supporting infrastructures with a means to cooperate, exchange views, and share information on OTC derivatives central counterparties (CCPs) and trade repositories (TRs)."<sup>102</sup> However, as described above, following the G20's adoption of core commitments regarding derivatives trading, the task of coordinating implementation fell to the FSB. This move took the issue out of the hands of the derivatives networks, as described by the ODRF itself:

[S]ince its formation the environment in which the ODRF has been operating has changed significantly: the international standard setting bodies have created risk management standards for infrastructures serving the OTC derivatives markets; further, domestic mandatory clearing and reporting rules have resulted in the increased use of these infrastructures to meet the G20 objectives. Authorities participating in the ODRF have noted that several of the gaps and concerns the forum was initially formed to address are now more appropriately handled by these standard setting bodies and domestic authorities.<sup>103</sup>

As noted above, the FSB operates as a meta-network, coordinating participants from multiple private and public sectors. In launching its work, the FSB called for the formation of a working group to help develop recommendations on the implementation of the core commitments regarding OTC derivatives. It included representatives of the Committee on Payment and Settlement Systems, IOSCO, and the European Commission.<sup>104</sup> In subsequent meetings, additional

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100. See *infra*. The CFTC's approach, enshrined in its proposed guidance released on June 29, 2012, was widely criticized as overly aggressive in asserting the Commission's authority to apply its rules to swap participants worldwide whose activities touched the United States. See *Regulator of the World*, WALL ST. J., May 27, 2013.

101. This group, comprising "representatives of major OTC derivatives market participants and their domestic and international supervisors," was formed in 2005. The last documents posted on its website date to 2011. See *OTC Derivatives Supervisors Group*, FED. RES. BANK OF N.Y., [https://www.newyorkfed.org/markets/otc\\_derivatives\\_supervisors\\_group.html#tabs-1](https://www.newyorkfed.org/markets/otc_derivatives_supervisors_group.html#tabs-1) (last visited Jul. 20, 2016).

102. See OTC DERIVATIVES REGULATORS' F., <http://www.otcdrf.org/index.htm> (last visited Jul. 20, 2016).

103. *Id.* The group subsequently revised its mandate to focus on information sharing and cooperation. See *Revised Framework for Information Sharing and Cooperation Among OTC Derivatives Regulators*, OTC DERIVATIVES REGULATORS' F. (2014), [http://www.otcdrf.org/documents/odrf\\_framework\\_may2014.pdf](http://www.otcdrf.org/documents/odrf_framework_may2014.pdf).

104. *Implementing Market Reforms*, *supra* note 64, at iii.

organizations were brought into the implementation process: for instance, in a 2011 meeting, the G20 requested the Basel Committee on Banking Supervision and IOSCO, “together with other relevant organizations,” to work on developing standards on margin requirements for non-centrally cleared OTC derivatives.<sup>105</sup>

As this account demonstrates, the issue of regulating OTC derivative securities was wrapped into much broader discussions regarding financial regulation generally. Given the proliferation of international institutions at that point engaged in various financial sectors,<sup>106</sup> many different entities had their hands on the issue of derivatives regulation, with the Financial Stability Board playing only a loose coordinating role. The transnational entities whose mandates aligned most closely with the specific question of derivatives regulation were not in control of the process.<sup>107</sup>

## 2. *The return of unilateralism*

Because rulemaking within the G20 framework proceeded at the national level, it was clear from the outset that significant divergence might remain in the scope and content of regulation (if for no other reason, simply because the pace of legislative reform would differ). In light of this, both the United States and the European Union, while working to implement their own rules complying with the G20 commitments, nevertheless preserved the right to apply domestic law extraterritorially if they felt that doing so was necessary to protect the integrity of their markets.<sup>108</sup> Each threatened to bar foreign dealers from participating in local swaps markets if it concluded that those dealers were not sufficiently regulated by their home country. For instance, Section 715 of Dodd-Frank provided that entities could be prohibited from participating in the U.S. swaps markets if they were domiciled in nations whose own regulation was deemed inadequate to protect “the

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105. G20 Cannes Summit Final Declaration – Building Our Common Future: Renewed Collective Action for the Benefit of All ¶ 24 (Nov. 4, 2011), <http://www.g20.utoronto.ca/2011/2011-cannes-declaration-111104-en.html>.

106. See Helleiner, *Regulating the Regulators*, *supra* note 73, at 239 (noting that at that point in time “the international institutional landscape was rapidly becoming quite cluttered.”).

107. This is not to say that sector-specific networks had no input—the OTC Derivatives Regulators Group, for instance, comprising the principals of regulatory authorities in Australia, Brazil, the European Union, Hong Kong, Japan, Ontario, Quebec, Singapore, Switzerland, and the United States, advise G20 leaders and the FSB on cross-border implementation issues. See OTC DERIVATIVES REGULATORS GROUP, REPORT OF THE OTC DERIVATIVES REGULATORS GROUP (ODRG) TO G20 LEADERS ON CROSS-BORDER IMPLEMENTATION ISSUES (2015), [http://www.cftc.gov/idc/groups/public/@internationalaffairs/documents/file/odrgreportg20\\_111.pdf](http://www.cftc.gov/idc/groups/public/@internationalaffairs/documents/file/odrgreportg20_111.pdf); OTC DERIVATIVES REGULATORS GROUP, REPORT ON AGREED UNDERSTANDINGS TO RESOLVING CROSS-BORDER CONFLICTS, INCONSISTENCIES, GAPS AND DUPLICATIVE REQUIREMENTS (2013), <http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/odrgreport.pdf>. However, the transnational process was located within the broader FSB working group. Helleiner notes another change in the constitution of contributors to these networks: “[T]he unprecedented politicization of OTC derivatives in the wake of the crisis—particularly within the USA and Europe—has drawn many domestic groups into the policymaking process beyond those involved in the FSB’s elite transgovernmental networks.” Helleiner, *Towards Cooperative Decentralization?*, *supra* note 61, at 143.

108. See Coffee, *supra* note 61, at 1263-64 (focusing on this extraterritoriality problem).

stability of the United States financial system.”<sup>109</sup> The European Market Infrastructure Regulation adopted a similar approach: in Article 25, for instance, it reserved the right to bar foreign CCPs from providing clearing services within the European Union if they were not subject to “effective supervision and enforcement” in their home jurisdiction.<sup>110</sup> In this sense, the respective countries used extraterritorial regulation as a backstop to efforts to harmonize regulation of the derivatives markets.<sup>111</sup>

The extent to which domestic laws would apply extraterritorially generated a significant dispute between the United States and the European Union. In mid-2012, the CFTC issued proposed guidance on this point, which indicated an aggressive approach toward the extraterritorial application of U.S. regulations.<sup>112</sup> Under this guidance, U.S. rules would have been applied to several categories of transactions substantially connected with foreign markets—including, for example, transactions between foreign affiliates of a U.S. person and foreign parties.<sup>113</sup> The guidance offered limited relief only for non-U.S. registered swap dealers or major swap participants, who would be exempt from U.S. regulation if they complied with foreign regulatory requirements that the CFTC deemed comparable. The CFTC’s position was opposed by the European Union, which in spring 2013, along with the finance ministers of several other countries, complained to the U.S. Secretary of the Treasury that it did not defer sufficiently to European rules and would lead to a fragmentation of the derivatives market.<sup>114</sup>

Following additional discussions, the CFTC and the EU in summer 2013 issued a joint statement reaffirming their mutual commitment to the general approach of substituted compliance, stating that “[j]urisdictions and regulators should be able to defer to each other when it is justified by the quality of their respective regulation and enforcement regimes.”<sup>115</sup> And the CFTC subsequently

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109. 15 U.S.C. § 8304 (2012). Section 722(d) further provided that U.S. law would apply to foreign swap activities that had “a direct and significant connection” with activities in U.S. commerce, or that were deemed evasive of U.S. law. 7 U.S.C. § 2(i).

110. EMIR Article 25. The European regulators likewise provided that EU law would apply to certain foreign swap activities that were deemed to have a “direct, substantial and foreseeable effect within the Union,” or that were deemed evasive of European regulations. Commission Delegated Regulation (EU) No 285/2014 of 13 February 2014 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on direct, substantial and foreseeable effect of contracts within the Union and to prevent the evasion of rules and obligations, 2014 O.J. (L 85/1).

111. See Griffith, *supra* note 69, at 1325, 1329-30.

112. Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act, 77 Fed. Reg. 41,214 (July 12, 2012). See Coffee, *supra* note 61, at 1277-78 (describing the proposed guidance).

113. See Coffee, *supra* note 61, at 1278 (“the guidance would have exempted transactions only between a non-U.S. swap entity and a non-U.S. counterparty that was not an affiliate of a U.S. person.”).

114. Ministerial-level Joint Letter from the Fin. Servs. Agency and nine foreign authorities on Cross-Border OTC Derivatives Reform to Jacob J. Lew, U.S. Secretary of the Treasury (Apr. 19, 2013), <http://www.fsa.go.jp/en/news/2013/20130419.html>.

115. Press Release, U.S. Commodity Futures Trading Comm’n, Cross-Border Regulation of Swaps/Derivatives, Discussions between the Commodity Futures Trading Commission and the

modified its position, expanding the category of transactions eligible for exemption on the basis of compliance with comparable foreign requirements.<sup>116</sup> It also issued a no-action letter concluding that the European Union's risk mitigation rules were "essentially identical" to the CFTC's own (and thus that market participants complying with those rules were conclusively in compliance with U.S. regulation).<sup>117</sup>

Subsequent action by the CFTC, however, appeared again to frustrate expectations regarding the possible scope of extraterritorial regulation. At the end of 2013, the CFTC issued another advisory that approved the entity-level regulations of several other regimes as comparable to U.S. regulation, but approved only a very limited number of transaction-level regulations.<sup>118</sup> The result was that many transactions would remain subject to the CFTC's transaction-level requirements, which include the clearing requirement, the trade execution mandate and real-time public reporting obligations.

A spokesman for European Commissioner Barnier was "surprised" by the CFTC advisory, stating that it "seem[s] to us to go against both the letter and spirit of the path forward agreement. . . . [The advisory is] another step away from the kind of inter-operable global system that we want to build." One commentator described the resulting risk in the following way:

[T]he global swaps market was splitting into two segments—a U.S. market governed by the CFTC's rules and participants elsewhere trying to avoid the CFTC's rules. This was harmful given the extent to which economic activity had to be coordinated across national borders. Regulators in other nations argued that the CFTC was violating norms of global regulatory cooperation given how aggressively it was claiming jurisdiction over activities in other nations on the grounds that they affected the United States.<sup>119</sup>

This dispute was eventually resolved, as the CFTC and European regulators came to terms on issues including the regulation of each other's clearinghouses and certain margin requirements for uncleared swaps.<sup>120</sup> However, it was resolved through bilateral negotiations between the regulators involved, and not by means of any mediation through the networking organizations.<sup>121</sup> The dispute therefore

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European Union – A Path Forward, (Jul. 11, 2013), <http://www.cftc.gov/PressRoom/PressReleases/pr6640-13>.

116. Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations, 78 Fed. Reg. 45292 (Jul. 26, 2013).

117. Letter from Div. of Swap Dealer and Intermediary Oversight, U.S. Commodity Futures Trading Comm'n on No-Action Relief for Registered Swap Dealers and Major Swap Participants from Certain Requirements (Jul. 11, 2013) (Letter No. 13-45).

118. Press Release, U.S. Commodities Futures Trading Comm'n, CFTC Approves Comparability Determinations for Six Jurisdictions for Substituted Compliance Purposes (Dec. 20, 2013), <http://www.cftc.gov/PressRoom/PressReleases/pr6802-13>.

119. McCaffrey, *supra* note 61, at 46.

120. See *infra* notes 141-44 and accompanying text.

121. See Coffee, *supra* note 61, at 1264 (noting that "[t]hroughout this bruising and hard-nosed negotiation process, the major international networking institutions—the IMF, the World Bank, the

had the consequence of pulling negotiation regarding substantive norms out of the transnational networks.

### 3. *Diagnostic issues and the political economy of capital markets*

As discussed above, the framing of the problems posed by OTC trading in derivative securities rested in part on two critical assumptions. The first was that the earlier deregulation of those markets had enabled an explosion in the speculative, socially non-beneficial use of derivatives, which in turn contributed to the financial crisis.<sup>122</sup> The second was that the systemic risk posed by the OTC markets was not only cross-border but also truly global in nature, and thus could be contained only through concerted global action.<sup>123</sup> This framing engendered expectations that the incentives were in place to advance the spread of transnational norms related to the regulation of derivatives trading.<sup>124</sup> The regulatory process that has unfolded since the crisis, however, has revealed confrontations between these assumptions and the political economy of the global capital markets.<sup>125</sup>

On the first point, it is important to emphasize that trading in OTC derivatives is not per se irrational or inefficient. Indeed, the primary purpose of derivatives is to permit entities engaged in productive economic activity to manage the financial risks that those activities create.<sup>126</sup> OTC derivatives are particularly useful in this regard, as they can be customized in order to address the specific hedging or other needs of the counterparties.<sup>127</sup> As rulemaking proceeded, the initial and somewhat rough framing of the issue (that unregulated trading in OTC derivatives creates unacceptable levels of systemic risk) gave way to debates over exactly how the risks created by abusive or purely speculative OTC trading could be contained without eliminating the beneficial aspects of that market. These debates inevitably involved a clash between proponents of greater regulatory intervention and market participants who resisted the characterization of OTC derivatives as inherently

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Basel Committee, IOSCO, and the Financial Stability Board—remained largely on the sidelines, with the real bargaining being between U.S. regulators and an EU commissioner.”).

122. See generally Born, *supra* note 60.

123. *Supra* note 63 and accompanying text.

124. Brummer, *Post-American Securities Regulation*, *supra* note 32, at 331 (“[O]nly where securities regulation touches upon ‘systemic risks. . .’ will regulators be sufficiently incentivized to cooperate and will networks potentially be capable of realizing significant regulatory coordination.”).

125. See JORDAN, *supra* note 5, at 52.

126. MILLER & CAFAGGI, *supra* note 51, at 43. Frank Partnoy outlines the argument as follows: Derivatives, the argument goes, allow corporations, governments, financial firms, and others to: (1) reduce or hedge exposure to fluctuations in interest rates, foreign exchange rates, equity and commodity prices, and other financial variables; (2) speculate in a less costly and more efficient manner; and (3) capture arbitrage opportunities and thus reduce funding and other financial costs.

Partnoy, *supra* note 2, at 213.

127. Norman Menachem Feder, *Deconstructing Over-The-Counter Derivatives*, 2002 COLUM. BUS. L. REV. 677, 735 (2002); see also Gina-Gail Fletcher, *Hazardous Hedging: The (Unacknowledged) Risks of Hedging with Credit Derivatives*, 33 REV. BANKING & FIN. L. 813, 828 (2014).

dangerous.<sup>128</sup> It was to be expected that different countries would strike the balance between these interests differently, depending in part on the strength of local lobbies on behalf of market participants.<sup>129</sup>

On the second point, the framing of the problem as a shared global concern ignored the political economy of individual capital markets. As discussed above, countries continue to maintain different regulatory philosophies, and have different outcome preferences, with some preferring weak regulation.<sup>130</sup> With respect to derivatives regulation in particular, regulatory competition may benefit certain countries. As noted above, banks are free to move their derivatives operations to whatever country offers the most hospitable regulatory regime, therefore creating an incentive for some host countries to compete by adopting less restrictive requirements.<sup>131</sup> If those countries do not face significant risk from an eventual market collapse, they would see little benefit in adopting more restrictive rules. And, indeed, even clearly systemic risks, such as those created by the global OTC derivatives markets, do not in fact affect all markets equally. The costs of a systemic risk crisis would fall unevenly on different countries, posing a greater risk to the major markets.<sup>132</sup> Thus, it is those markets, and those alone, that have the incentive to invest in tightening their regulations.<sup>133</sup> In this light, the outcome of regulatory efforts to date is consistent with the theory of “minilateralism”: the countries “whose markets are relevant (or ‘systemically important’) to the regulatory task at hand” are the ones that will be involved in the formation of regulatory norms.<sup>134</sup>

#### IV. TRANSNATIONAL LEGAL ORDERS IN THE REGULATION OF SECURITIES MARKETS

The problem of systemic risk created by OTC derivatives trading (particularly as considered against the backdrop of a global financial crisis) presented an unusually strong case for the development of a regulatory order based on formalized

128. At stake here was the cost of the new regulations for participants in the OTC derivatives markets and the concern of participants in heavily regulated markets that they would be at a competitive disadvantage to participants in less regulated markets.

129. See generally Stavros Gadinis, *The Politics of Competition in International Financial Regulation*, 49 HARV. INT’L L.J. 447, 450 (2008) (noting that financial firms may benefit from cross-border regulatory differences, and stating that their positions are likely to be “coherently articulated, actively pursued through lobbying, and ultimately reflected in government policy.”).

130. See Brummer, *International Financial Law*, *supra* note 59, at 270.

131. Griffith, *supra* note 69, at 1293. See also Helleiner, *Towards Cooperative Decentralization?*, *supra* note 61, at 143 (discussing the possibility that Asian countries may seek to minimize regulatory burdens in order to avoid undermining their own growing derivatives markets).

132. Swap dealers, for instance, are overwhelmingly located in the United States, the European Union, and a small number of additional markets.

133. See Coffee, *supra* note 61, at 1268; Brummer, *International Financial Law*, *supra* note 59, at 270 (recognizing this problem of asymmetric benefit).

134. CHRIS BRUMMER, MINILATERALISM: HOW TRADE ALLIANCES, SOFT LAW, AND FINANCIAL ENGINEERING ARE REDEFINING ECONOMIC STATECRAFT 85 (2014). See also Coffee, *supra* note 61, at 1268 (advocating a “minilateral” solution rather than one that aims to achieve global harmonization of the relevant rules).

transnational legal norms. The obstacles that impeded the development of such an order are even less likely to be surmounted in areas where the particular regulatory challenge is less clearly global and systemic. Indeed, a recent IOSCO consultation report expressed skepticism regarding the possibility of harmonization in international securities regulation.<sup>135</sup> That report surveyed a number of methods that regulatory systems use in applying their rules to global financial activity, including national treatment, “passporting,” and various forms of recognition.<sup>136</sup> The report concluded:

From the information and analysis derived from consultation so far, no consensus exists on the question of whether cross-border regulation of the securities markets would best be achieved by full coordination and total harmonization of cross-border rules among jurisdictions, even if those goals were somehow achievable. The responses, however, make clear that such a result is not achievable in the current context, noting the absence of any supranational institution with legal authority to impose harmonized regulations from the top down.<sup>137</sup>

It went on to suggest a conscious turn toward a more institutionalized conflicts-type order—one supported by clearer rules on the allocation of jurisdiction among national regulators.

Some respondents and commenters also suggested that IOSCO could propose a “conflict of regulations” framework, which would be used to determine the regulation that applies and the regulator which has jurisdiction in a specific cross-border situation. In their view, such a framework may increase efficiency and prevent duplication of supervisory work with regard to reporting. These responses also noted that IOSCO could propose a granular set of rules determining the regulation that applies with regard to the reporting duties and designate the regulator to which the concerned market participant has reporting duties.<sup>138</sup>

The most recent wave of rulemaking, which incorporates a “substituted compliance” (or “mutual recognition”) approach, takes steps in this direction. The substituted compliance approach was first developed in a 2007 article co-authored by the director and the general counsel of the SEC’s Office of International Affairs.<sup>139</sup> In the original article, the authors applied this approach to the question of exchange and broker-dealer regulation. They argued that

instead of being subject to direct SEC supervision and U.S. federal securities regulations and rules, foreign stock exchanges and broker-dealers

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135. BD. OF INT’L ORG. OF SEC. COMM’N, IOSCO TASK FORCE ON CROSS-BORDER REGULATION, CONSULTATION REPORT (2014), <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD466.pdf> [hereinafter 2014 Consultation Report].

136. *Id.* at 8.

137. *Id.* at 44.

138. *Id.* at 45-46.

139. Ethiopis Tafara & Robert J. Peterson, *A Blueprint for Cross-Border Access to U.S. Investors: A New International Framework*, 48 HARV. J. INT’L L. 31 (2007).

would apply for an exemption from SEC registration based on their compliance with substantively comparable foreign securities regulations and laws and supervision by a foreign securities regulator with oversight powers and a regulatory and enforcement philosophy substantively similar to the SEC's.<sup>140</sup>

This model takes for granted that different countries will adopt different regulatory frameworks (in other words, it does not presuppose a move toward eventual unification of the rules governing securities markets). It provides instead that a country can choose to recognize another regime as substantively equivalent to its own.

Recent rulemaking explicitly adopts this substituted compliance model.<sup>141</sup> In early 2016, for instance, the CFTC and the European Union approved a substituted compliance framework for the regulation of central counterparties (CCPs).<sup>142</sup> Under this framework, the European Commission agreed to issue an equivalence determination permitting U.S.-registered CCPs to provide clearing services within the European Union as long as they meet applicable U.S. requirements.<sup>143</sup> Similarly, the CFTC agreed to issue a determination concluding that the requirements set forth in the European EMIR were comparable to U.S. requirements, and that EU-registered CCPs complying with EMIR would be deemed in compliance with U.S. law. The SEC too has adopted rules incorporating a substituted compliance approach—for example, in connection with reporting requirements applicable to security-based swaps.<sup>144</sup>

This model is compatible with the conflict-of-laws framework. Each national regulator continues to apply its own domestic law to foreign entities whose operations affect its markets, and to particular transactions involving domestic interests. It is domestic law, in the form of an equivalence or comparability determination, that dictates whether compliance with a foreign regime will be accepted as sufficient. It may be that this approach promotes the ultimate harmonization of substantive rules; indeed, the regulators presented this framework

140. *Id.* at 32.

141. See Marjosola, *supra* note 89, at 12-14 (discussing the adoption of a substituted compliance approach in both the European Union and the United States).

142. Comm. Fut. L. Rep. P 33644 (C.C.H.), The United States Commodity Futures Trading Commission and the European Commission: Common Approach for Transatlantic CCPs (February 10, 2016).

143. See the provisional text of the Commission Implementing Decision (EU) on the equivalence of the regulatory framework of the United States of America for central counterparties that are authorised and supervised by the Commodity Futures Trading Commission to the requirements of Regulation (EU) No 648/2012 of the European Parliament and of the Council, [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2016.070.01.0032.01.ENG&toc=OJ:L:2016:070:TOC](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2016.070.01.0032.01.ENG&toc=OJ:L:2016:070:TOC). (Mar. 15, 2016).

144. Sec. Exch. Rel. No. 34-74244 (Feb. 11, 2015), Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information. Rule 908(c) of this Regulation allows foreign entities to request a determination that the regulatory reporting and public dissemination requirements imposed by their home regulator are comparable to those of the United States.



as “an important step forward for global regulatory convergence.”<sup>145</sup> But that is not inevitable. In a release addressing certain security-based swaps, the Securities and Exchange Commission noted that

[i]n practice, however, we recognize that there will be limits to the availability of substituted compliance. For example, it is possible that substituted compliance may be permitted with regard to some requirements and not others with respect to a particular jurisdiction. For certain jurisdictions, moreover, substituted compliance may not be available with respect to any requirements depending on our assessment of the comparability of the relevant foreign requirements, as well as the availability of supervisory and enforcement arrangements among the Commission and relevant foreign financial regulatory authorities.<sup>146</sup>

As Annelise Riles has pointed out, the benefit of a more robust conflict-of-laws based approach is that it can go beyond generalized rules to encompass expansive and sensitive analysis, issue by issue and party by party, of the most critical questions regarding the choice to exercise regulatory power: “What other regulatory authority is involved? How different are the rules and principles of the two possible authorities? Who are the parties? What is the nature of the transaction? What state and private interests are implicated?”<sup>147</sup> In the context of substituted compliance, accordingly, the granularity of the equivalence determinations is critical.<sup>148</sup> In this connection, it is important to note that some market participants and policymakers have resisted this form of “issue by issue” analysis, advocating instead for broad, categorical equivalence determinations in a number of areas.<sup>149</sup> In a dissenting statement criticizing the CFTC’s decision to pursue granular equivalence determinations regarding certain margin requirements, for instance, Commissioner Giancarlo stated that “instead of recognizing and building upon . . . the CFTC’s own history of using a principles-based, holistic approach to comparability determinations, the Commission is adopting a set of preconditions to substituted compliance that is overly complex, unduly narrow and operationally impractical.” He went on to criticize the applicable rule for requiring an “element-by-element” comparison of CFTC and foreign margin requirements, and a “fact-specific inquiry

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145. Press Release, U.S. Commodity Futures Trading Comm’n and Eur. Comm’n: Common Approach for Transatlantic CCPs (Feb. 10, 2016), [http://www.cftc.gov/PressRoom/PressReleases/cftc\\_euapproach021016](http://www.cftc.gov/PressRoom/PressReleases/cftc_euapproach021016).

146. Exch. Act Rel. No. 34-77104, Security-Based Swap Transactions Connected With a Non-U.S. Person’s Dealing Activity, at 33. (Feb. 10, 2016).

147. Riles, *supra* note 48, at 101.

148. As Riles notes, a conflicts approach “generates not blanket rules, but issue-by-issue determinations of scope.” *Id.* at 101.

149. The recent release adopting rules governing margin requirements for uncleared swaps summarized the comments of market participants to this effect. Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants—Cross-Border Application of the Margin Requirements, 17 C.F.R. Part 23, 2016 WL 3038148, at 34828-29.

of each legal and regulatory provision,” rather than simply “assessing a foreign authority’s margin regime as a whole.”<sup>150</sup>

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It is a temptation in studying transnational legal orders to think of them as evolutionary—as moving from the primitive stages of isolationism and unilateralism to an end state of unification.<sup>151</sup> They have no such clear teleology. The political economy of particular markets may mean it is not possible (or, indeed, desirable) to work toward a top-down type of TLO where the norms are generated within transnational networks or supranational institutions and then diffused—or where uniform regulatory norms are developed at all. Rather, systems that continue to tolerate regulatory divergence, and that rely on tools such as conflicts methodology to manage that divergence, may persist in certain sectors.

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150. *Id.* at 34853-54.

151. *See, e.g.*, Riles, *supra* note 48, at 69 (describing this view as “standard and almost universally shared”); Eric C. Chaffee, *Contemplating the Endgame: An Evolutionary Model for the Harmonization and Centralization of International Securities Regulation*, 79 U. CIN. L. REV. 587, 590 (2010) (advocating an “evolutionary process” leading to the development of a harmonized, centralized regulatory order).