THE RISE OF INTERNATIONAL CORPORATE LAW

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ABSTRACT

Comparative corporate governance has focused either on prevailing differences across legal systems or on spontaneous legal transplants of foreign institutions in response to global competition. This Essay argues that corporate law today is not only a product of the invisible hand of the market but also of the soft (and not-so-soft) hands of international organizations and standard setters. By tracing the emergence of international corporate law (ICL) since the Asian crisis of the late 1990s, it shows how the IMF, the OECD, the World Bank, and the United Nations, among several other international players, have helped shape legal reforms and corporate governance developments around the world. The observed influence of ICL ranges from the impulse for independent directors and the control of related-party transactions to the growth of ESG investment factors and human rights policies.

The rise of ICL responds to interjurisdictional externalities and nationalist bias of domestic regimes that have been largely neglected by prevailing theories, which failed to predict and notice the strong push for international coordination and standard setting in the field. ICL has also gone beyond merely prescribing an Anglo-Saxon model of corporate governance to promote legal innovations that place the United States on the receiving end of international pressure. Legal implants from ICL, rather than legal transplants from a foreign jurisdiction, are an increasingly relevant force behind corporate governance change. While ICL has been influential, its efficacy and normative vision face challenges. The time has come to move beyond an exclusively comparative focus to also scrutinize the potential and limits of corporate lawmaking at the international level.

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INTRODUCTION

What do the emergence of independent directors in South Korea, the legal reforms on related-party transactions in India, and the rise of environmental, social, and governance (ESG) factors in the United States have in common? They all trace back to efforts by international organizations—the International Monetary Fund, the World Bank, and the United Nations, respectively—to shape corporate governance arrangements around the world. The different corporate guidelines and norms produced by international organizations have had a noticeable impact on legal changes across multiple jurisdictions. Yet the literature on comparative corporate governance (CCG) has failed to notice and reflect on the creeping rise of what I term international corporate law (ICL).[1]

Corporate law is one of the main fields of comparative legal inquiry.[2] In sharp contrast to the norm in other areas, many, if not most, prominent corporate law scholars in the United States and beyond have contributed to comparative corporate governance.[3] Politicians also habitually appeal to foreign legal systems when advancing domestic corporate law reforms, as illustrated by the reference to German law in the US bill aiming to mandate employee representation on corporate boards.[4]

While the influence of foreign legal transplants on the evolution of domestic corporate law regimes is longstanding and well known, by the late 1990s a central debate emerged about the possible effects of economic globalization on national corporate arrangements. The "convergence" camp posited that the competitive pressures of global markets would push jurisdictions around the world to converge in the adoption of efficient systems of shareholder protection.[5] The opposing "persistence" camp

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1. "Transnational corporate law," "global corporate law," and "transnational legal orders in corporate law" are alternative labels for the phenomenon. The widely used term transnational law is too broad, encompassing not only laws that originate in international law or originate domestically and are spread through international law, but also "law that is borrowed or 'horizontally transplanted' from one national system to another." Harold Hongju Koh, *Why Transnational Law Matters*, 24 PENN ST. INT'L L. REV. 745, 745–46 (2006). I adopt international corporate law to underscore the novel dimension of interjurisdictional *coordination*, since the borrowing of legal ideas across jurisdictions and the cross-fertilization of corporate law and governance systems are longstanding and well known. For the related sociolegal conception of transnational legal ordering, see Gregory Shaffer, *Transnational Legal Ordering and State Change*, *in* TRANSNATIONAL LEGAL ORDERING AND STATE CHANGE (Gregory Shaffer ed., 2021). I use the term "comparative corporate governance" as the most common label for the field, which also encompasses comparative corporate law.

2. *See*, *e.g.*, Edward B. Rock, *America's Shifting Fascination with Comparative Corporate Governance*, 74 WASH. UNIV. L.Q. 367 (1996); Klaus J. Hopt, *Comparative Corporate Governance: The State of the Art and International Regulation*, 59 AM. J. COMPAR. L. 1 (2011); Donald C. Clarke, *"Nothing but Wind"? The Past and Future of Comparative Corporate Governance*, 59 AM. J. COMPAR. L. 75 (2011).

3. For just a few illustrative examples, see REINIER KRAAKMAN, JOHN ARMOUR, PAUL DAVIES, LUCA ENRIQUES, HENRY HANSMANN, GERARD HERTIG, KLAUS HOPT, HIDEKI KANDA, MARIANA PARGENDLER, WOLF-GEORG RINGE & EDWARD ROCK, THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH (3d ed., 2017); Ronald J. Gilson, *Globalizing Corporate Governance: Convergence of Form or Function*, 49 AM. J. COMPAR. L. 329 (2001); Lucian Arye Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127 (1999); CURTIS J. MILHAUPT & KATHARINA PISTOR, LAW AND CAPITALISM: WHAT CORPORATE CRISES REVEAL ABOUT LEGAL SYSTEMS AND ECONOMIC DEVELOPMENT AROUND THE WORLD (2008).

4. For the brief description of the Accountable Capitalism Act, S. 3348, 115th Cong. § 2 (2018), introduced by U.S. Senator Elizabeth Warren, see Elizabeth Warren, *Accountable Capitalism Act*, https://www.warren.senate.gov/download/accountable-capitalism-act-one-pager [https://perma.cc/QEA5-4DJT] ("Borrowing from the successful approach in Germany and other developed economies, a United States corporation must ensure that no fewer than 40% of its directors are selected by the corporation's employees.").

5. *See, e.g.*, Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001).

argued that distinct ownership and political structures would ensure the persistence of national differences despite the pressures of globalization.[6] Both camps relied on a model of *competition*, with states unilaterally choosing either to maintain their existing corporate governance framework, or to update it toward greater investor protection to improve the position of domestic firms in global markets.[7] In parallel, at least some jurisdictions would also compete in the provision of investor-friendly laws in a global market for incorporations.

The competition paradigm, however, offers an incomplete picture of the forces shaping corporate law over the last few decades. *Coordination* efforts by international institutions, rather than unilateral moves prompted by competition alone, have played a role in several corporate law developments around the world.[8] Unbeknownst to most observers, the various guidelines and initiatives by international organizations such as the International Monetary Fund (IMF), the World Bank, the Organisation for Economic Co-Operation and Development (OECD), and the United Nations have amounted to a sizable body of ICL.[9] Beyond international organizations proper, transnational institutions and standard-setting bodies such as the International Organization of Securities Commissions (IOSCO), the Basel Committee on Banking Supervision, and the Financial Stability Board have also increasingly influenced corporate governance developments.

Moreover, the emergence of ICL is not only surprising for its international origin and coordinated form, but also for its substance. Both sides of the convergence-persistence debate shared the assumption that concerns about externalities fell outside of corporate law's domain. Yet ICL

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6. Bebchuk & Roe, *supra* note 3, at 170.

7. *See supra* notes 4–5.

8. Coordination is used loosely to refer to concerted international action aimed at solving both prisoner's dilemmas and coordination games across jurisdictions. For a discussion of the distinction and implications of solutions to prisoner's dilemmas and coordination games in the international arena, see generally Duncan Snidal, *Coordination Versus Prisoners' Dilemma: Implications for International Cooperation and Regimes*, 79 AM. POL. SCI. REV. 923 (1985).

9. *See, e.g.*, Klaus Hopt, *Comparative Company Law*, *in* OXFORD HANDBOOK OF COMPARATIVE LAW 1172 (Mathias Reimann & Reinhard Zimmermann eds., 2006) ("In view of the golden age of the elaboration of common principles of law such as the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law, it is astonishing that similarly successful work has not yet been undertaken in the area of company law."). *But see* Jeffrey N. Gordon, *Convergence and Persistence in Corporate Law and Governance*, *in* OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018) (alluding to the role of "global governance" through supranational public institutions in prompting convergence, mentioning the channels of the World Bank, the OECD, and the G-20/Financial Stability Board); Dionysia Katelouzou & Peer Zumbansen, *The Transnationalization of Corporate Governance: Law, Institutional Arrangements & Corporate Power* 6 (Transnat'l L. Inst., Working Paper No. 17, 2020) (arguing against "treating transnational law as the 'exception'"); Dionysia Katelouzou & Peer Zumbansen, *The New Geographies of Corporate Governance*, 42 U. PA. J. INT'L L. 51, 54 (2020) (advocating for a broader conception of corporate governance as a "transnational field of . . . norm-production, policymaking, and political contestation").

has sought not only to enhance investor protection (the result predicted by convergence proponents), but also to address various externalities generated by corporate activity, such as systemic risk, environmental harm, and human rights violations (an outcome that was not foreseen).

ICL has not been merely a vehicle for the diffusion of Anglo-Saxon practices, but has become increasingly a source of institutional innovation, including in directions resisted by the United States. Despite strong networks and points of contact, ICL is far from monolithic. Not only are the avenues for influence of ICL on domestic law varied, but there is also some tension between the pro-investor focus promoted by some organizations and the concern for stakeholders fostered by others.

The IMF imposed various corporate law reforms on South Korea, including the requirement of independent directors, as a condition for financial support at the height of the Asian crisis in the late 1990s.[10] In the mid-2010s, India reformed its corporate laws to improve its relative ranking in the World Bank's Doing Business Project, a mechanism of "governance by indicators" that arguably serves both to lure foreign investment and to obtain World Bank funding.[11] By the late 2010s, the corporate governance debate around the world had placed great emphasis on ESG factors—a concept first coined and dutifully promoted by various United Nations initiatives.[12] More generally, jurisdictional competition for corporate law may become increasingly bounded by international lawmaking.[13]

This Essay aims to describe and explain the rise of ICL since the late 1990s in the face of the dominant view that coordinated efforts at harmonization are unnecessary, if not counterproductive. Why, then, do we see ICL at all? While this complex phenomenon is certainly multifaceted and not monocausal, this Essay interprets the emergence of ICL as a solution to two critical problems within corporate law:

Interjurisdictional externalities. Corporate activity can have negative effects on third parties, such as producing systemic risk, environmental harm, and human rights violations. In the orthodox law and economics view, these externalities should be addressed through regulations from legal fields other than corporate law, such as financial regulation, environmental law, labor law, and tort law, among others.[14] However, states may be reluctant to

10. *See infra* Part II.A.

11. GOVERNANCE BY INDICATORS: GLOBAL POWER THROUGH QUANTIFICATION AND RANKINGS (Kevin E. Davis, Angelina Fisher, Benedict Kingsbury & Sally Engle Merry eds., 2012).

12. *See infra* Part II.D.

13. For the argument that Delaware lawmaking is bounded by US federal law, see Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 590 (2003).

14. Mariana Pargendler, *Controlling Shareholders in the Twenty-First Century: Complicating Corporate Governance Beyond Agency Costs*, 45 J. CORP. L. 953, 969 (2020) [hereinafter Pargendler,

impose regulations on local companies if—as is often the case—the negative effects are largely felt abroad, as this could impact their international competitiveness. Moreover, dedicated regulation from other fields is famously absent in the international arena, thus leading to major regulatory gaps which ICL may seek to fill.[15] ICL could thus help solve a prisoner's dilemma arising from states' temptation to engage in beggar-thy-neighbor policies. Another form of interjurisdictional externality relates to the potential network benefits of standardization in corporate governance practices and disclosure standards in reducing transaction costs in cross-border transactions.[16]

Political capture by domestic interest groups. Even when the promotion of shareholder protection or the mitigation of externalities are welfare enhancing within a given country, reforms may still not materialize due to the political clout of powerful interest groups, such as controlling shareholders, managers, or labor unions. Moreover, states famously face a problem of time-inconsistency in the protection of foreign investors, initially seeking to attract investors only to renege on early promises once foreigners' investment is sunk.[17] In this context, international law initiatives may weaken the political force of domestic interest groups in defending rent-seeking measures and promote credible commitments to investor protection and other areas of concern for foreign parties.

These problems relate to the phenomenon I have termed "*the grip of nationalism on corporate law*," which is the pervasive use of corporate law to achieve protectionist purposes at the expense of foreign parties.[18]

Controlling Shareholders in the Twenty-First Century] (describing the standard "modular" approach to corporate law, according to which the sole efficiency objective of the field is the reduction of agency costs).

15. On the regulatory gaps of globalization as a motivation for ICL, see *infra* Part II.D. On the broader uses of corporate governance in substituting for state regulation, see Mariana Pargendler, *The Corporate Governance Obsession*, 42 J. CORP. L. 359 (2016).

16. For the role of network effects in corporate law, see Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757 (1995). The current debate about comparability of ESG disclosure frameworks and the virtues of a single global reporting framework illustrates this concern. *See* John Coates (Acting Director, SEC Division of Corporate Finance), *ESG Disclosure – Keeping Pace with Developments Affecting Investors, Public Companies and the Capital Markets*, Mar. 11, 2021, https://www.sec.gov/news/public-statement/coates-esg-disclosure-keeping-pace-031121 [https://perma.cc/F7EP-PJDL] ("It would be unhelpful for multiple standards to apply to the same risks faced by the same companies that happen to raise capital or operate in multiple markets.").

17. RAYMOND VERNON, SOVEREIGNTY AT BAY: THE MULTINATIONAL SPREAD OF U.S. ENTERPRISES 46–47 (1971) (describing foreign direct investment as an "obsolescing bargain"). On the government incentives to expropriate foreigners' sunk investment, see David W. Leebron, *A Game Theoretic Approach to the Regulation of Foreign Direct Investment and the Multinational Corporation*, 60 U. CIN. L. REV. 305, 313, 325 (1991).

18. Mariana Pargendler, *The Grip of Nationalism on Corporate Law*, 95 IND. L.J. 533 (2020) [hereinafter Pargendler, *The Grip of Nationalism*]. However, certain nationalist uses of corporate law may well enhance global welfare (if, for instance, they help the development of nascent industries in emerging economies or protect national security). *See id.* at 578–79.

Conventional theories have traditionally neglected interjurisdictional externalities as a justification for corporate law harmonization. Although scholars have long documented the influence of politics on corporate governance,[19] the potential of international coordination to mitigate domestic capture has not been explored in this context, in contrast to other fields.[20]

The aim here is not to overstate the significance of ICL from a normative or descriptive perspective—that is, as a source of law that is necessarily (or never) meritorious and fully (or never) efficacious. It seems clear that ICL is not always welfare enhancing and has not produced complete formal or functional legal convergence in corporate laws around the world. Rather, the goal is to document the rise of ICL as a robust and influential phenomenon that deserves corresponding attention. While the international dimensions of other fields such as bankruptcy law,[21] antitrust law,[22] anticorruption law,[23] administrative law,[24] and financial regulation[25] are the subject of a booming literature, corporate law scholarship has failed to track institutional developments in the international arena. Greater understanding of the role and impact of ICL, as well as of its welfare effects, is necessary to better understand and influence the development of corporate governance institutions.

19. For prominent political accounts, see, e.g., PETER ALEXIS GOUREVITCH & JAMES J. SHINN, POLITICAL POWER AND CORPORATE CONTROL: THE NEW GLOBAL POLITICS OF CORPORATE GOVERNANCE (2005); MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE (1994); Marco Pagano & Paolo F. Volpin, *The Political Economy of Corporate Governance*, 95 AM. ECON. REV. 1005 (2005).

20. For this argument in the context of international trade law, see Giovanni Maggi & Andrés Rodríguez-Clare, *The Value of Trade Agreements in the Presence of Political Pressures*, 106 J. POL. ECON. 574 (1998); Chad P. Brown, *The Truth About Trade Agreements—and Why We Need Them*, PETERSON INST. FOR INT'L ECON. (Nov. 21, 2016), https://piie.com/commentary/op-eds/truth-about-trade-agreements-and-why-we-need-them [https://perma.cc/38UV-F8VH].

21. *See, e.g.*, John A. E. Pottow, *Greed and Pride in International Bankruptcy: The Problems of and Proposed Solutions to "Local Interests"*, 104 MICH. L. REV. 1899 (2006); Terence C. Halliday & Bruce G. Carruthers, *The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes*, 112 AM. J. SOCIOLOGY 1135 (2007).

22. *See, e.g.*, Andrew T. Guzman, *Is International Antitrust Possible?*, 73 N.Y.U. L. REV. 1501 (1998); Eleanor M. Fox, *International Antitrust and the Doha Dome*, 43 VA. J. INT'L L. 911 (2003); Anu Bradford, *Antitrust Law in Global Markets*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF ANTITRUST LAW (Einer Elhauge ed., 2012).

23. *See, e.g.*, Rachel Brewster & Christine Dryden, *Building Multilateral Anticorruption Enforcement: Analogies Between International Trade & Anti-Bribery Law*, 57 VA. J. INT'L L. 221 (2018); KEVIN E. DAVIS, BETWEEN IMPUNITY AND IMPERIALISM: THE REGULATION OF TRANSNATIONAL BRIBERY (2019).

24. *See, e.g.*, Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15 (2005).

25. *See, e.g.*, CHRIS BRUMMER, SOFT LAW AND THE GLOBAL FINANCIAL SYSTEM: RULE MAKING IN THE 21ST CENTURY (2012); David Zaring, *Financial Reform's Internationalism*, 65 EMORY L.J. 1255 (2016); JOHN ARMOUR, DAN AWREY, PAUL DAVIES, LUCA ENRIQUES, JEFFREY N. GORDON, COLIN MAYER & JENNIFER PAYNE, PRINCIPLES OF FINANCIAL REGULATION (2016) (devoting chapter 28 to international regulatory coordination).

The remainder of this Essay proceeds as follows. Part I begins by defining ICL. Part II describes the rise of ICL since the 1990s by mapping key initiatives of several international organizations and illustrating their influence on domestic laws and governance practices. Part III documents the growing diffusion of ICL through standard setters and international agreements. Part IV reflects on the limits of ICL. The Conclusion concludes by outlining a research agenda for the field.

I. DEFINING ICL

This section clarifies what one means by "international corporate law" by focusing on four questions: (1) is ICL *international law*?; (2) is ICL *corporate* law?; (3) how does ICL differ from CCG?; and (4) how does ICL relate to the large field of EU corporate law?

A. ICL as International Law

The prevailing scholarly assumption among enthusiasts and critics alike is that corporate globalization is governed entirely by rules of private international law (or conflict of laws, in Anglo-Saxon parlance). Once states began to increasingly recognize the place of incorporation as the relevant conflict rule for the application of choice of law, a market for corporate laws would emerge leading to regulatory competition. As a result, a few jurisdictions, such as Delaware, London, and the Cayman Islands, would be in a position to provide efficient corporate laws for a significant fraction of global corporations under the auspices of global (mostly Anglo-Saxon) law firms.[26] While compelling, this narrative unduly neglects the role of ICL in producing coordinated standard setting in the field, with significant support not only from states but also from multinational corporations, institutional investors, and the elite global law firms who serve them.

As here defined, ICL is the body of corporate governance rules and standards produced by international organizations, standard setters, and international agreements. Clearly, ICL does not look like domestic corporate law in its form, structure, and operation. Not only does ICL (like all forms of international law) escape coercive enforcement, but it has also largely eschewed the traditional modes of "hard" international law in the form of treaties or customary international law. Instead, ICL relies primarily

26. KATHARINA PISTOR, THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY 9 (2019) (arguing that the "decentered nature of law" means that "global commerce and finance can thrive without a global state or law").

on soft, decentralized, and highly networked forms of international coordination and standard setting that characterize "the new world order."[27]

Not all ICL is soft, however. Corporate governance provisions are now making an appearance in international investment agreements—a classic form of "hard" international law.[28] Moreover, not all soft law is truly soft in its impact, with the distinction between hard and soft law best described as a continuum rather than a strict dichotomy.[29] Corporate governance conditionalities of IMF financing may seem highly coercive to countries in crisis. Efforts such as the World Bank's Doing Business rankings appear to rely on potential Bank funding and reputation benefits in international markets. Even US regulators, the most powerful in the world, now often decry international regulatory pressure as "coercive."[30] International organizations and standard setters have also increasingly operated as relevant "intellectual actors" in the field.[31]

The claim here is that the various mechanisms of ICL are sufficiently institutionalized and robust to be qualified as law, if usually soft law. To put it differently, ICL appears to be "legal" as much as international financial regulation is "regulatory."[32] It is worth noting that even state corporate law is softer than usually recognized, often operating through its impact on social norms.[33] At any rate, even if one does not deem ICL to be *law*, this would not affect the argument about its role in shaping corporate governance developments.

B. ICL as Corporate Law

Even if ICL is international law, is it truly *corporate* law? The answer here appears to be undoubtedly positive. The stuff of ICL—standards on board independence, shareholder rights, related-party transactions, executive compensation, and fiduciary duties—constitutes the bread and

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27. ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 24–25 (2004); Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 VAND. J. TRANSNAT'L L. 501 (2009).

28. *See infra* Part III.

29. Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421 (2000) (describing different gradations of soft law as weakening the dimensions of obligation, precision, and delegation that characterize hard law).

30. *See infra* note 252 and accompanying text.

31. André Broome & Leonard Seabrooke, *Seeing like an International Organisation*, 17 NEW POL. ECON. 1, 13 (2012).

32. BRUMMER, *supra* note 25, at 4 (ascribing the early neglect of international financial regulation to "an incomplete understanding of soft law—both of its impact on financial markets and of the unique institutional ecosystem in which it operates").

33. Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1016 (1997) (arguing that Delaware law influences managers' behaviors through social norms articulated as "corporate law sermons," which are often not accompanied by hard sanctions).

butter of corporate law scholarship and practice. Although topics such as the consideration of ESG factors in investment decisions or the corporation's responsibility to protect human rights appear to be a closer call, they can still be understood as affecting the exercise of corporate discretion and fiduciary duties. Cognizant of this point, ICL lawmakers have often sought legal opinions from international law firms on the compatibility of their proposed measures with national corporate and fiduciary laws.[34]

An alternative approach would be to define corporate law not in terms of its structure (e.g., rules governing the balance of power among shareholders, directors, and officers) but in terms of a stipulated goal: reducing agency costs. Adopting this narrower definition would mean that World Bank initiatives to promote investor protection would qualify as corporate law, but Basel corporate governance rules aimed at reducing systemic risk would not. Such a purpose-based definition of the field would not eliminate the significance of ICL, but only restrict its scope. Nevertheless, the notion that corporate law has only one objective, although prevalent in law-and-economics scholarship, fails to reflect the actual operation of legal institutions, and is ultimately untenable.[35] At any rate, one common move within ICL is to reconceptualize ESG and systemic risk issues as fundamentally addressing agency problems in a world of long-term and diversified investors.[36]

C. ICL and CCG: From Legal Transplants to Legal Implants

Foreign legal models have long influenced the evolution of corporate law around the world, from the expansion and liberalization of incorporations in the nineteenth century, to the recurrent debates about board structure and shareholder power since the late 1970s. The novelty of ICL does not lie in the transnational diffusion of legal ideas, which has shaped corporate law since its inception, but in the new forms of coordinated and original lawmaking at the international level. This new form of outside influence is

34. *See infra* notes 186, 193, and 195 and accompanying text. For a discussion of the emergence of transnational fiduciary law, see Thilo Kuntz, *Transnational Fiduciary Law*, 5 UC IRVINE J. INT., TRANSNAT'L & COMP. L. 47, 50 (2020).

35. Pargendler, *Controlling Shareholders in the Twenty-First Century*, *supra* note 14, at 969–75.

36. *See infra* Part III.D. For a reinterpretation of shareholder value in a world of diversified shareholders, see John Armour & Jeffrey N. Gordon, *Systemic Harms and Shareholder Value*, 6 J. LEGAL ANALYSIS 35 (2014).

markedly different from the traditional conception of legal transplants that dominate comparative scholarship generally and CCG in particular.[37]

The notion of a legal transplant explicitly builds on the metaphor of a plant that is transplanted to different soil or of an organ that is transplanted to a different patient. The Oxford English Dictionary defines the verb transplant as to "move or transfer (someone or something) to another place or situation."[38] A legal transfer is then the transfer of law from one jurisdiction to another.[39] A canonical comparative law question is whether the transplant will be "accepted" or "rejected" by the recipient jurisdiction (or, less binarily, whether it will cause "irritation," and in what form).[40] The premise for this question is that, just like a transplanted organ or plant, the viability of transplanted law critically depends on the characteristics of the new environment.

ICL, however, goes beyond prompting transfers of legal institutions rooted in a given jurisdiction to different contexts. Its standards are often new, disembedded, and explicitly designed for worldwide adoption. ICL standards conceived in abstract form and detached from concrete institutional contexts are best characterized as *legal implants* of new and artificial legal frameworks rather than transplants of real laws governing a given jurisdiction.

Just like a prosthetic implant may imitate a natural organ, ICL standards often draw inspiration from existing laws of certain jurisdictions (especially the United States and the United Kingdom). There is no necessary equivalence between ICL and national corporate laws, however. The promotion of independent board membership by the OECD followed a similar trend in US corporate governance, but the definition of independence that the OECD embraced and then spread around the world differed from its US counterpart.[41] Perhaps more importantly, several ICL

37. For the classic defenses and critiques of legal transplants in comparative scholarship, see ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (1974); O. Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1 (1974); Pierre Legrand, *The Impossibility of 'Legal Transplants'*, 4 MAASTRICHT J. EUR. & COMPAR. L. 111 (1997). For examples of works relying on the concept in the CCG context, see MILHAUPT & PISTOR, *supra* note 3, at 209 (describing legal transplants as potentially providing a "'market-tested' product to local consumers of law"); Martin Gelter & Geneviève Helleringer, *Opportunity Makes a Thief: Corporate Opportunities as Legal Transplant and Convergence in Corporate Law*, 15 BERKELEY BUS. L.J. 92 (2018).

38. OXFORD ENGLISH DICTIONARY (3d ed. 2015).

39. *See* Legrand, *supra* note 37, at 111.

40. *See* Kahn-Freund, *supra* note 37, at 6 (comparing a legal transfer to a kidney transplant); Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11, 12 (1998) (criticizing legal transplants as a misleading metaphor for suggesting the narrow alternatives of repulsion or integration); *see also* Legrand, *supra* note 37, at 114 (arguing that law cannot possibly travel given the cultural, epistemological, and historical baggage of legal institutions).

41. *See infra* notes 117–120 and accompanying text.

concepts—including ESG, human rights policies, climate change disclosure, and control of opaque subsidiaries—were first constructed at the international level before spreading across different countries around the world.[42] Despite traces of it, ICL goes beyond the international intermediation of legal transplants.

Legal transplants are often used as a synonym for legal borrowing, which implies voluntary adoption by the host country.[43] Yet the acceptance of ICL implants is not always the result of spontaneous choice by recipient jurisdictions—the prevailing view in CCG scholarship—but rather the product of different forms of pressure and nudges at the international level. ICL legal implants are soft and consciously designed to travel in a way that CCG legal transplants are not. Their development is subject to inputs from a different and potentially broader set of players compared to domestic lawmaking in a single jurisdiction. Nevertheless, legal implants may still lead to rejection or irritation in the host country or be largely ineffectual in achieving the goals of ICL lawmakers, as will be discussed further below.

Figure 1 summarizes the key distinctions between CCG and ICL and shows that a comparative focus based exclusively on different national laws is no longer justified. It is true that, like all legal developments, ICL is not made from scratch; some of its components—such as the World Bank's Doing Business rankings and the OECD Principles on Corporate Governance—borrow heavily from existing corporate legal regimes, especially from the United States.[44] Nonetheless, ICL is not entirely a product of legal transplants. Nor is it simply a result of harmonization strategies based on the "lowest common denominator" across different jurisdictions or of new synthetic solutions representing a compromise approach among various legal systems following comparative law research.[45] As discussed below, it has also been the source of legal innovations, such as the concept of ESG factors, human rights policies, and the discouragement of complex and opaque structures within corporate groups. In fact, given that ESG initiatives originate from international

42. *See infra* Part II.

43. *See, e.g.*, Alan Watson, *The Birth of Legal Transplants*, 41 GA. J. INT'L & COMPAR. L. 605, 607 (2013) (attributing the prevalence of legal transplants to the fact that "[b]orrowing is much easier than thinking" and therefore "saves time and effort"). It is, however, well-known that legal transplants can also result from the brute force of conquest or colonization. *See*, *e.g.*, Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *Economic Development, Legality, and the Transplant Effect*, 47 EUR. ECON. REV. 165, 180–81 (2003).

44. This has led to routine accusations of bias in the World Bank's Doing Business rankings and traditional critiques of legal transplants as failing to account for the particular needs and institutional complements of recipient jurisdictions.

45. *See* Katharina Pistor, *The Standardization of Law and Its Effect on Developing Economies*, 50 AM. J. COMPAR. L. 97, 129 (2002) (discussing the shortcomings of harmonization efforts based on lowest common denominators or on synthetic concepts attempting to bridge differences across various legal cultures).

efforts and are not rooted in US law, US regulators currently resent international pressure for the adoption of ESG disclosure, to cite just one conspicuous example.[46]

Figure 1. Differences between CCG and ICL

	CCG	ICL
Mode of legal change	Indigenous reforms Legal transplants	International harmonization Legal implants
Purpose of legal change	Domestic welfare	Global welfare
Reason for legal change	National objectives	International pressure
Source of legal rules	State law and private contracting	International standards
Main players	State courts, legislatures, and stock exchanges	International organizations and standard setters
Legal dynamics	Regulatory competition	Regulatory coordination

D. EU Corporate Law and ICL

The European Union has been greatly involved in the regulation of corporate law over the last several decades, viewing it as a cornerstone of the internal market.[47] To the extent that EU law may be regarded as a special form of international law, ICL is extensive and robust in the EU context. I will not address ICL in the EU context both because of its distinct features (approaching a federal rather than a truly international system in some respects) and because EU corporate law is the subject of a robust literature. Nevertheless, the vast body of EU corporate law confirms the strong push for corporate law coordination in the face of economic integration. At the same time, EU law has also demonstrated the limits of ICL in overcoming strong nationalistic opposition to liberalizing reforms, as illustrated by the

46. A former US official has urged American financial regulators to develop a foreign policy to prevent the domestic regulatory agenda from being hijacked by international institutions at the expense of US interests. Eric Pan, Senior Rsch. Fellow & Adjunct Professor of L., Presentation at Columbia Law School: Financial Regulators Need a Foreign Policy (Nov. 19, 2019) (citing the rise of ESG disclosure despite US SEC resistance as an example).

47. *See* Martin Gelter, *EU Company Law Harmonization Between Convergence and Varieties of Capitalism*, *in* RESEARCH HANDBOOK ON THE HISTORY OF CORPORATE AND COMPANY LAW 347 (Harwell Wells ed., 2018) ("Throughout all periods [since the 1960s], EU company law harmonization was largely a top-down, technocratic project that was considered imperative to realize the common market.").

failure of the Takeover Directive in overcoming corporate law barriers to the cross-border market for corporate control.[48] Ironically, the harder character of EU law, whose directives are binding on member-countries, may have contributed to reduce its scope and development compared to the nimbler nature of ICL.

II. THE RISE OF ICL THROUGH INTERNATIONAL ORGANIZATIONS

The birth of ICL can be traced to the East Asian crisis in the late 1990s. This serious financial crisis involving the "Asian tigers" took the world by surprise, exposing new fragilities in global markets and imposing hefty losses on international investors.[49] While the causes of the East Asian crisis are contested, one influential view attributed it to the flawed institutional fundamentals—including corporate governance—of the affected jurisdictions, leading to growing international pressure for reforms.[50]

This section portrays the emergence of ICL in various international organizations. The measures described are merely illustrative, not exhaustive. The goal is not to provide a precise mapping of all initiatives and networks and the different responses they prompted in various jurisdictions. Rather, the aim is to provide a glimpse of the scope and operation of ICL initiatives and their influence on corporate governance developments. Figure 2 in the appendix offers a graphical representation of the networked operation of ICL by international organizations and standard setters. Nevertheless, the influence of international pressures on domestic corporate law reforms is broader still.

A. IMF

An immediate consequence of the Asian financial crisis was to prompt financial support by the IMF, which required numerous reforms in return for its funding. These conditionalities spanned various macroeconomic and monetary policies, financial regulations, and labor laws.[51] The inclusion of corporate governance among IMF conditionalities during the Asian crisis marks the birth of ICL. This section will focus on the IMF agreement with South Korea, a paradigmatic context for the broad scope of the new policy

48. For an analysis, see Pargendler, *The Grip of Nationalism*, *supra* note 18, at 555–57.

49. Stanley Fischer, *In Defense of the IMF: Specialized Tools for a Specialized Task*, 77 FOREIGN AFFS. 103, 106 (1998).

50. Jack Glen & Ajit Singh, *Corporate Governance, Competition, and Finance: Re-Thinking Lessons from the Asian Crisis*, 31 E. ECON. J. 219, 220 (2005) (criticizing what they term the "Greenspan-Summers-IMF" view that the cause of the crisis was "the Asian way of doing business and the institutional structures that supported that kind of business culture").

51. Martin Feldstein, *Refocusing the IMF*, 77 FOREIGN AFFS. 20, 26 (1998).

interventions in a country that had a successful history of economic development. The core of South Korea's IMF Memorandum concerned, in its own words, "the government's policies to reform labor markets, restructure the corporate sector, and *improve corporate governance*."[52]

Overcoming domestic capture and mitigating interjurisdictional externalities appeared to have motivated the IMF's intervention. The IMF's role aimed to restrain the influence of powerful South Korean business groups (*chaebols*) on the political process to the detriment of foreign investors' interests. This can be interpreted as an attempt to mitigate the grip of nationalism on corporate law by opening the market for foreign investors and deterring future nationalistic backlash. In addition, there was a presumed connection between corporate governance practices and systemic risk. An influential academic study argued that low investor protection was a key cause of the crisis in encouraging greater expropriation during downturns, which in turn prompted foreign and domestic investors to withdraw from assets in domestic currency.[53]

Among the panoply of investor-friendly reforms proposed by the IMF—which notably included the facilitation of foreign takeovers[54]—South Korea amended its commercial law to impose a requirement of a majority (or, for certain smaller entities, one quarter) of independent directors in public companies and certain financial institutions.[55] Although pressure in South Korea for corporate governance changes was mounting prior to the crisis,[56] South Korean scholars uniformly describe the involvement of the IMF and the World Bank as "consequential" in prompting the changes.[57] While the initial thrust for corporate governance reform came from the IMF, the World Bank became increasingly involved in connection with its technical assistance loan, hence illustrating the coordinated and networked operation

52. Letter of Intent of the Government of Korea to the IMF (Feb. 7, 1998), https://www.imf.org/external/np/loi/020798.htm [https://perma.cc/52Q4-DUVP] (describing "the policies that Korea intends to implement in the context of its request for financial support from the IMF") (emphasis added).

53. Simon Johnson, Peter Boone, Alasdair Breach & Eric Friedman, *Corporate Governance in the Asian Financial Crisis*, 58 J. FIN. ECON. 141 (2000).

54. The panoply of proposed reforms included the preparation of financial statements of listed firms in accordance with international standards, the reduction in the use of mutual guarantees by affiliates and subsidiaries, the requirement that listed companies on the Korea Stock Exchange have at least one outside director, the removal of the restrictions in the voting rights of institutional investors in public companies, strengthening minority shareholder rights by reducing applicable thresholds, eliminating mandatory tender offer requirements, and permitting foreign takeovers of non-strategic Korean firms without governmental approval. *See* Letter of Intent, *supra* note 52 and accompanying text.

55. Kyung-Hoon Chun, *Korea's Mandatory Independent Directors: Expected and Unexpected Roles*, *in* INDEPENDENT DIRECTORS IN ASIA 177 (Dan W. Puchniak, Harald Baum & Luke Nottage eds., 2017); Hwa-Jin Kim, *Living with the IMF: A New Approach to Corporate Governance and Regulation of Financial Institutions in Korea*, 17 BERKELEY J. INT'L L. 61 (1999).

56. Chun, *supra* note 55, at 189.

57. Kim, *supra* note 55, at 62.

of ICL across different international organizations.[58] Starting in 1999, the executive boards of the IMF and the World Bank have engaged in "conditionality-sharing."[59]

The South Korean experience shows that some signs of corporate governance convergence, such as the embrace of independent directors and enhanced investor protection, are not entirely voluntary, but can result from pressure by international organizations. The IMF conditionalities imposed in the context of financial bailouts can hardly be characterized as purely "market" mechanisms, as they are occasionally described.[60] Some economists have argued that the role of IMF bailouts in foreign crises in fact increases moral hazard by muting the operation of market sanctions and incentives.[61]

The influence of ICL in prompting legal reforms in South Korea does not mean that it was fully effective in achieving economic liberalization and corporate governance convergence. There is evidence that the independent director mechanism in South Korea works differently from its foreign counterparts, based on the widespread appointment of former government officials to serve as lobbyists in circumvention of South Korea's anticorruption laws.[62] Moreover, while the IMF-sponsored changes decreased foreign ownership restrictions and led to a surge of foreign investment in South Korean-listed firms, subsequent domestic reforms have sought to discourage foreign investors from influencing corporate policies.[63] *Chaebols* continue to dominate the South Korean landscapes, and give rise to international charges of state favoritism to the detriment of international investors. An illustrative example is the recent investment arbitration claim

58. The last version of the Letter of Intent between Korea and the IMF contains several references to the World Bank in connection with its corporate governance reforms. Letter of Intent of the Government of Korea to the IMF (July 12, 2000), https://www.imf.org/external/NP/LOI/2000/kor/01/INDEX.HTM [https://perma.cc/DAC4-H9NM].

59. Susanne Soederberg, *The Promotion of 'Anglo-American' Corporate Governance in the South: Who Benefits from the New International Standard?*, 24 THIRD WORLD Q. 7, 13 (2003).

60. Kim, *supra* note 55, at 63 ("The involvement of international lending agencies in the industrial restructuring process of the Korean economy has subjected Korean firms and banks to the harsh, but fair, discipline of international financial markets.").

61. *See, e.g.*, Charles W. Calomiris, *The IMF's Imprudent Role as Lender of Last Resort*, 17 CATO J. 275, 286 (1998) (arguing that the bailouts create moral hazard by insulating foreign creditors from losses and lending legitimacy to domestic bailouts, which are not counterweighted by ineffective conditionalities).

62. Chun, *supra* note 55, at 207; Dan W. Puchniak & Kon Sik Kim, *Varieties of Independent Directors in Asia: A Taxonomy*, *in* INDEPENDENT DIRECTORS IN ASIA 116 (Dan W. Puchniak, Harald Baum & Luke Nottage eds., 2017).

63. Kon Sik Kim, *Dynamics of Shareholder Power in Korea*, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER 539–40 (Jennifer G, Hill & Randall S. Thomas eds., 2015). For a critique of foreign legal plug-ins in South Korea that pay little attention to local culture, see Amir N. Licht, *Legal Plug-Ins: Cultural Distance, Cross-Listing, and Corporate Governance Reform*, 22 BERKELEY J. INT'L L. 195 (2004).

launched by hedge fund Elliott Management against South Korea, which asserts improper government intervention in a corporate merger to favor "a domestic corporate *chaebol* family over an unpopular foreign investor."[64]

In what would be a lasting byproduct of the Asian crisis response, in 1999 the IMF and the World Bank jointly launched the Report on the Observance of Standards and Codes (ROSC) with the goal of strengthening the international financial architecture by identifying institutional weaknesses that contribute to a country's vulnerability.[65] As one scholar put it, "[t]he ROSCs are novel in that they have not only expanded octopus-style surveillance in the public sectors, they have also moved into the private spheres of emerging market economies."[66]

Corporate governance is one of the twelve areas of ROSC assessment of individual country practices that came to be benchmarked against the OECD Principles of Corporate Governance described below. The ROSC reports typically propose several specific legal changes in the area of corporate law to bolster investor protection and carefully assess the degree of implementation of prior recommendations.[67] For instance, various ROSC assessments have specifically recommended countries to adopt stewardship codes, thus contributing to the startling diffusion of such codes worldwide.[68]

B. OECD

The Asian financial crisis also prompted the OECD to intervene in the formulation of best practices in corporate governance, though the organization had begun working in the field shortly before the eruption of

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64. Edward White & Kang Buseong, *Elliott's $718m Claim Against South Korea Poses Risk for Moon*, FIN. TIMES (May 2, 2019), https://www.ft.com/content/1a972668-6ca9-11e9-80c7-60ee53e6681d.

65. *Reports on the Observance of Standards and Codes*, WORLD BANK, https://www.worldbank.org/en/programs/rosc [https://perma.cc/9XHX-VC88].

66. Soederberg, *supra* note 59, at 8.

67. For instance, Brazil's ROSC report for corporate governance in 2012 recommends (i) moving toward international standard board practices, (ii) raising listing standards for the traditional listing sector, (iii) targeting enforcement by increasing resources of the Securities Commission, (iv) updating various securities regulations, and (v) updating various rules on shareholder rights and related-party transactions in the corporations statute. WORLD BANK, REPORT ON THE OBSERVANCE OF STANDARDS AND CODES (ROSC): CORPORATE GOVERNANCE COUNTRY ASSESSMENT: BRAZIL 5 (2012).

68. *See, e.g.*, *id.*; WORLD BANK, REPORT ON THE OBSERVANCE OF STANDARDS AND CODES (ROSC): CORPORATE GOVERNANCE COUNTRY ASSESSMENT: RUSSIAN FEDERATION (2013); WORLD BANK, REPORT ON THE OBSERVANCE OF STANDARDS AND CODES (ROSC): CORPORATE GOVERNANCE COUNTRY ASSESSMENT: PAKISTAN (2018); WORLD BANK, REPORT ON THE OBSERVANCE OF STANDARDS AND CODES (ROSC): CORPORATE GOVERNANCE COUNTRY ASSESSMENT: MAURITIUS (2011). For a collection of studies documenting and analyzing the rise of stewardship codes around the world, see GLOBAL SHAREHOLDER STEWARDSHIP: COMPLEXITIES, CHALLENGES AND POSSIBILITIES (Dionysia Katelouzou & Dan W. Puchniak eds., forthcoming). *See also* Dan W. Puchniak, *The False Hope of Stewardship in the Context of Controlling Shareholders: Making Sense Out of the Global Transfer of a Legal Misfit*, AM. J. COMP. L. (forthcoming 2022) (on file with the author).

the crisis. A Business Sector Advisory Group led by US lawyer Ira Millstein presented a report to the OECD in 1998, following a call at the 1996 meeting of the Council at Ministerial level for the study of corporate governance.[69] The so-called Millstein report, which had a strong focus on self-regulation by the private sector, was influential in the design of the original OECD Principles promulgated one year later.[70]

First published in 1999, the OECD Principles of Corporate Governance followed an explicit call by the OECD Council at the Ministerial level for the OECD "to develop, in conjunction with national governments, other relevant international organisations and the private sector, a set of standards and guidelines in this field . . . ."[71] The call by the OECD Council took place in a meeting marked by the recognition of the "growing interdependence of countries in the world economy" highlighted by the Asian financial crisis and the belief that "effective structural policies," including corporate governance, are critical to the "smooth functioning of the global economy."[72] The ministers "urged countries affected by the crisis to implement fully and expeditiously the recommended reforms agreed with the IMF, the World Bank and other relevant international institutions."[73] Since their inception, the Principles have had a "tremendous impact on corporate governance legal reforms, especially in emerging economies, as well as on the contents of codes of corporate governance."[74]

The very formulation of the OECD Principles of Corporate Governance—self-described as "the first initiative by an inter-governmental organisation to develop the core elements of a good corporate governance regime"—was highly enmeshed in a network of international organizations.[75] The Ad Hoc Task Force in charge of the principles included not only all member governments, but also four international organizations (the World Bank, the International Monetary Fund, the Basel Committee, and IOSCO), the European Commission, and representatives from selected private sector organizations.[76] As described by one senior OECD official, the major losses suffered by international investors in the context of the

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69. *See* IRA M. MILLSTEIN, MICHEL ALBERT, SIR ADRIAN CADBURY, ROBERT E. DENHAM, DIETER FEDDERSEN & NOBUO TATEISI, CORPORATE GOVERNANCE: IMPROVING COMPETITIVENESS AND ACCESS TO CAPITAL IN GLOBAL MARKETS: A REPORT TO THE OECD BY THE BUSINESS SECTOR ADVISORY GROUP ON CORPORATE GOVERNANCE (1998).

70. Francesca Cuomo, Christine Mallin & Alessandro Zattoni, *Corporate Governance Codes: A Review and Research Agenda*, 24 CORP. GOV. 222, 225 (2015).

71. ORG. FOR ECON. CO-OP. & DEV., OECD COUNCIL MEETING AT MINISTERIAL LEVEL: PARIS, 27-28 APRIL 1998 (1998).

72. *Id.*

73. *Id.*

74. Amir N. Licht, *State Intervention in Corporate Governance: National Interest and Board Composition*, 13 THEORETICAL INQ. LAW 597, 604 (2012).

75. ORG. FOR ECON. CO-OP. & DEV., OECD PRINCIPLES OF CORPORATE GOVERNANCE 6 (1999).

76. *Id.* at 8.

Asian financial crisis were a key motivation for the principles.[77] While IMF conditionalities are often perceived as coercive, the preface to the 1999 OECD Principles emphasized their non-binding character, with their adoption being a matter for the "self-interest [of] countries and corporations" in a world of "highly mobile capital."[78]

The OECD Principles explicitly aimed to "assist Member and non-member governments in their efforts to evaluate and improve the legal, institutional and regulatory framework for corporate governance in their countries . . . ."[79] From the outset, the OECD's goal was not only to promote best practices of corporate governance within its membership, but also to spread them to developing countries.[80] The Principles focus on the agency problems arising from the "separation of ownership and control."[81]

Although the Principles note that "there is no single model of good corporate governance,"[82] they favor Anglo-Saxon best practices, such as board independence,[83] and focus on protecting shareholders' rights, including *foreign* shareholders.[84] While the Principles mention the role of stakeholders in corporate governance, the relevant language is fairly constrained in providing that "the rights of stakeholders *that are protected by law* are respected" and permitting "performance-enhancing mechanisms for stakeholder participation."[85] In so proceeding, the OECD anticipates subsequent developments in ICL in conceptualizing stakeholder concerns as a means to enhance investment value.

In 2002, the Council at the Ministerial level urged the OECD to "continue its successful co-operative programme with the World Bank to promote corporate governance reform efforts *worldwide*, using the OECD Principles of Corporate Governance as a benchmark."[86] It also called on the

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77. Response from Mats Isaksson of question posed during Blue Sky lunch at Columbia Law School on Dec. 4, 2019, following the presentation of the paper Ownership of the World's Listed Companies by Mats Isaksson and Serdar Çelik.

78. ORG. FOR ECON. CO-OP. & DEV., *supra* note 75, at 6.

79. *Id.* at 9.

80. *See* SLAUGHTER, *supra* note 27, at 143 (noting how the OECD Principles on Corporate Governance, as well as the Guidelines on Multinational Enterprises, "are used to gauge public policy in developing countries and have become criteria taken into account in country assessments by the World Bank").

81. ORG. FOR ECON. CO-OP. & DEV., *supra* note 75, at 10.

82. *Id.* at 6.

83. *Id.* at 41 ("The board should be able to exercise objective judgement on corporate affairs independent, in particular, from management."). For a description of the lasting obsession with independent directors and shareholder empowerment in the corporate governance movement, see Pargendler, *Controlling Shareholders in the Twenty-First Century*, *supra* note 14.

84. ORG. FOR ECON. CO-OP. & DEV., *supra* note 75, at 17 (emphasis added).

85. *Id.* at 18, 33 (emphasis added).

86. *OECD Council Meeting at Ministerial Level, 15-16 May 2002*, ORG. FOR ECON. CO-OP. & DEV., https://www.oecd.org/newsroom/oecdcouncilatministeriallevel15-16may2002.htm [https://perma.cc/35P5-VNSD].

OECD to assess its Principles, which led to a broad consultation and a new version in 2004.[87] The foreword to the 2004 version of the Principles recounted their success in promoting reform in both OECD and non-OECD countries, their designation as one of twelve key standards for sound financial systems by the Financial Stability Forum, and their role in underpinning the corporate governance component of World Bank/IMF Reports and on the Observance of Standards and Codes (ROSC).[88] The foreword also mentions for the first time the contribution of corporate governance to financial market stability.[89]

The 2004 edition of the Principles innovates in several respects, including stronger shareholder rights, greater control of related-party transactions, and the more explicit recognition of the need for investor protection vis-à-vis controlling shareholders in addition to management. It also tweaks its section on the role of stakeholders to recognize protection to rights not only established by law, but also "through mutual agreements."[90] Perhaps more revealingly, the new version no longer regards corporate governance as primarily a voluntary enterprise driven by the private sector, but increasingly emphasizes the role of regulatory authorities. To this effect, the Principles now open with a new section on "[e]nsuring the [b]asis for an [e]ffective [c]orporate [g]overnance [f]ramework," calling for legal and regulatory requirements that aim at "overall economic performance" and are "consistent with the rule of law, transparent and enforceable."[91]

Following the global financial crisis of 2008, the OECD identified corporate governance weaknesses as one of its root causes.[92] A 2009 report—discussed with non-member countries such as Brazil, China, India, and Russia—concludes that while there was no urgent need for revisions to the Principles, a key challenge was supporting their effective implementation—an effort to be conducted jointly with the Financial Stability Forum, the World Bank, and the Basel Committee based on peer review of country experiences.[93] Corporate governance was no longer

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87. *See id.*; ORG. FOR ECON. CO-OP. & DEV., OECD PRINCIPLES OF CORPORATE GOVERNANCE (2004).
88. *Id.* at 3.
89. *Id.*
90. *Id.* at 21.
91. *Id.* at 17, 29–30.
92. GRANT KIRKPATRICK, THE CORPORATE GOVERNANCE LESSONS FROM THE FINANCIAL CRISIS 2 (2009).
93. ORG. FOR ECON. CO-OP. & DEV., CORPORATE GOVERNANCE AND THE FINANCIAL CRISIS: KEY FINDINGS AND MAIN MESSAGES 55 (2009).

conceived as a mere matter of country or corporate self-interest,[94] as the report emphasized the externalities of corporate failures.[95]

The most recent 2015 version, now called the *G20/OECD Principles of Corporate Governance*, reflects the participation of all non-OECD G20 countries on equal footing.[96] Experts from other international organizations such as the Basel Committee, the Financial Stability Board, and the World Bank again "participated actively in the review."[97] The 2015 Principles explicitly note that "[i]nternational *coordination* is becoming increasingly relevant in corporate governance," and call for greater cross-border regulatory cooperation.[98]

The 2015 edition of the Principles also refers to the availability of beneficial ownership information to aid regulatory enforcement and the control of related-party transactions and insider trading.[99] The Principles provide that information about beneficial owners should be "obtainable at least by regulatory and enforcement agencies and/or through the judicial process."[100] Secrecy as to beneficial ownership is a relevant dimension of the competition for corporate charters that negatively impacts the enforcement of foreign laws and regulations. While jurisdictions around the world are moving toward greater beneficial ownership disclosure, the United States has been a laggard in the area.[101]

OECD influence on corporate governance is not limited to the Principles. In 2005, it also issued specific Guidelines on Corporate Governance of State-Owned Enterprises, which aim to address the distinct challenges of state-owned enterprises (SOEs) while being "fully compatible" with the OECD Principles.[102] While the SOE Guidelines focus on corporate governance of SOEs, they are not primarily concerned with the agency costs and investor protection considerations that were the primary motivation for

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94. *Id.* at 12. Indeed, the report begins by critically quoting the remarks by Alan Greenspan at a US Congressional hearing ("I made the mistake in presuming that the self-interests of organizations, specifically banks and others, were such that they were best capable of protecting their own shareholders and the equity of the firm."). *Id.*

95. *Id.* at 40.

96. ORG. FOR ECON. CO-OP. & DEV., G20/OECD PRINCIPLES OF CORPORATE GOVERNANCE 3 (2015).

97. *Id.*

98. *Id.* at 17 (emphasis added).

99. *Id.* at 39.

100. *Id.*

101. *See* JOHN GITHONGO, BENEFICIAL OWNERSHIP: THE GLOBAL STATE OF PLAY 2019 8–9 (2019), https://cic.nyu.edu/sites/default/files/beneficial_ownership_githongo_final_july_1.pdf [https://perma.cc/2WS9-EM38].

102. ORG. FOR ECON. CO-OP. & DEV., CORPORATE GOVERNANCE OF STATE-OWNED ENTERPRISES 181 (2005).

the 1999 Principles. Instead, their main goal is to mitigate the effects of state ownership on market competition.[103]

Accordingly, the first guideline begins by enunciating that "[t]he legal and regulatory framework for state-owned enterprises should ensure a *level-playing field* in markets where state-owned enterprises and private sector companies compete in order to avoid market distortions."[104] Marked by growing concern about the role of SOEs in distorting international market dynamics, the 2015 revisions to the Guidelines provide for more stringent corporate governance standards, including the requirement of disclosure and state funding of public policy objectives.[105] Like other areas of ICL, the Guidelines focus on general principles without delving into much detail about particular practices, possibly as a result of the need to achieve political compromise among countries with different policy preferences.[106] Nevertheless, for jurisdictions accustomed to significant levels of state intervention in SOE governance, the OECD Guidelines can be less anodyne than they first appear. For instance, the Guidelines recommend that the state reimburse SOEs for the cost of pursuing public policy objectives—a stringent regime compared to the international norm—and have inspired countries to adopt similar rules.[107]

Corporate governance has been a key pillar of the OECD's self-described role as a standard setter and "house of best practices."[108] In addition to its Principles and Guidelines, the OECD sponsors countless reports, regional roundtables, and country peer reviews to collect data and promote compliance.[109] These events are influential at the country level. For

103. Mariana Pargendler, *State Ownership and Corporate Governance*, 80 FORDHAM L. REV. 2917, 2964 (2012).

104. ORG. FOR ECON. CO-OP. & DEV., *supra* note 102, at 185 (emphasis added).

105. ORG. FOR ECON. CO-OP. & DEV., CORPORATE GOVERNANCE OF STATE-OWNED ENTERPRISES 7 (2015) (noting that SOEs are "increasingly prominent actors in international markets," and that "[e]nsuring that they operate in a sound competitive and regulatory environment is crucial to maintaining an open trade and investment environment that underpins economic growth").

106. For a review and critique of the OECD Guidelines on state-owned enterprises, see Curtis J. Milhaupt & Mariana Pargendler, *Governance Challenges of Listed State-Owned Enterprises Around the World: National Experiences and a Framework for Reform*, 50 CORNELL INT'L L.J. 473, 533–34 (2017).

107. Curtis J. Milhaupt & Mariana Pargendler, *Related Party Transactions in State-Owned Enterprises: Tunneling, Propping and Policy Channeling*, *in* THE LAW AND FINANCE OF RELATED PARTY TRANSACTIONS 257–58 (Luca Enriques & Tobias H. Tröger eds., 2019).

108. *Global OECD Boosted by Decision to Open Membership Talks with Colombia and Latvia with More to Follow*, ORG. FOR ECON. CO-OP. & DEV. (May 30, 2013), https://www.oecd.org/newsroom/global-oecd-boosted-by-decision-to-open-membership-talks-with-colombia-and-latvia-with-more-to-follow.htm [https://perma.cc/4YHT-BFD3].

109. As an illustration, the OECD has organized multiple editions of seven regional roundtables on corporate governance. The OECD Corporate Governance Factbook 2019 contains comparative data and information across forty-nine different jurisdictions including all thirty-six OECD members and all G20 and Financial Stability Board members. OECD corporate governance reports and events are so numerous as to defy quantification. ORG. FOR ECON. CO-OP. & DEV., OECD CORPORATE GOVERNANCE

example, when Brazil's Securities Commission (*Comissão de Valores Mobiliários* (CVM)) recently amended its regulations to lower the minimum ownership requirements for the filing of derivative lawsuits and the exercise of various other shareholder rights, it specifically mentions OECD support for reforms in the area.[110]

One particularly effective channel for OECD influence on corporate lawmaking is the accession process for new members. The recent efforts by Colombia to secure OECD membership in 2020 illustrates this dynamic. The invitation to become a member of the OECD requires a review of the candidate country's "[w]illingness and ability to implement substantive OECD legal instruments," which include corporate governance.[111] In its corporate governance assessment, the OECD described the "substantial reforms undertaken by the Colombian government during this process to strengthen its corporate governance framework, both for listed companies and state-owned enterprises."[112] The various reforms included the enactment of a comprehensive corporate governance code (*Codigo País*), the implementation of International Financial Reporting Standards (IFRS), a statutory reform that provides for greater regulatory authority to oversee financial conglomerates to address conflicted related-party transactions, and an overhaul to the institutions of SOE governance to limit political intervention and centralize the ownership function.[113] The press review of the OECD's formal membership invitation to Colombia praises the country's "major reforms to align its legislation, policies and practices to OECD standards," including in the area of corporate governance.[114]

The OECD Principles helped spur the spread of corporate governance codes around the world. While corporate governance codes are a UK innovation tracing back to the Cadbury Code of 1992, the international diffusion of codes was slow, accelerating only after the OECD Principles and the ICGN Code of 1999 (which follows the OECD Principles).[115] A review of the empirical evidence shows that the key recommendations of

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FACTBOOK 2019 (2019). For an influential volume on related-party transactions, see ORG. FOR ECON. CO-OP. & DEV., RELATED PARTY TRANSACTIONS AND MINORITY SHAREHOLDER RIGHTS (2012).

110. *CVM Edita Instrução que Reduz Porcentagens Mínimas de Participação Acionária para Abertura de Ações Judiciais e Exercício de Direitos Relacionados*, GOV.BR (June 22, 2020), https://www.gov.br/cvm/pt-br/assuntos/noticias/cvm-edita-instrucao-que-reduz-porcentagens-minimas-de-participacao-acionaria-para-abertura-de-acoes-judiciais-e-exercicio-de-direitos-relacionados-e51f8a9141b8466ca3998516d979a9ab [https://perma.cc/R4XL-KPNP].

111. ORG. FOR ECON. CO-OP. & DEV. COUNCIL, ROADMAP FOR THE ACCESSION OF COLOMBIA TO THE OECD CONVENTION 4 (2013).

112. ORG. FOR ECON. CO-OP. & DEV., CORPORATE GOVERNANCE IN COLOMBIA 3 (2017).

113. *Id.* at 7–9.

114. *OECD Countries Agree to Invite Colombia as 37th Member*, ORG. FOR ECON. CO-OP. & DEV. (May 25, 2008), https://www.oecd.org/colombia/oecd-countries-agree-to-invite-colombia-as-37th-member.htm [https://perma.cc/KT7Q-9AHT].

115. Cuomo, Mallin & Zattoni, *supra* note 70, at 228.

codes issued by transnational organizations have been incorporated in national codes, with international organizations such as the OECD, the World Bank, and the IMF actively promoting and assessing the implementations of these codes around the globe.[116]

In particular, the OECD Principles appeared to have played a crucial role in the observed convergence toward formal levels of shareholder protections worldwide. An empirical study by Dionysia Katelouzou and Mathias Siems found that reliance on independent directors, as proposed by the 2004 OECD Principles of Corporate Governance, is the element of corporate governance that spread most rapidly worldwide between 1990 and 2013.[117] While there is widespread perception that the diffusion of independent directors was a legal transplant from the United States, the model of independent directors embraced by most jurisdictions differs from the US model in also requiring independence from controlling shareholders rather than solely from management.[118] The reason appears to be that the global diffusion of independent directors was less a legal transplant from the United States than a legal implant from the 2004 OECD Principles. Following a 2003 change to the UK corporate governance code,[119] the 2004 version of the Principles provides that, depending on prevailing ownership patterns, "independence from controlling shareholders or another controlling body will need to be emphasized, in particular if the *ex ante* rights of minority shareholders are weak and opportunities to obtain redress are limited."[120]

C. World Bank

Since the Asian financial crisis, the World Bank has also been a key player in the development of ICL through its active cooperation with the IMF and the OECD. As described in its 2000 report on *Corporate Governance: A Framework for Implementation*, corporate governance came to be viewed as "an essential foundation of the global financial architecture and central to the World Bank Group's mission to fight poverty."[121] The report—"the outcome of a close working partnership between the public

116. *Id.* at 234.

117. Dionysia Katelouzou & Mathias Siems, *Disappearing Paradigms in Shareholder Protection: Leximetric Evidence for 30 Countries, 1990-2013*, 15 J. CORP. L. STUD. 127, 150 (2015).

118. Dan W. Puchniak & Luh Luh Lan, *Independent Directors in Singapore: Puzzling Compliance Requiring Explanation*, 65 AM. J. COMPAR. L. 265, 267–68 (2017).

119. Puchniak & Kim, *supra* note 62, at 100.

120. ORG. FOR ECON. CO-OP. & DEV., *supra* note 87, at 64.

121. MAGDI R. ISKANDER & NADEREH CHAMLOU, WORLD BANK, CORPORATE GOVERNANCE: A FRAMEWORK FOR IMPLEMENTATION 2 (2000).

and private sectors,"[122] as described in the foreword by Sir Adrian Cadbury—explicitly conceived of corporate governance as a mechanism of investor protection to mitigate the principal-agent problem stemming from the separation between ownership and control.[123] The central reasoning was that investor protection promoted financial development and, consequently, economic development. The World Bank partnered with the OECD to broaden the impact of corporate governance beyond OECD countries, with the OECD Principles serving as a "starting point" but not "a reference point."[124]

While the report acknowledged the power of competition in bringing about desired convergence, it still deemed coordination to be necessary. In Cadbury's words, while "[i]n the past these standards might have spread by a gradual process of economic osmosis," "the pace of change today is such that to leave the raising of governance standards to natural forces might put areas of the world where funds could be put to best use at a competitive disadvantage in attracting them."[125] The report specifically identifies "resistance from powerful interest groups" that would lose power from investor protection and leave firms vulnerable to foreign control as a key impediment to be overcome.[126]

Concerns about domestic capture and the grip of nationalism on corporate law were the main driving forces behind the Bank's corporate governance efforts and its skepticism on voluntary convergence to greater levels of investor protection. The Bank's initial goal was not to create standards or codes, but to "marshal[] support for corporate governance reforms" according to the countries' own initiatives.[127] To this end, the Bank embarked on a highly networked strategy relying on cooperation from various international organizations, governments, and private sector participants. In June 1999, the World Bank and the OECD signed a Memorandum of Understanding based on the recognition that "corporate governance has emerged as an important focus of efforts by multilateral organisations to assist countries in improving financial architecture," which could "benefit greatly from closer and more structured co-operation."[128]

122. Sir Adrian Cadbury, *Foreword* to MAGDI R. ISKANDER & NADEREH CHAMLOU, WORLD BANK, CORPORATE GOVERNANCE: A FRAMEWORK FOR IMPLEMENTATION v (2000).

123. ISKANDER & CHAMLOU, *supra* note 121, at 3.

124. *Id.* at 13.

125. Cadbury, *supra* note 122, at vi.

126. ISKANDER & CHAMLOU, *supra* note 121, at 10 ("Worried about diluting their privileged position in the company's decisionmaking, insiders often oppose such substantive corporate governance requirements as one-share one-vote, cumulative voting, public tender offers, and independent directors. Giving greater power to minority shareholders is often opposed on the grounds that it could lead to foreign control of local firms, ignoring the benefits that could bring."). *Id.*

127. *Id.* at 12.

128. *Id.* at 65.

While the OECD Principles were viewed as a starting point, the goal was to "help countries identify specific issues and problems and develop their own programmes and institutions to strengthen corporate governance."[129]

The Global Corporate Governance Forum was a highly networked initiative involving regional development banks, international associations such as APEC and IASC, IOSCO, the IMF and the Commonwealth Association, private sector participants, and donor and developing countries.[130] The Forum aimed, among other things, to "build a consensus in favor of appropriate policy, regulatory and institutional reforms," "provide support for regulatory and private voluntary action," and "promote institutional development and human capacity building in the associated fields of corporate governance."[131] It was an effort in thought leadership and human capital development in the field.

The Memorandum of Understanding also contemplated the establishment of a Private Sector Advisory Group formed by a small group of "private sector international leaders," aiming to "mobilise support among private sector players world-wide and carry weight with senior officials from the government/regulatory side."[132] The inaugural chairman of the Private Sector Advisory Group was US lawyer and corporate governance expert Ira Millstein.[133]

The World Bank corporate law efforts also piggybacked on its conditionalities and its traditional efforts "supporting client countries in undertaking difficult structural changes requiring reforms of legal and regulatory structures."[134] These include corporate governance measures such as establishing regulatory capacity in capital markets and strengthening the competence and independence of boards of directors.[135] The International Finance Corporation (IFC)—the private-sector support arm of the World Bank—also came to require corporate governance improvements in investee companies.[136]

One successful initiative benefitting from World Bank support was the establishment of Brazil's Novo Mercado—a premium listing segment on the São Paulo stock exchange that imposed higher standards of corporate governance than those required under Brazilian law. A main motivation for the creation of the Novo Mercado was the significant political resistance by

129. *Id.* at 66.
130. *Id.*
131. *Id.*
132. *Id.* at 67.
133. SIMON C.Y. WANG, IFC GLOBAL CORP. GOVERNANCE F., DEVELOPING AND IMPLEMENTING CORPORATE GOVERNANCE COSTS 13 (2006).
134. ISKANDER & CHAMLOU, *supra* note 121, at 12.
135. *Id.* at 12.
136. *Id.*

established companies to statutory reforms aimed at increasing investor protection.[137] The Novo Mercado arguably helped investors regain confidence in Brazil's capital markets, with the vast majority of IPOs in the mid-2000s taking place in the segment.[138]

As reported by a founder of the Novo Mercado initiative at the São Paulo Stock Exchange, "the comments and criticisms from representatives of the IFC/World Bank and the OECD attracted special attention" during the discussions preceding the segment, as they "not only conveyed criticisms from foreign institutional investors concerning Brazil's regulatory environment, but they also supported the reform efforts by sharing relevant international experiences and furnishing a 'best practices' benchmark."[139] The contributions of the World Bank (through the IFC and the IFC's Global Corporate Governance Forum) and the OECD were deemed to be "key."[140] The Forum's Private Sector Advisory Group played an "essential" role in publicizing the Novo Mercado in the international press, as their "enormous prestige and economic clout helped advance the initiative."[141] The IFC's heavy involvement in the formulation and launch of the Novo Mercado includes organizing meetings and roadshows with the Private Sector Advisory Group's Investor Task Force (including TIAA-CREF, Capital International, and CalPERS, among others) and large Brazilian companies and sending letters to its listed company investees to encourage a Novo Mercado listing.[142]

By the mid-2000s, corporate law would also make an appearance in the World Bank's influential *Doing Business* reports.[143] Launched in 2004, the Doing Business project builds on the academic literature on "law and finance," which originally sought to measure legal investor protections across jurisdictions and to demonstrate their causal impact on financial development.[144] By ranking countries according to several variables affecting the ease of doing business (including business formation, labor

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137. Ronald J. Gilson, Henry Hansmann & Mariana Pargendler, *Regulatory Dualism as a Development Strategy: Corporate Reform in Brazil, the United States, and the European Union*, 63 STAN. L. REV. 475, 483–86 (2011).

138. *Id.* at 495.

139. MARIA HELENA SANTANA, MELSA ARARAT, PETRA ALEXANDRU, B. BURCIN YURTOGLU & MAURO RODRIGUES DA CUNHA, IFC GLOBAL CORP. GOVERNANCE F., FOCUS 5: NOVO MERCADO AND ITS FOLLOWERS: CASE STUDIES IN CORPORATE GOVERNANCE REFORM 8 (2008).

140. *Id.* at 20.

141. *Id.*

142. *Id.* at 37.

143. Ralf Michaels, *Comparative Law by Numbers? Legal Origins Thesis,* Doing Business *Reports, and the Silence of Traditional Comparative Law*, 57 AM. J. COMPAR. L. 765, 771–72 (2009) (explaining that "the [Doing Business] reports have become the most-circulated series issued by that institution," are "actively marketed," and have had "enormous impact").

144. Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The Economic Consequences of Legal Origins*, 46 J. ECON. LIT. 285, 325 (2008).

laws, and contract enforcement, among others), the Doing Business project aims both to promote legal reforms through benchmarking and to influence their design. It thus departs from earlier World Bank initiatives, which paid lip service to the importance of tailoring corporate governance to the circumstances of individual countries.[145]

The Doing Business section on investor protection ranks countries based on the protections offered against related-party transactions in terms of transparency, liability of self-dealing, and shareholders' ability to sue directors for misconduct.[146] The ranking is based on a hypothetical transaction between two companies controlled by the same shareholder.[147] Scholars have criticized the index for neglecting "normative complexity" in only valuing stringent controls on related-party transactions, neglecting that they may confer firm-level and macro-level efficiency benefits, especially in developing countries.[148] The methodology is, however, noteworthy for taking concentrated ownership as the paradigm, since related-party transactions are deemed to be a more significant corporate governance problem in controlled companies.[149]

The World Bank's Doing Business ranking is highly influential in prompting reforms around the world. As described in the 2017 edition of the report, "[s]ince 2013, 54 economies introduced 63 legislative changes strengthening minority shareholder protections," and "[t]wenty-two of these economies did so by introducing practices and requirements measured by the extent of shareholder governance index introduced in *Doing Business 2015*."[150] Although the empirical evidence on the ranking's effects on the Bank's financing decisions are mixed,[151] scholars overwhelmingly believe

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145. *See supra* note 129 and accompanying text.

146. The investor protection dimension was first introduced in the report's second edition in 2005 as a measure of ownership and financial information disclosure. WORLD BANK, IFC & OXFORD UNIV. PRESS, DOING BUSINESS IN 2005: REMOVING OBSTACLES TO GROWTH 15 (2005) (introducing a new set of indicators on investor protection through an index of ownership and financial disclosure). The current methodology dates back to 2006. WORLD BANK & IFC, DOING BUSINESS IN 2006: CREATING JOBS 39 (2006) (introducing the current methodology of measuring investor protection against self-dealing based on the treatment of a standardized case).

147. *Id.* Interestingly, unlike the first version of the OECD Principles, which is implicitly based on a paradigm of dispersed ownership, the World Bank's Doing Business framework presumes the existence of a controlling shareholder.

148. Dan W. Puchniak & Umakanth Varottil, *Related Party Transactions in Commonwealth Asia: Complicating the Comparative Paradigm*, 17 BERKELEY BUS. L.J. 1, 34–35 (2020) (describing how the different forms of group-led development contributed to the Asian miracle despite the prevalence of loose related-party transactions).

149. Lucian A. Bebchuk & Assaf Hamdani, *The Elusive Quest for Global Governance Standards*, 157 U. PA. L. REV. 1263, 1304 (2009).

150. WORLD BANK, DOING BUSINESS 2017: EQUAL OPPORTUNITY FOR ALL 67 (2017).

151. Jason Webb Yackee, *Foreign Aid, Law Reform, and the World Bank's Doing Business Project*, 9 LAW & DEV. REV. 177, 178 (2016).

that the desire to achieve high rankings—and, arguably, greater levels of foreign investment—has been a key motivation behind legal reforms.[152]

India offers an illustrative example. Scholars have noted that the OECD and the World Bank have contributed to tighten the regime of related-party transactions in India, among other countries.[153] While some critical reforms in the area date back to the Companies Act of 2013, Prime Minister Modi's subsequent "Make in India" campaign explicitly turned to the World Bank's *Doing Business* report to improve the country's business environment.[154] Although the Indian government fell short of meeting its original goal to join the top 50 economies in the index, it still made substantial progress in soaring from 130 in 2016 to 63 in 2020.[155] India ranked as high as fourth in the protection of minority investors in 2017 and ranked thirteenth as of 2020.[156]

The political push for improved Doing Business rankings should not imply that India blindly converged to international standards without domestic political opposition. A 2014 amendment to the Companies Act relaxed some of the most stringent controls on related-party transactions such as the requirement of 75% minority shareholder approval—interestingly, under the rubric of improving the "ease of doing business."[157] To this day, commentators warn against the continued use of the "ease of doing business" agenda by Indian companies in compromising earlier investor protection reforms and India's Doing Business ranking.[158]

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152. *See*, *e.g.*, Doron Teichman & Eyal Zamir, *Nudge Goes International*, 30 EUR. J. INT'L L. 1263, 1276–77 (2019); Puchniak & Varottil, *supra* note 148, at 10.

153. Luca Enriques, *Related Party Transactions: Policy Options and Real-World Challenges (with a Critique of the European Commission Proposal)*, 16 EUR. BUS. ORG. L. REV. 1, 9 (2015) ("Under the influence of international economic organizations such as the OECD and the World Bank, many Asian countries, including India, have recently broadened the scope of RPTs rules and tightened their content.").

154. WORLD BANK, DOING BUSINESS 2020: COMPARING BUSINESS REGULATION IN 190 ECONOMIES 10 (2020).

155. *Id.*

156. For 2020 data, see *Protecting Minority Investors*, WORLD BANK DOING BUS. https://www.doingbusiness.org/en/data/exploretopics/protecting-minority-investors [https://perma.cc/X96E-NSJW]; *see also* Pavan Burugula, *Ease of Doing Business: India Scores on Minority Investor Protection*, BUS. STANDARD (Nov. 1, 2017), https://www.business-standard.com/article/economy-policy/ease-of-doing-business-india-scores-on-minority-investor-protection-117110100042_1.html (describing how India had improved to fourth place in the ranking).

157. *Cabinet Clears Changes to Companies Act for Ease of Doing Business*, NDTV (Dec. 2, 2014), https://www.ndtv.com/business/cabinet-clears-changes-to-companies-act-for-ease-of-doing-business-707399 [https://perma.cc/62SP-Z5KC].

158. Hetal Dalal, *Hardselling India to Investors: This Three-Point Agenda Should Help*, MONEYCONTROL (May 11, 2020), https://www.moneycontrol.com/news/opinion/hardselling-india-to-investors-this-three-point-agenda-should-help-4105061.html [https://perma.cc/AE7S-SJG7].

D. United Nations

A key recent development in corporate law has been the resurgence of the debate over the purpose of the corporation and the consideration of stakeholders' interests.[159] A key focal point is the emergence of ESG factors in investment decisions, culminating in the "remarkable rise of ESG."[160] While these factors are now salient and influential, less appreciated is the role of the United Nations (UN) in their rise. UN initiatives not only coined the concept of ESG, but also critically mobilized support for the spread and influence of ESG factors around the globe, in addition to the dissemination of a business and human rights agenda more broadly.

The role of the UN in shaping corporate governance is even less appreciated than that of the Bretton Woods institutions and the OECD. The new convergence around ESG and human rights—with the critical support of the UN—brought about a greater stakeholder orientation that was unforeseen in the original debates about the impact of globalization on corporate governance. While the initial goals of the IMF, the OECD, and the World Bank were to improve investor protection and overcome nationalist pressure on corporate law, the UN's chief concern from the outset was to mitigate the environmental, social, and human rights externalities of corporate activity. The very concept of sustainability also traces back to the UN-sponsored Brundtland Report from 1987.[161]

In contrast to the market orientation of the Bretton Woods institutions and the OECD, the United Nations has historically adhered to a conspicuous "antibusiness prejudice" since the creation of the United Nations Commission for Trade and Development (UNCTAD) in 1964.[162] In the 1970s, a coalition of developing countries known as the G-77 sought to realize a New International Economic Order based on a project of global reform and redistribution.[163] The UN sought to enact binding rules on

159. For a discussion, see, e.g., Edward Rock, *For Whom Is the Corporation Managed in 2020?: The Debate over Corporate Purpose* (Eur. Corp. Governance Inst., Working Paper No. 515, 2020).

160. Georg Kell, *The Remarkable Rise of ESG*, FORBES (July 11, 2018), https://www.forbes.com/sites/georgkell/2018/07/11/the-remarkable-rise-of-esg/?sh=66bd6d16951f [https://perma.cc/8RTU-56D2]; *see also* Jessica Strine, Marc Lindsay & Robert Main, *The Age of ESG*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 9, 2020), https://corpgov.law.harvard.edu/2020/03/09/the-age-of-esg/ [https://perma.cc/4ADW-ZMMN].

161. REPORT OF THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT: OUR COMMON FUTURE (1987).

162. Jean-Philippe Thérien & Vincent Pouliot, *The Global Compact: Shifting the Politics of International Development?*, 12 GLOB. GOVERNANCE 55, 57–58 (2006); *see also* John Gerard Ruggie, *The United Nations and Globalization: Patterns and Limits of Institutional Adaptation*, 9 GLOB. GOVERNANCE 301, 303–04 (2003) ("Historically, UN entities had expressed varying degrees of ambivalence about the market generally and globalization in particular.").

163. Jennifer Bair, *Corporations at the United Nations: Echoes of the New International Economic Order?*, 6 HUMAN. 159, 159 (2015).

transnational corporations known as the Draft Code of Conduct on Transnational Corporations.[164] Faced with significant opposition, especially from the US, the initiative was formally abandoned decades later in 1992.[165]

The current UN approach to corporate affairs traces back to Secretary-General Kofi Annan's 1999 speech to the World Economic Forum, in which he proposed that businesses and the UN initiate a "Global Compact," calling on businesses to uphold human rights, labor, and environmental standards.[166] Annan foresaw the risk that the international regulatory gap would produce backlash against globalization and the multilateral trade regime. He presciently warned that unless minimum standards came to prevail in global markets, the global economy would be "vulnerable to backlash from all the 'isms' of our post-cold-war world: protectionism; populism; nationalism; ethnic chauvinism; fanaticism; and terrorism."[167] In exchange for business support of UN values, Annan offered political support for free trade and open markets.[168]

The Global Compact became operational in 2000 as a voluntary initiative engaging companies and civil society in promoting UN principles on human rights, labor, environment and, since 2004, anticorruption.[169] Interestingly, the Global Compact initially faced significant resistance from civil society activist groups.[170] Ralph Nader, a long-time advocate of corporate social responsibility, decried the Global Compact as a "misstep" reflecting "the United Nations cozying up to big business" in encouraging corporations to sign up to the compact and "bluewash" their images despite continued wrongdoing.[171]

Nevertheless, the Kofi Annan-led corporate governance initiatives would be robust and influential. In 2003, the UN convened the first Institutional Investor Summit on Climate Risk to discuss the financial implications and economic effects of climate change.[172] The Summit led to the creation of the Investor Network on Climate Risk—a politically active

164. *Id.* at 161–63, 168.

165. *Id.* at 163.

166. Press Release, UN Secretary-General, Secretary-General Proposes Global Compact on Human Rights, Labour, Environment, in Address to World Economic Forum in Davos (Feb. 1, 1999).

167. *Id.*

168. *Id.*

169. John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT'L L. 819, 819–20 (2007) [hereinafter Ruggie, *Business and Human Rights*].

170. William S. Laufer, *Social Accountability and Corporate Greenwashing*, 43 J. BUS. ETHICS 253, 259 (2003).

171. Ralph Nader, *Corporations and the UN: Nike and Others "Bluewash" Their Images*, S.F. BAY GUARDIAN, Sept. 18, 2000. For an interpretation of the Global Compact as an exchange of legitimacy for influence, see Kishanthi Parella, *Compliance as an Exchange of Legitimacy for Influence*, *in* THE OXFORD HANDBOOK OF GLOBAL LEGAL PLURALISM (Paul Schiff Berman ed., 2020).

172. Press Conference, United Nations, Press Conference on Investor Summit on Climate Risk (Nov. 21, 2003).

group of seventy investors representing USD seven trillion in assets.[173] From the outset, the group's call for action included pushing the US Securities and Exchange Commission (SEC) to enforce the disclosure of climate-related financial risks.[174]

In 2004, Kofi Annan wrote to the CEOs of fifty-five leading financial institutions to join a financial sector initiative within the Global Compact.[175] The resulting 2004 report—*Who Cares Wins: Connecting Financial Markets to a Changing World*—coined the concept and acronym of environmental, social and governance (ESG) factors and promoted its diffusion.[176] The choice of new terminology was intentional and designed to highlight how the different areas are interconnected.[177] Unlike the confrontational tone of previous corporate social responsibility (CSR) initiatives, which were assumed to be rooted in moral obligations and harmful to investment performance,[178] the new ESG premise was one of alignment of interests: "[u]ltimately, successful investment depends on a vibrant economy, which depends on a healthy civil society, which is ultimately dependent on a sustainable planet."[179]

The ESG framework sought to mitigate externalities of corporate activities precisely by declining to treat them as externalities. Instead, the report appealed to the "clear self-interest" of investment markets in attending to ESG issues.[180] The report addressed issues that could have a material impact on investment value, but used a broader definition of materiality to encompass longer time-horizons and intangible aspects of company value.[181] Although socially responsible investing (especially focused on divestitures) had a long history, the ESG framing helped

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173. CRAIG MACKENZIE & FRANCISCO ASCUI, PRINCIPLES FOR RESPONSIBLE INV., INVESTOR LEADERSHIP ON CLIMATE CHANGE: AN ANALYSIS OF THE INVESTMENT COMMUNITY'S ROLE ON CLIMATE CHANGE AND SNAPSHOT OF RECENT INVESTOR ACTIVITY 32 (2009).

174. *Id.* at 24.

175. GLOBAL COMPACT, WHO CARES WINS: CONNECTING FINANCIAL MARKETS TO A CHANGING WORLD vii (2004).

176. The report was overseen by the Global Compact and funded by the Swiss government. *Id.* at i.

177. *Id.* at 1–2.

178. Elizabeth Pollman, *Corporate Social Responsibility, ESG, and Compliance*, *in* CAMBRIDGE HANDBOOK OF COMPLIANCE 7 (D. Daniel Sokol & Benjamin van Rooij eds., forthcoming 2020) ("[W]hereas CSR is often framed in terms of social obligations, rooted in ethical or moral concerns, ESG is generally discussed in terms of risk management for firms and investors, individually or systemically.").

179. GLOBAL COMPACT, *supra* note 175, at 3.

180. *Id.* at 3. In the report's words, "[a] better inclusion of environmental, social and corporate governance (ESG) factors in investment decisions will ultimately contribute to more stable and predictable markets, which is in the interest of all market actors." *Id.*

181. *Id.* at 2.

eliminate the traditional separation between socially responsible investment and mainstream investment.[182]

In 2006, the UN Global Compact and the UNEP (United Nations Environment Programme) Finance Initiative launched the Principles of Responsible Investment (PRI) together with a group of the world's largest institutional investors in sixteen countries.[183] As described by Kofi Annan, "[t]hese Principles grew out of the understanding that while finance fuels the global economy, investment decision-making does not sufficiently reflect environmental, social and corporate governance considerations—or put another way, the tenets of sustainable development."[184] The PRI operate as a network of institutional investors committed to following the six principles based on the understanding that "environmental, social, and corporate governance (ESG) issues can affect the performance of investment portfolios."[185] There are currently more than 2,500 institutions as signatories with over USD ninety trillion in assets under management.[186] In 2018, the PRI introduced new requirements for signatories, including an investment policy and accountability mechanisms for implementation.[187]

The corporate governance architecture promoted by Kofi Annan proved to be influential, both through voluntary commitments, the political and lawmaking process, and legal culture. The *Who Cares Wins* report envisioned a role for regulatory change regarding disclosure and accountability on ESG issues, even if the favored regulatory format was "flexible" rather than "prescriptive."[188] The Investor Network on Climate Risk was "instrumental" in petitioning the US SEC to enact its guidance on

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182. Blaine Townsend, *From SRI to ESG: The Origins of Socially Responsible and Sustainable Investing*, 1 J. IMPACT & ESG INVESTING 1 (2020).

183. Press Release, UN Secretary-General, Secretary-General Launches 'Principles for Responsible Investment' Backed by World's Largest Investors (Apr. 27, 2006).

184. *Id.*

185. *What Are the Principles for Responsible Investment?*, PRINCIPLES FOR RESPONSIBLE INV., https://www.unpri.org/pri/what-are-the-principles-for-responsible-investment [https://perma.cc/8V3X-L4MJ] (listing the following principles: "Principle 1: We will incorporate ESG issues into investment analysis and decision-making processes"; "Principle 2: We will be active owners and incorporate ESG issues into our ownership policies and practices"; "Principle 3: We will seek appropriate disclosure on ESG issues by the entities in which we invest"; "Principle 4: We will promote acceptance and implementation of the Principles within the investment industry"; "Principle 5: We will work together to enhance our effectiveness in implementing the Principles"; "Principle 6: We will each report on our activities and progress towards implementing the Principles").

186. UN ENV'T PROGRAMME FIN. INITIATIVE & PRINCIPLES FOR RESPONSIBLE INV., FIDUCIARY DUTY IN THE 21ST CENTURY: FINAL REPORT 8 (2019).

187. *Id.* at 8.

188. GLOBAL COMPACT, *supra* note 175, at i, 32.

climate change disclosure in 2010 by identifying three existing items in Regulation S-K that could require disclosure relating to climate change.[189]

In addition to promoting regulatory reforms, UN institutions have also pushed for broader interpretation of existing law to accommodate the pursuit of ESG issues. In 2004, the PRI, the UNEP Finance Initiative (UNEP FI), and UN partners identified the misinterpretation of fiduciary duties of asset managers as a key obstacle to the ESG agenda.[190] In 2005, the Asset Management Working Group of UNEP FI commissioned a report from the law firm Freshfields Bruckhaus Deringer on whether legal systems around the world constrained asset managers from attending to ESG considerations in investment decisions.[191] The conclusion was that "decision-makers are required to have regard (at some level) to ESG considerations in every decision they make" given the "body of credible evidence demonstrating that such considerations often have a role to play in the proper analysis of investment *value*."[192] The Freshfields report came to be hailed as "[t]he single most effective document for promoting the integration of environmental, social and governance (ESG) issues into institutional investment"[193] and "its conclusions are nearly universally accepted by proponents of the SRI movement."[194]

In 2016, the PRI and UNEP FI launched a new project to "end the debate" on whether fiduciary duty is a legitimate barrier to the integration of ESG issues into investment practices and decision-making.[195] The resulting 2019 report declares that the fiduciary duties of investors *require* them to: (1) incorporate environmental, social and governance (ESG) issues into investment analysis and decision-making processes, consistent with their investment time horizons; (ii) encourage high standards of ESG performance in the companies or other entities in which they invest; (iii) understand and incorporate beneficiaries' and savers' sustainability-related

189. Mindy S. Lubber, *SEC Climate Risk Disclosure Effort Under Serious Attack from Congress*, CERES (July 19, 2016), https://www.ceres.org/news-center/blog/sec-climate-risk-disclosure-effort-under-serious-attack-congress [https://perma.cc/H52Q-8NTP]; *see also* Petition for Interpretative Guidance on Climate Risk Disclosure, Sep. 18, 2007, https://www.sec.gov/rules/petitions/2007/petn4-547.pdf [https://perma.cc/QZ87-45YY].

190. UN ENV'T PROGRAMME FIN. INITIATIVE & PRINCIPLES FOR RESPONSIBLE INV., *supra* note 186, at 9.

191. FRESHFIELDS BRUCKHAUS DERINGER, A LEGAL FRAMEWORK FOR THE INTEGRATION OF ENVIRONMENTAL, SOCIAL AND GOVERNANCE ISSUES INTO INSTITUTIONAL INVESTMENT 10–11 (2005).

192. *Id.* at 10–11.

193. UN ENV'T PROGRAMME FIN. INITIATIVE, FIDUCIARY RESPONSIBILITY: LEGAL AND PRACTICAL ASPECTS OF INTEGRATING ENVIRONMENTAL, SOCIAL AND GOVERNANCE ISSUES INTO INSTITUTIONAL INVESTMENT 13 (2009).

194. Joakim Sandberg, *Socially Responsible Investment and Fiduciary Duty: Putting the Freshfields Report into Perspective*, 101 J. BUS. ETHICS 143, 144 (2011).

195. UN ENV'T PROGRAMME FIN. INITIATIVE & PRINCIPLES FOR RESPONSIBLE INV., *supra* note 186, at 52.

preferences, regardless of whether these preferences are financially material; (iv) support the stability and resilience of the financial system; and (v) report on how they have implemented these commitments.[196]

The project's initiatives resulted in the publication of a Global Statement on Investor Obligations and Duties with over one hundred signatories from fifty countries; roadmaps for the policy changes required to achieve full integration of ESG issues in eleven countries; and engagement with the European Commission and its High Level Expert Group on Sustainable Finance to help formulate a clarification to investor duties in the EU.[197] The report celebrates how "[p]olicy and regulatory frameworks are changing to require ESG incorporation," boasting that there are globally over 730 hard and soft law policy revisions across 500 policy instruments that support, encourage, or require concern for ESG issues.[198] It warns that "[i]nvestors that fail to incorporate ESG issues are failing their fiduciary duties and are increasingly likely to be subject to legal challenge."[199]

The UN initiatives have played a role in the hardening of disclosure and consideration of ESG factors over time. The recitals of a 2014 European Union Directive requiring disclosure of nonfinancial information explicitly mentions the UN Global Compact and the UN "Protect, Respect and Remedy" Framework (discussed below) as possible references for companies.[200] New statutory requirements in the UK now explicitly recognize pension schemes' duties to consider financially material ESG factors, including climate change.[201] The new UK Stewardship Code has expanded the concept of stewardship to forcefully embrace ESG considerations, including explicitly climate change.[202] The 2019 EU Council regulation on sustainability-related disclosure specifically refers to the UN-supported PRI.[203] Meanwhile, various groups of institutional investors, many of which with UN affiliations, continue to push governments worldwide to strengthen their disclosure requirements on

196. *Id.* at 8.

197. *Id.* at 52.

198. *Id.* at 8.

199. *Id.*

200. Directive 2014/95/EU, of the European Parliament and of the Council of 22 Oct. 2014 on Amending Directive 2013/34/EU as Regards Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups, 2014 O.J. (L 330) 2.

201. NORTON ROSE FULBRIGHT, UK PENSIONS BRIEFING: TRUSTEE INVESTMENT DECISIONS AND THE ROLE OF ESG: A PRACTICAL GUIDE TO THE NEXT STEPS 3 (2020).

202. Paul L. Davies, *The UK Stewardship Code 2010-2020: From Saving the Company to Saving the Planet?* 8 (Eur. Corp. Governance Inst., Working Paper No. 506, 2020) ("The aim is clearly to mainstream ESG factors into stewardship, not simply to present them as an add-on.").

203. Regulation 2018/0179 of the European Parliament and of the Council of 23 Oct. 2019 on Sustainability-Related Disclosures in the Financial Services Sector, 2019 O.J. (C 62) 13.

climate change.[204] The UN Global Compact has also sought to harness support from elite lawyers through the Guide for General Counsel on Corporate Sustainability.[205]

The rise of ESG prompted by UN initiatives points to the growing pressure of ICL on US law, whose role has shifted from leader to laggard in this emerging dimension of corporate governance. The SEC has until now resisted enacting an ESG disclosure framework, though pressure continues to mount from investors and international organizations[206]—a topic that will be further explored in connection with the discussion of IOSCO below.

Beyond ESG, the United Nations has also made great strides in the promotion of human rights considerations in corporate governance through the UN Guiding Principles on Business and Human Rights, approved in final form in 2011.[207] Although efforts in the area date back to the failed initiative of a draft Code of Conduct on Transnational Corporations in the 1970s, the immediate predecessor of the Guiding Principles was a treaty-like document developed by a group of experts with significant input from the NGO sector called "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights."[208] Aiming to be binding, the Norms imposed on companies the obligation to promote, respect, and protect human rights in their sphere of influence, but failed to secure approval by the UN Commission on Human Rights following significant opposition from governments and the corporate sector.[209]

At the request of the Commission, Kofi Annan appointed a Special Representative to the Secretary-General—Harvard Kennedy School professor John Ruggie—to "identify and clarify" international standards

204. *In Unprecedented Response, Investors Call on SEC to Improve Reporting of Climate Risks and Other Sustainability Challenges*, CERES (July 20, 2016), https://www.ceres.org/news-center/pressreleases/unprecedented-response-investors-call-sec-improve-reporting-climate [https://perma.cc/3NAE-VXBK]; *Letter from Global Investors to Governments of the G7 and G20 Nations*, PRINCIPLES FOR RESPONSIBLE INVS. (May 8, 2017), https://www.unpri.org/letter-from-global-investors-to-governments-of-the-g7-and-g20-nations/379.article [https://perma.cc/EH8S-LBFV].

205. GLOBAL COMPACT & LINKLATERS LLP, GUIDE FOR GENERAL COUNSEL ON CORPORATE SUSTAINABILITY (2015); *see also* Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401, 1430 (2020) (noting companies' adoption of sustainability initiatives at the urging of in-house lawyers).

206. Allison Herren Lee, *"Modernizing" Regulation S-K: Ignoring the Elephant in the Room*, SEC (Jan. 30, 2020), https://www.sec.gov/news/public-statement/lee-mda-2020-01-30 [https://perma.cc/9TBM-JFKF].

207. UN HUM. RTS. OFF. OF THE HIGH COMM'R, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: IMPLEMENTING THE UNITED NATIONS "PROTECT, RESPECT AND REMEDY" FRAMEWORK iv (2011).

208. Bair, *supra* note 163, at 160.

209. *Id.* at 164, 171 (describing criticisms of the norms as an attempt to "privatize" human rights, including the statement by the International Chamber of Commerce that the Norms would "undermine human rights, the business sector of society, and the right to development").

and policies in relation to business and human rights and propose "views and recommendations."[210] Ruggie described his appointment to "an unpaid position, lacking any independent authority, and initially with no budget or staff" as "soft power at its softest."[211] Ruggie decided to abandon the binding program of the Norms, which he viewed as requiring a major overhaul of domestic corporate laws to replace the shareholder model that prevails in many jurisdictions in favor of a broad stakeholder model.[212] Instead, he decided to build a new "conceptual and normative foundation."[213]

Aware of "the (powerful) systemic constraints and (modest) opportunities identified in this literature [on global governance],"[214] Ruggie echoed Kofi Annan's Davos speech in framing the problem of business and human rights as resulting from "the governance gaps created by globalization—between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences."[215] Published in 2008, the resulting Ruggie Report was premised on three pillars: (i) the state's duty to protect human rights; (ii) corporations' responsibility to respect human rights; and (iii) access to remedy for human rights violations.[216]

The rise of human rights in ICL did not go unnoticed by the US corporate governance establishment. In response to the Ruggie Report, the prominent New York law firm Wachtell, Lipton, Rosen & Katz released a memorandum to clients warning of the Report's "significant, potentially harmful implications for global business and for meaningful accountability in various social actors' duties to fulfill the promises of international human rights instruments," thus requiring "close scrutiny by the business community."[217] Given the perceived risk that this criticism could unravel support for the Report, non-governmental organization Oxfam commissioned a pro bono response from the competing law firm of Weil,

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210. Ruggie, *Business and Human Rights*, *supra* note 169, at 821.

211. John Gerard Ruggie, *Global Governance and "New Governance Theory": Lessons from Business and Human Rights*, 20 GLOB. GOVERNANCE 5, 7 (2014) [hereinafter Ruggie, *Global Governance*].

212. JOHN GERARD RUGGIE, JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS 53 (2013).

213. Ruggie, *Global Governance*, *supra* note 211, at 7.

214. *Id.* at 6.

215. John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Protect, Respect and Remedy: A Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5, at 3 (Apr. 7, 2008).

216. *Id.* at 1.

217. Memorandum from Martin Lipton & Kevin S. Schwartz, Wachtell, Lipton, Rosen & Katz, A United Nations Proposal Defining Corporate Social Responsibility for Human Rights (May 1, 2008), https://corpgov.law.harvard.edu/wp-content/uploads/2008/05/a-united-nations-proposal-defining-corporate-social-responsibility-for-human-rights.pdf [https://perma.cc/VPK5-59LB].

Gotshal & Manges through its corporate governance partner Ira Millstein. The Weil memorandum argued that the Report did not create new legal duties, could benefit US firms by leveling the playing field, and reflected a sound business case for safeguarding human rights.[218] It concluded that "the basic concepts embodied in the Report are sound and should be supported by the business community in the United States."[219]

The battle of legal memoranda between titans of US corporate governance highlighted the role of international law firms' pro bono engagement in shaping ICL. Learning from the experience, Ruggie launched a new "Corporate Law Tools" project, which involved engaging more than twenty corporate law firms around the globe to examine how the corporate and securities laws of thirty-nine jurisdictions encourage or impede corporations' respect for human rights.[220] The project not only helped inform elements of the Guiding Principles, but also operated to "draw the subject of corporate and securities laws more centrally into the business and human rights debate" and to engage the corporate law firm's community and gather publicity and support for the project.[221] The effort was highly successful. Wachtell Lipton came around and offered lavish praise of the final version of the Guiding Principles,[222] while several law firms and the American Bar Association issued enthusiastic endorsements, together with the OECD, the European Commission, and the American Chamber of Commerce.[223]

The Human Rights Council formally endorsed the Guiding Principles in 2011. They provide that, in meeting their duty to protect, states should ensure that their corporate laws do not constrain, but enable business respect for human rights.[224] As of 2020, the website of the Business & Human Rights Resource Centre included the human rights policies of over three

218. Memorandum from Ira M. Millstein, E. Norman Veasey, Harvey Goldschmid, Steven Alan Reiss, Holly J. Gregory & Ashley R. Altschuler, Weil, Gotshal & Manges LLP, Corporate Social Responsibility for Human Rights: Comments on the UN Special Representative's Report Entitled "Protect, Respect and Remedy: A Framework for Business and Human Rights" (May 22, 2008), https://media.business-humanrights.org/media/documents/files/reports-and-materials/Weil-Gotshal-legal-commentary-on-Ruggie-report-22-May-2008.pdf [https://perma.cc/98RN-4MA8].

219. *Id.*

220. RUGGIE, *supra* note 212, at 133.

221. *Id.* at 134–35.

222. Memorandum from Martin Lipton & Kevin S. Schwartz, Wachtell, Lipton, Rosen & Katz, Guiding Corporate Social Responsibility: A United Nations Blueprint to Promote Human Rights (Nov. 24, 2010), https://media.business-humanrights.org/media/documents/58b1011ed6a8039371ce665fc7c335399f1777d3.pdf [https://perma.cc/AA85-JZ8B] (noting that the report "marries aspirations and practicality" and "will be widely applauded").

223. RUGGIE, *supra* note 212, at 151.

224. UN HUM. RTS. OFF. OF THE HIGH COMM'R, *supra* note 207, at 5.

hundred and fifty companies worldwide.[225] The Guiding Principles are now recurrently cited in US shareholder proposals and in company responses.[226] Nearly twenty percent of Standard & Poor's fifteen hundred companies disclose human rights and environmental policies, despite the absence of such a requirement by any regulator or listing rules[227]—a finding which strongly suggests the influence of ICL. Moreover, UN initiatives on business and human rights have not ended. A legally binding instrument on the topic is currently under consideration, with the goal of requiring, among other things, that states impose liability on corporations for failing to prevent certain human rights violations caused by subsidiaries or contractual counterparties.[228]

By working closely with corporations and institutional investors and promoting dedicated networks, the UN played an important role in promoting the new wave of "shareholder-driven stakeholderism."[229] In 2019, the Business Roundtable generated significant controversy by publishing a new statement affirming the commitment of US business corporations to various stakeholders beyond shareholders.[230] While this development was hailed as groundbreaking, nearly forty percent of the companies subscribing to the Business Roundtable's statement had previously committed to consider stakeholder interests under various UN-sponsored initiatives such as the Global Compact, the Principles for Responsible Investment, or the Guiding Principles for Business and Human Rights.[231]

On another front, since 2014, the United Nations Commission on International Trade Law (UNCITRAL)—which has previously promoted

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225. *Company Policy Statements on Human Rights*, BUS. & HUM. RTS. RES. CTR., https://www.business-humanrights.org/en/company-policy-statements-on-human-rights [https://perma.cc/V586-QV6A].

226. *See*, *e.g.*, Alphabet Inc., Proxy Statement (Schedule 14A) (Apr. 24, 2020); Amazon.com, Inc., Proxy Statement (Schedule 14A) (May 27, 2020); The Procter & Gamble Co., Proxy Statement (Schedule 14A) (Sept. 12, 2017).

227. Yaron Nili & Cathy Hwang, *Shadow Governance*, 108 CAL. L. REV. 1097, 1116 (2020).

228. OPEN-ENDED INTERGOVERNMENTAL WORKING GROUP CHAIRMANSHIP, LEGALLY BINDING INSTRUMENT TO REGULATE, IN INTERNATIONAL HUMAN RIGHTS LAW, THE ACTIVITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES (July 16, 2019) https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf [https://perma.cc/VD53-TRL7].

229. Cathy Hwang & Yaron Nili, *Shareholder-Driven Stakeholderism*, 2020 U. CHI. L. REV. ONLINE 1 (2020).

230. *Statement on the Purpose of a Corporation*, BUS. ROUNDTABLE (Aug. 19, 2019), https://system.businessroundtable.org/app/uploads/sites/5/2021/02/BRT-Statement-on-the-Purpose-of-a-Corporation-Feburary-2021-compressed.pdf [https://perma.cc/39HC-GZLB].

231. Author's calculation based on list of signatories of Global Compact and the Principles for Responsible Investment. Eight subscribers of the Business Roundtable Statement subsequently adhered to the Global Compact or the PRI. *See Our Participants*, UN GLOB. COMPACT, https://www.unglobalcompact.org/what-is-gc/participants [https://perma.cc/Y953-3DWR]; *Signatories*, PRINCIPLES FOR RESPONSIBLE INV., https://www.unpri.org/signatories [https://perma.cc/KZ6Y-XTHD].

the celebrated Vienna Convention for the International Sale of Goods and a Model Law on Cross-Border Insolvency—has come to focus on corporate law as well. Building on the experience of Colombian scholar and then-UNCITRAL chairman Francisco Reyes Villamizar in implementing a new simplified corporation in Colombia, the initiative has focused on "the facilitation of simplified business incorporation and registration" to promote the formalization and financing of micro-businesses.[232] The relevant working group has begun examining a legislative guide tentatively called the "UNCITRAL Limited Liability Organization."[233]

Since then, Mr. Villamizar's policy entrepreneurship has also helped promote the adoption of a Model Law on the Simplified Corporation by the Organization of American States (OAS) in 2017, which aims to extend "the benefits of incorporation to many small- and medium-sized business enterprises (MSMEs) without the complexity and cost that is frequently required under existing domestic legislation in the Americas."[234] The OAS initiative has since prompted reform efforts in Uruguay, Ecuador, and Peru.[235] The OAS experience in company law harmonization followed the precedent of OHADA (*Organisation pour L'Harmonisation en Afrique du Droit des Affaires*), which in 1997 enacted a uniform law on business companies to preempt the national laws of all seventeen member states.[236]

III. INTERNATIONAL STANDARD SETTERS IN CORPORATE LAW

Formal international organizations constituted by international treaties do not have a monopoly in the formulation of ICL. Private standard setters also play an important role. This section will briefly summarize the contributions of the International Organization of Securities Commissions (IOSCO), the Basel Committee on Banking Supervision (Basel), and the Financial Stability Board to the emerging field of ICL. The exposition that

232. Corrado Malberti, *The Reduction of the Legal Obstacles Faced by MSMEs in the Footsteps of the Previous Attempts at Harmonizing Company Law: Will UNCITRAL Reinvent the Role of Harmonization in Company Law?*, *in* 4 MODERNIZING INTERNATIONAL TRADE LAW TO SUPPORT INNOVATION AND SUSTAINABLE DEVELOPMENT: PROCEEDINGS OF THE CONGRESS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW 43 (2017). For a discussion of UNCITRAL initiatives in this area, see *id.* at 41–49.

233. *Id.* at 44, 46 (describing the UNCITRAL Limited Liability Organization as "the first global attempt at harmonizing company law").

234. *Model Law on the Simplified Corporation*, OAS (July 2017), http://www.oas.org/en/sla/dil/newsletter_Model_Law_Simplified_Corporation_Report_Jul-2017.html [https://perma.cc/M3N4-W2F7].

235. *Recent Advances in the Law for the Simplified Corporation*, OAS (May 2019), http://www.oas.org/en/sla/dil/newsletter_DDI_Recent_Advances_Law_Simplified_Corporation_May-2019.html [https://perma.cc/9ETM-L4BS].

236. *History of OHADA*, OHADA, https://www.ohada.org/en/history-of-ohada/ [https://perma.cc/W753-W6ZJ].

follows is again merely illustrative. Other standard setters such as ISO, S&P, the Equator Principles, and the International Corporate Governance Network (ICGN) are also influential and highly intertwined with the ICL of international organizations.[237]

A. International Organization of Securities Commissions (IOSCO)

IOSCO is a non-profit organization constituted in 1983 to enhance coordination among securities regulators in North and South America.[238] Since then, IOSCO has witnessed an expansion of its membership and a transformation of its role from collaboration and coordination in the Americas to global standard setting.[239] It now includes 95% of securities regulators worldwide, making it a "United Nations of securities regulation."[240]

In a pattern that should be familiar by now, IOSCO's standard setting on corporate governance began in response to the Asian financial crisis.[241] First published at the height of the crisis in 1998, the IOSCO Objectives and Principles of Securities Regulation were revised in 2010 following the global financial crisis.[242] In shaping a public corporation's disclosure obligations and governance structure, securities regulators contribute to corporate law from a functional perspective.[243] IOSCO often serves as a source of inspiration and legitimacy for local regulatory changes, especially in developing countries.[244] The controversy surrounding the strengthening of executive compensation disclosure in Brazil demonstrates this dynamic.

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237. *See*, *e.g.*, Dionysia Katelouzou & Mathias Siems, *The Global Diffusion of Stewardship Codes* 19 (Eur. Corp. Governance Inst., Working Paper No. 526, 2020) (finding significant influence of the ICGN Code on the stewardship codes enacted in Malaysia and Kenya).

238. *About IOSCO*, INT'L ORG. OF SEC. COMM'RS, https://www.iosco.org/about/?subsection=about_iosco [https://perma.cc/3EZ6-5F4W].

239. CALLY JORDAN, CTR. FOR INT'L GOVERNANCE INNOVATION, THE NEW INTERNATIONALISM? IOSCO, INTERNATIONAL STANDARDS AND CAPITAL MARKETS REGULATION 2–3 (2018).

240. PIERRE-HENRI CONAC, EUROPEAN PARLIAMENT, THE EUROPEAN UNION'S ROLE IN INTERNATIONAL ECONOMIC FORA PAPER 6: THE IOSCO 7 (2015), https://www.europarl.europa.eu/RegData/etudes/STUD/2015/542195/IPOL_STU(2015)542195_EN.pdf [https://perma.cc/FKL2-NN84].

241. JORDAN, *supra* note 239, at 2.

242. *Id.*

243. John Armour, Henry Hansmann, Reinier Kraakman & Mariana Pargendler, *What Is Corporate Law?*, *in* THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 16 (3d ed., 2017) (noting that, through their effects on corporate governance through disclosure mandates, takeovers, and elections, securities regulation is "necessarily part of the overall structure of corporate law").

244. *See* Amir N. Licht, *Games Commissions Play: 2x2 Games of International Securities Regulation*, 24 YALE J. INT'L L. 61, 99 (1999) (noting that IOSCO may facilitate international cooperation by allowing countries to "save face" domestically, as "it may be considered more respectable to yield to IOSCO than to the SEC").

When Brazil's Securities Commission (CVM) enacted broader disclosure requirements for executive compensation in 2009, an association of executives filed suit arguing that the new requirements were illegal and unconstitutional in view of fundamental rights to privacy and security.[245] To justify the reasonableness of the requirements before the judiciary, CVM argued that the new disclosure rules represented an international commitment it had assumed before IOSCO.[246] When the Federal Court of Appeals upheld the new regulation, it cited the "extreme relevance of credibility of capital markets, whose rules must be integrated with those already existing in the international market, it being implausible to permit that possible cultural differences justify the lack of transparency."[247] This is only one example of the influence of IOSCO standards, whose "ubiquity is impressive" around the world, in part due to the "power of persuasion of international financial institutions," such as the IMF and the World Bank through their Financial Sector Assessment Program (FSAP).[248]

While IOSCO's influence on the expansion of executive compensation disclosure points to convergence toward Anglo-American investor protection, its more recent initiatives on ESG have generated tension with US regulators. Broader membership including Asian and other developing countries has shifted the balance of power and priorities at IOSCO.[249] In early 2019, IOSCO issued a statement, without the participation of the US SEC, "setting out the importance for issuers of considering the inclusion of environmental, social and governance (*ESG*) matters when disclosing information material to investors' decisions."[250] While US influence on

245. Gilson, Hansmann & Pargendler, *supra* note 137, at 534.

246. Viviane Muller Prado & Luiza Saito Sampaio, *Enforcing International Financial Standards in Brazil: Limits and Possibilities for Adoption of IOSCO Principles* 25 (São Paulo Law School of Fundação Getulio Vargas, DIREITO GV Research Paper Series, Paper No. 95, 2014). Following the global financial crisis, IOSCO published new "Principles for Periodic Disclosure by Listed Entities" recommending the "[q]uantitative information on compensation, broken down as appropriate to indicate incentives underlying the compensation, together with any necessary qualitative information." TECH. COMM., INT'L ORG. OF SEC. COMM'RS, PRINCIPLES FOR PERIODIC DISCLOSURE BY LISTED ENTITIES 12 (2010).

247. TRF-2 Apelação Cível No. 0002888-21.2010.4.02.5101, Relator Des. Federal Guilherme Diefenthaeler (decided on May 23, 2018).

248. JORDAN, *supra* note 239, at 10. The FSAP was created following the Asian crisis to assess the stability and soundness of the financial sector and underwent significant changes following the financial crisis. *See Factsheet: Financial Sector Assessment Program (FSAP)*, INT'L MONETARY FUND (June 3, 2019), https://www.imf.org/en/About/Factsheets/Sheets/2016/08/01/16/14/Financial-Sector-Assessment-Program [https://perma.cc/H7UF-ZCBP].

249. JORDAN, *supra* note 239, at 2–3.

250. *Statement on Disclosure of ESG Matters by Issuers*, INT'L ORG. OF SEC. COMM'RS 1 (Jan. 18, 2019), https://www.iosco.org/library/pubdocs/pdf/IOSCOPD619.pdf [https://perma.cc/M2U6-TSAF].

IOSCO in the 1990s was described in terms of "hegemonic coercion,"[251] by the late 2010s it saw itself on the receiving end of international pressure.

In her speech decrying the focus on ESG as "scarlet letters," US SEC Commissioner Hester M. Pierce refers to efforts by the United Nations, the International Finance Corporation as part of the World Bank, and IOSCO in promoting ESG disclosure.[252] US resentment of IOSCO pressure is not a novel phenomenon. In 2013, US SEC Commissioner Daniel Gallagher had decried the "coercive" nature of regulatory harmonization brought about by the G-20, the Financial Stability Board, and IOSCO.[253]

B. *Basel Committee*

The international accords on capital standards of the Basel Committee on Banking Supervision of the Bank for International Settlements (BIS), comprised of representatives of the central banks and supervisory authorities initially from various significant jurisdictions, represent "one of the most successful international regulatory initiatives ever attempted."[254] Although the Basel accords focus primarily on capital requirements, the Basel Committee also began issuing corporate governance standards following the Asian financial crisis. In 1999, the Basel Committee published its first corporate governance guidance, entitled *Enhancing Corporate Governance for Banking Organisations*.[255] It aimed to reinforce the importance of the recently published OECD principles and raise new issues, "in the belief that it will assist supervisors [worldwide] in promoting the adoption of sound corporate governance practices by banking organisations in their countries."[256] In its words, "sound corporate governance makes the work of supervisors infinitely easier."[257]

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251. Licht, *supra* note 244, at 98–99 (describing the US leading role in securities regulation standard setting in the 1990s as "the largest, most efficient, and most demanding market in the world").

252. Hester M. Pierce, Comm'r, Sec. & Exch. Comm'n, Scarlet Letters: Remarks before the American Enterprise Institute (June 18, 2019).

253. Daniel M. Gallagher, Comm'r, Sec. & Exch. Comm'n, The Impacts of Post-Crisis Global Regulatory Reforms on Financial Markets (Dec. 10, 2013) (denouncing how these organizations "have attempted to arrogate to themselves regulatory powers that properly reside with sovereign governments").

254. Michael S. Barr & Geoffrey P. Miller, *Global Administrative Law: The View from Basel*, 17 EUR. J. INT'L L. 15, 17 (2006). Basel Committee membership was initially limited to supervisors from G-10 countries but was expanded in 2009 to include representatives from twenty-seven jurisdictions. Press Release, Bank for Int'l Settlements, Basel Committee Broadens Its Membership (June 10, 2009), https://www.bis.org/press/p090610.htm [https://perma.cc/W6QP-5P6A].

255. BASEL COMM. ON BANKING SUPERVISION, ENHANCING CORPORATE GOVERNANCE FOR BANKING ORGANISATIONS 2 (1999).

256. *Id.* at 2.

257. *Id.* at 1.

Basel's guidance on corporate governance has been revised in 2006 (following the new OECD Principles of Corporate Governance),[258] in 2010 (following the global financial crisis),[259] and in 2015 (following the Financial Stability Board's recommendations)[260]—each time to make the recommendations more detailed, encompassing, and prescriptive.[261] From the outset, Basel's guidance on corporate governance was designed to inspire regulators and banks in member and non-member states alike,[262] even to the point of contemplating "legal change."[263] Top international law firms have likewise covered changes in Basel's corporate governance standards and recommended that their clients benchmark their practices against Basel principles.[264]

Scholars of financial regulation have described a shift from an "assimilation" theory of bank governance, which assumed that banks should follow the same governance arrangements as non-financial firms to minimize agency costs, to a "bank exceptionalism" theory of bank governance, which posits that the systemic risk posed by banks warrants distinct governance arrangements.[265] Basel's 1999 framework was a precursor in gradually moving away from bank assimilation to exceptionalism in corporate governance. It recognized that "[s]ound corporate governance considers the interests of all stakeholders, including depositors, whose interests may not always be recognised," even as it conventionally described the board's duty of loyalty as running "to the corporation and its shareholders."[266] Basel's 1999 standards were impactful

258. BASEL COMM. ON BANKING SUPERVISION, ENHANCING CORPORATE GOVERNANCE FOR BANKING ORGANISATIONS (2006).

259. BASEL COMM. ON BANKING SUPERVISION, PRINCIPLES FOR ENHANCING CORPORATE GOVERNANCE (2010).

260. BASEL COMM. ON BANKING SUPERVISION, GUIDELINES: CORPORATE GOVERNANCE PRINCIPLES FOR BANKS (2015).

261. Basel's recommendations evolved from eleven pages in 1999 to forty pages in 2015. *Compare* BASEL COMM. ON BANKING SUPERVISION, *supra* note 255, *with* BASEL COMM. ON BANKING SUPERVISION, *supra* note 260. The changes to the document's name also point to its increasing ambition and status.

262. *See*, *e.g.*, BASEL COMM. ON BANKING SUPERVISION, *supra* note 258, at 2 ("The principles set forth in this paper are applicable regardless of whether or not a country chooses to adopt the Basel II Framework").

263. BASEL COMMITTEE ON BANKING SUPERVISION, *supra* note 260, at 5.

264. *See*, *e.g.*, GREGORY J. LYONS, PAUL M. RODEL, ERIC T. JUERGENS, CAROLINA NOVOGROD, DAVID L. PORTILLA, SAMUEL E. PROCTOR & SATISH M. KINI, DEBEVOISE & PLIMPTON, CLIENT UPDATE: BASEL COMMITTEE 2015 CORPORATE GOVERNANCE PRINCIPLES (Aug. 11, 2015).

265. ARMOUR ET AL., *supra* note 25, at 371.

266. BASEL COMM. ON BANKING SUPERVISION, *supra* note 255, at 11, 16.

as setting off a wave of financial-industry specific corporate governance codes in various countries in the following decades.[267]

By 2015, the shift toward bank exceptionalism—or the retooling of corporate law to address systemic risk considerations—was complete. The latest Basel Guidelines specify that "[t]he primary objective of corporate governance should be safeguarding stakeholders' interest in conformity with public interest on a sustainable basis," and that "[a]mong stakeholders, particularly with respect to retail banks, shareholders' interest would be secondary to depositors' interest."[268] It defines the duty of loyalty as "the duty of board members to act in good faith in the interests of the company," no longer mentioning shareholders.[269] It also provides that "[i]n discharging these responsibilities, the board should take into account the legitimate interests of depositors, shareholders and other relevant stakeholders."[270]

Beyond the board's role and duties, Basel principles cover a number of corporate law matters, such as board structure, board committees, required disclosure, related-party transactions, the role of a chief risk officer, as well as special rules on the governance of group structures, including a unique focus—present since the 2006 guidelines but unparalleled in national laws—on discouraging complex and opaque structures that may hinder effective supervision.[271] As previously noted, Basel's corporate governance standards are now also influenced by the Financial Stability Board, of which Basel is a member and to which I now turn.

C. Financial Stability Board

The Financial Stability Board (FSB) is an international body that monitors and makes recommendations about the global financial system.[272] Like the Basel accords, concerns about national competitiveness and a level playing field provided a powerful impetus for the creation of the FSB in the aftermath of the global financial crisis, a time in which the United States

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267. Christoph Van der Elst, *Corporate Governance and Banks: How Justified Is the Match?* 5 (Eur. Corp. Governance Inst., Working Paper No. 284, 2015) (citing Basel's 1999 initiative as "the start of the industry specific corporate governance development," though many such codes, unlike Basel's, do not sufficiently specify the protection of depositors).

268. BASEL COMMI. ON BANKING SUPERVISION, *supra* note 260, at 3.

269. *Id.* at 1.

270. *Id.* at 9.

271. *Id.* at 22–24 ("Principle 5: Governance of group structures - In a group structure, the board of the parent company has the overall responsibility for the group and for ensuring the establishment and operation of a clear governance framework appropriate to the structure, business and risks of the group and its entities. The board and senior management should know and understand the bank group's organisational structure and the risks that it poses.").

272. *See About the FSB*, FIN. STABILITY BD., https://www.fsb.org/about/ [https://perma.cc/EUN7-BR6V].

faced significant political pressure for stricter regulatory standards.[273] In this view, the FSB could help ensure that the new strictures did not place US banks at a competitive advantage in global markets.

The G20 established the FSB in 2009 as a successor to the Financial Stability Forum (created by the G7 in 1999) with larger membership and a more solid organizational footing.[274] Membership in the FSB is composed of standard setters such as IOSCO and the Basel Committee, central bankers and securities commissioners from G20 countries, as well as their finance ministers.[275] In contemplating membership of the latter as representatives of elected politicians, the FSB has a strong political dimension that sets it apart from other international standard setters.[276]

As Treasury Secretary Tim Geithner argued at the FSB's inception,

> the basic strategy is a simple strategy. You get countries to agree to raise the standards, to commit to a level playing field, and then you have a huge interest in all countries in holding each other accountable to hold their institutions to that same standard, because they all know that if anybody tries to compete by lowering those standards, it would be adverse to their interests.[277]

The FSB's charter requires compliance with international financial standards by member jurisdictions; mechanisms of enforcement include both country reviews and thematic reviews. Moreover, since 2010, FSB members must also undergo periodic FSAP assessments by the IMF and World Bank as part of the Report on the Observance of Standards and Codes (ROSC).[278]

FSB has taken an interest in the corporate governance of financial institutions from the outset. Its FSB Principles for Sound Compensation Practices of 2009 directed the Basel Committee and IOSCO to "undertake all necessary measures to support and address prompt implementation of these standards."[279] Cooperation in this area was regarded as critical to avoid negative externalities of systemic risk and the risk that one-sided country reforms could lead to competitiveness concerns in the market for

273. Eric Helleiner, *What Role for the New Financial Stability Board? The Politics of International Standards After the Crisis*, 1 GLOB. POL'Y 282, 286 (2010).

274. *History of the FSB*, FIN. STABILITY BD., https://www.fsb.org/about/history-of-the-fsb/ [https://perma.cc/7Q9B-MPUR].

275. *Members of the Financial Stability Board*, FIN. STABILITY BD. (Mar. 16, 2021), https://www.fsb.org/wp-content/uploads/fsb-plenary-members.pdf [https://perma.cc/PCD4-6J9Z].

276. Stavros Gadinis, *The Financial Stability Board: The New Politics of International Financial Regulation*, 48 TEX. INT'L L. J. 157, 159 (2013).

277. Press Briefing by Treasury Secretary Tim Geithner on the G20 Meeting Pittsburgh Convention Center, U.S. Dep't of Treasury (Sept. 24, 2009), https://www.treasury.gov/press-center/press-releases/Pages/tg405.aspx [https://perma.cc/4TTY-Q6HG].

278. Helleiner, *supra* note 273, at 284.

279. FIN. STABILITY BD., FSB PRINCIPLES FOR SOUND COMPENSATION PRACTICES: IMPLEMENTATION STANDARDS 1 (2009).

managerial talent.[280] The Principles covered the role of the board in aligning compensation with prudent risk taking and comprehensive disclosure to facilitate stakeholder engagement. The EU soon transformed the international standards into rigid and detailed prescriptions in its directives, while the United States retained a more flexible approach.[281]

The FSB prioritized compensation as the object of its first thematic review. The recommendations range from improved disclosure related to governance arrangements and considering requiring shareholders to approve compensation policies and packages, to the adoption and disclosure of codes of ethics and conduct.[282] The thematic reports describe implementation failures and the various legal reforms by member countries to address the principles. The 2019 report, for instance, took stock of the new corporate governance and compensation structures required by the Brazilian Central Bank, the Bank of Italy, and the Bank of Russia.[283]

In 2015, after being asked by the G20 to consider climate risk, the FSB created the industry-led Task Force on Climate Related Disclosures (TFCD) to develop recommendations on climate-change-related disclosure by companies.[284] The TFCD recommendations, published in 2017, have been influential among companies, asset managers, and regulators worldwide, with most jurisdictions with the largest stock markets having responded with climate change disclosure initiatives.[285] The IMF and the United Nation's special envoy for climate change and finance has urged the mandatory implementation of TCFD reporting standards, which have been influential across several jurisdictions.[286]

D. International Agreements

Finally, international economic agreements are also an emerging source of ICL. In 2019, the Economic Partnership Agreement (EPA) between

280. Guido Ferrarini & Maria Cristina Ungureanu, *Lost in Implementation: The Rise and Value of the FSB Principles for Sound Compensation Practices at Financial Institutions* 3 (Int'l Ctr. for Fin. Regul., Working Paper, 2011), https://www.ssrn.com/abstract=1753657 [https://perma.cc/AN52-3AZR].

281. *Id.*

282. FIN. STABILITY BD., THEMATIC REVIEW ON CORPORATE GOVERNANCE (2017), https://www.fsb.org/wp-content/uploads/Thematic-Review-on-Corporate-Governance.pdf [https://perma.cc/EB94-FSKD].

283. FIN. STABILITY BD., IMPLEMENTING THE FSB PRINCIPLES FOR SOUND COMPENSATION PRACTICES AND THEIR IMPLEMENTATION STANDARDS: SIXTH PROGRESS REPORT (2019), https://www.fsb.org/wp-content/uploads/P170619-1.pdf [https://perma.cc/779D-PJFK].

284. *About*, TASK FORCE ON CLIMATE-RELATED FIN. DISCLOSURES, https://www.fsb-tcfd.org/about/ [https://perma.cc/CU47-UHKS].

285. For a discussion and critique of international efforts at climate change disclosure, see Brandon D. Stewart, *Shining Some Light on Mandatory Corporate Climate-Related Disclosure*, 17 MCGILL J. SUSTAIN. DEV. L. 34 (2020).

286. *Id.* at 34.

Japan and the European Union broke new ground by including an entire chapter on corporate governance.[287] The corporate governance section of the EPA can be understood as an attempt to constrain the grip of nationalism on corporate law and the use of corporate law as stealth protectionism, a historical feature of Japanese corporate governance.[288] The EPA covers topics such as shareholder rights, access to key information on the control or management of the company, board accountability and independence, and fair and transparent conditions for takeovers.[289]

There are also various other sparse provisions touching on corporate governance in international agreements. Numerous agreements, such as the Trans-Pacific Partnership and the European-Canada Comprehensive Economic and Trade Agreement, prohibit nationality restrictions for management, board, or director positions.[290] There is an emerging trend of including corporate social responsibility provisions in international investment treaties.[291] There is also a growing number of cases relying on international investment agreements to obtain redress for corporate governance abuses linked to state action.[292]

IV. THE LIMITS OF ICL

Because ICL has been largely unnoticed, the case for and against it has not received dedicated attention. Although one might assume predictable reactions from the analogous debates about the federalization of corporate law in the United States and the harmonization of corporate law in the EU,[293] the international dimension of ICL has some peculiarities that may affect the relevant tradeoffs. This section examines four potential shortcomings of ICL: (i) undoing regulatory diversity; (ii) challenging democracy and national policy autonomy; (iii) enforcement constraints; and (iv) political

287. For a detailed analysis, see Ram Sachs, *The International Law of Corporate Governance*, 32 PACE INT'L L. REV. 57 (2019).

288. Pargendler, *Grip of Nationalism*, *supra* note 18 at 588.

289. EUR. COMM'N, THE ECONOMIC IMPACT OF THE EU – JAPAN ECONOMIC PARTNERSHIP AGREEMENT (EPA) 32 (2018).

290. Sachs, *supra* note 287, at 90.

291. *See* Ying Zhu, *Corporate Social Responsibility and International Investment Law: Tension and Reconciliation*, 1 NORDIC J. COM. L. 90, 109–15 (2017). For instance, the 2007 draft Norwegian Model BIT provides that "[p]arties agree to encourage investors to conduct their investment activities in compliance with the OECD Guidelines on Multinational Enterprises and to participate in the United Nations Global Compact." *Id.* at 111. In 2011, the European Parliament passed a resolution calling for the inclusion of a corporate social responsibility clause in every free trade agreement to be signed by the EU. *Id.* at 115.

292. *See*, *e.g.*, *supra* note 64 and accompanying text.

293. For the United States, see, e.g., ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW (1993); for the European Union, see, e.g., Luca Enriques & Matteo Gatti, *The Uneasy Case for Top-Down Corporate Law Harmonization in the European Union*, 27 U. PA. J. INT'L ECON. L. 939 (2006).

capture at the domestic and international level. It then explores the prospects for ICL in view of the emerging signs of deglobalization.

A. Undoing Regulatory Diversity

If one borrows from the prevailing views in the United States and E.U. contexts, harmonization of corporate law would be unnecessary and harmful. Harmonization could be counterproductive in undermining the different benefits of multiple regulatory regimes in addressing heterogeneity, uncertainty, and political capture.

First, companies in different industries or with different ownership structures might be best served by diverse corporate law rules. Harmonization could thus compromise this form of beneficial *regulatory differentiation*. Second, multiple regulatory regimes allow *regulatory experimentation* in the face of uncertainty about the effects of different rules, permitting states to fulfill the Brandeisian notion of "laboratories of democracy."[294] Third, *regulatory dualism* permits states to circumvent political resistance to reforms by established elites.[295] Finally, but no less important, the orthodox view assumes that the externalities of corporate activity can be effectively addressed through legal rules and regulations from other areas of law, such as environmental law, labor law, antitrust law, and the like.

Harmonization therefore has significant costs if legal, economic, and political institutions differ across jurisdictions (as they clearly do), there is uncertainty about the optimal legal regime (which is certainly the case), or powerful interest groups exercise influence over the agenda (a common outcome). While all of these benefits of regulatory diversity count against harmonization efforts, there are two countervailing factors in ICL that potentially set it apart from the debate in national corporate law. First, by facilitating deviations, the softer nature of ICL permits greater experimentation, accommodation of firm and country heterogeneity, and mitigation of political resistance.[296] Second, the argument for addressing externalities through other areas of law is weaker in view of the observed regulatory gaps in the international context.[297]

On the other hand, soft law can easily harden or become sticky in deterring innovation or otherwise promoting harmful behavior. In the related context of international financial regulation, Roberta Romano has

294. Gilson, Hansmann & Pargendler, *supra* note 137, at 480.

295. For the conceptualization of the different rationales for regulatory multiplicity, see *id.*

296. Abbott & Snidal, *supra* note 29, at 531 (citing experimentation, learning, and particularization to local circumstances as advantages of the "new governance" approach embodied in international regulation).

297. Ruggie, *Global Governance*, *supra* note 211, at 10.

argued that the Basel accord may have contributed to the global financial crisis in conferring favorable treatment on home mortgages—an international rule included to favor US domestic policies and appease its concerns about competitiveness.[298]

B. Democracy and Nation-State Policy Autonomy

ICL appears to incur in what Dani Rodrik has called the "trilemma" of globalization, which is the difficulty of simultaneously satisfying the ideals of deep economic integration, nation-state sovereignty, and democratic politics.[299] ICL lawmakers such as Basel, the OECD, and the United Nations have sought to increase the legitimacy of their standards through greater transparency and formal public consultations,[300] though these do not necessarily undermine the critique of democratic deficit. On the other hand, it is worth recalling that, at least in the jurisdictions selling corporate charters to companies that operate extraterritorially, corporate law is the subject of a market dynamic driven by the interests of managers and shareholders, not by the political preferences of stakeholders.[301] In this view, even if ICL is misguided in substituting bureaucratic fiat for market competition, it might be no less democratic than its market-based alternative.

Another concern is that ICL unduly limits policy autonomy or supersedes nation-state sovereignty, a preoccupation voiced by US lawmakers in the context of financial regulation.[302] This has different dimensions. State-sovereignty may have non-instrumental value. Moreover, preserving local policy space may produce outcomes that are more suitable to the needs or preferences of any given jurisdiction compared to the "one-size-fits-all" provisions of international standards. Here again, one could argue that the soft nature of much of ICL is an interesting antidote permitting greater experimentation and particularization to local circumstances typical of new governance theory,[303] though ICL's softness may prove illusory.

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298. Roberta Romano, *For Diversity in the International Regulation of Financial Institutions: Critiquing and Recalibrating the Basel Architecture*, 31 YALE J. ON REGUL. 1, 16–17 (2014).

299. DANI RODRIK, THE GLOBALIZATION PARADOX: DEMOCRACY AND THE FUTURE OF THE WORLD ECONOMY (2011).

300. Kingsbury, Krisch & Stewart, *supra* note 24, at 35 (noting that international organizations such as the OECD and the Basel Committee have adopted greater procedural transparency).

301. Ronald J. Gilson, Henry Hansmann & Mariana Pargendler, Corporate Chartering and Federalism: A New View 15–16 (2015) (unpublished manuscript) https://ecgi.global/sites/default/files/Corporate%20Chartering%20and%20Federalism%3A%20A%20New%20View.pdf [https://perma.cc/4999-RYRB] (describing the dichotomy between market-oriented and politics-oriented corporate laws).

302. *See supra* note 253 and accompanying text.

303. Abbott & Snidal, *supra* note 29, at 531; *see also* Ruggie, *Global Governance*, *supra* note 211, at 8.

C. Enforcement Limitations

If even "hard" international law faces significant enforcement constraints in view of state sovereignty, soft law—here defined broadly as "things that fall short of international law"[304]—faces even greater challenges to implementation. That ICL does not entail complete compliance with its vague standards is clear. The broad application of choice of law allows defiant jurisdictions disproportionate weight in frustrating ICL's regulatory efforts. Even explicit IMF conditionalities, which according to some authors do not qualify as soft law, are often evaded in various ways.[305] Yet one must avoid the nirvana fallacy of comparing an ideal domestic law subject to full enforcement to the actual ICL that is observed. There is little question that domestic corporate laws around the world face enforcement challenges to varying degrees.

ICL does appear to influence state behavior to some extent. ICL is neither wholly inconsequential nor fully efficacious, falling somewhere in between. Soft law provides a focal point for policy convergence.[306] Through a combination of reputational mechanisms, peer pressure, indicators, new ideas, and formal and informal constraints, ICL has helped move the needle in various corporate law reforms around the world. Soft ICL is often the catalyzer for hard domestic law.

A particularly effective avenue for ICL influence has been through the role of international organizations as "coordination hubs" for certain private sector players. While this strategy has been interpreted as representing the capture of the United Nations by large corporations, a more charitable interpretation is that the UN has helped reduce transaction costs in finding solutions to collective action problems. In this positive light, when the UN promotes a meeting of asset managers and financial institutions to address the regulatory gap of globalization, it is reducing transaction costs for the organization of encompassing coalitions to promote public goods. The UN may have served as a transaction cost engineer in helping the collective organization of asset managers as "systematic stewards."[307]

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304. Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS 171, 172 (2010).

305. *See*, *e.g.*, Charles W. Calomiris, *When Will Economics Guide IMF and World Bank Reforms*, 20 CATO J. 85, 96 (2000) ("The conditionality imposed on these countries (particularly in the area of financial sector reform) is not enforced and not effective, owing in part to the short disbursement time period of emergency lending and the long time period required for meaningful reform.").

306. SLAUGHTER, *supra* note 27, at 180.

307. Jeffrey N. Gordon, *Systematic Stewardship* (Eur. Corp. Governance Inst., Working Paper No. 566, 2021); *see also* Madison Condon, *Externalities and the Common Owner*, 95 WASH. L. REV. 1 (2020); John C. Coffee, Jr., *The Future of Disclosure: ESG, Common Ownership, and Systematic Risk* (Eur. Corp. Governance Inst., Working Paper No. 541, 2020).

Nevertheless, the different drawbacks of ICL harmonization in disregarding local conditions may also lead jurisdictions to promote the phenomenon known as "faux convergence,"[308] "creative compliance,"[309] "cosmetic compliance,"[310] or "mock compliance."[311] The new frontrunners in adopting global standards of shareholder protection are Russia, China, and France, jurisdictions still not regarded as highly investor friendly, which strongly suggests a wedge between the standards "on the books" and "in action."[312] In attempting to tailor global norms to global needs and/or cater to local interest groups, formal convergence serves to mask persistence of existing institutions or even the increase of substantive divergence. The global spread of independent directors, a strategy promoted by different branches of ICL, arguably follows this trend.

D. Political Capture at the Domestic and International Level

ICL is not immune from interest group capture. On the one hand, powerful domestic interest groups may, indirectly through their home states or directly through the international lawmaking process, block reforms that are welfare enhancing. On the other hand, powerful states may shape the ICL agenda to favor the interests of their own citizens or elites to the detriment of global welfare. A former US Treasury Secretary has overtly defended the role of international financial institutions such as the IMF and the World Bank in promoting core US economic and commercial interests.[313] This is the imperialist critique of ICL.

ICL may also reflect capture not by the interests of countries as such, but by powerful interest groups within them. Scholars have posited that the interests of the large international accounting firms help explain convergence toward International Financial Reporting Standards (IFRS) in the European Union as well as the persistence of Generally Accepted Accounting Principles (GAAP) in the United States.[314] Interest groups that

308. Gen Goto, Alan K. Koh & Dan W. Puchniak, *Diversity of Shareholder Stewardship in Asia: Faux Convergence*, 53 VAND. J. TRANSNAT'L L. 829, 838 (2020) (coining the term "faux convergence").

309. Pistor, *supra* note 45, at 113.

310. Hyoung-Kyu Chey, *Explaining Cosmetic Compliance with International Regulatory Regimes: The Implementation of the Basel Accord in Japan, 1998–2003*, 11 NEW POL. ECON. 271 (2006).

311. ANDREW WALTER, GOVERNING FINANCE: EAST ASIA'S ADOPTION OF INTERNATIONAL STANDARDS 5 (2008).

312. For an empirical study attributing high scores for these jurisdictions, see Katelouzou & Siems, *supra* note 117, at 134.

313. Lawrence H. Summers. U.S. Sec'y of the Treasury, Testimony Before the House Banking Committee (Mar. 23, 2000) (stating that international financial institutions "are one of the most effective, and cost-effective, investments we can make in the forward defense of America's core interests").

314. Martin Gelter, *Accounting and Convergence in Corporate Governance: Doctrinal or Economic Path Dependence?* (Eur. Corp. Governance Inst., Working Paper No. 524, 2020).

cannot prevail domestically may nevertheless form successful coalitions at the international level.[315] The prestige and consulting opportunities associated with international harmonization initiatives may also help lure academics and practitioners alike.

Still another concern is that ICL may embody a "corporate governance obsession," with similar corporate governance prescriptions—such as director independence and shareholder rights—being offered as a solution to a vast array of social and economic problems.[316] Corporate governance reform is uniquely appealing as a compromise solution between government regulation and unfettered markets.[317] By offering a private sector solution without the need for prescriptive regulation, corporate governance is particularly palatable from a political perspective—but, precisely for this reason, it may be misused at the expense of potentially more effective solutions for the problem at hand.[318]

E. Deglobalization and the Future of ICL

ICL is, in essence, a response to the various economic, social, and environmental challenges posed by globalization. It emerged during the Asian crisis and gained force following the global financial crisis. There is, however, an apparent irony in documenting and scrutinizing ICL precisely in the early 2020s, when there are visible signs of deglobalization and growing nationalist backlash.[319] Should we now expect to see the fall of ICL to follow its rapid and unexpected rise?

For now, the fall of ICL does not appear to be imminent, and demand for it may even increase in the near future. The potential uses of corporate law to address externalities in view of government failures are now at the forefront of the debate worldwide. Lower levels of economic integration are unlikely to reduce major interjurisdictional externalities in the form of global systemic risk, climate change, and data governance. National governments' hostility to international organizations may be counterweighted by a greater role of private standard setters and other

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315. *See*, *e.g.*, Helen Callaghan, *Beyond Methodological Nationalism: How Multilevel Governance Affects the Clash of Capitalisms*, 17 J. EUR. PUB. POL'Y 564, 569–70 (2010).

316. Pargendler, *Controlling Shareholders in the Twenty-First Century*, *supra* note 14; *see also* Marcel Kahan & Edward Rock, *Symbolic Corporate Governance Politics*, 94 BOS. U. L. REV. 1997 (2014) (describing corporate governance reform as a ritual response that bears little relationship to the actual stakes).

317. Pargendler, *Controlling Shareholders in the Twenty-First Century*, *supra* note 14.

318. *Id.*

319. *Slowbalisation: The Steam Has Gone Out of Globalisation*, THE ECONOMIST (Jan. 24, 2019), https://www.economist.com/leaders/2019/01/24/the-steam-has-gone-out-of-globalisation; Geoffrey Gertz, *How to Deglobalize*, FOREIGN POL'Y (July 24, 2020), https://foreignpolicy.com/2020/07/24/how-to-deglobalize.

"minilateral" solutions.[320] There may also be greater room for regional harmonization initiatives, which seem to be well under way in Asia.[321] For good or bad, ICL may be increasingly called upon to deflect growing nationalist backlash against international firms and markets.

CONCLUSION: A RESEARCH AGENDA FOR ICL

Comparative corporate scholarship has assumed that any convergence among domestic legal systems would result from decentralized systems of competition in product markets, capital markets, and national laws. The premise was that corporate law models would travel, and the best models would win. Yet this view offers at best a partial understanding of the evolution of corporate law since the turn of the century. Some models travelled faster because of their active international promotion.

Corporate law today is the product not only of the invisible hand of the market, but also of the visible soft (or not-so-soft) hand of international organizations and standard setters. ICL has been at once conspicuous and ignored, hiding in plain sight. Because the rise of ICL challenges conventional corporate theories, and the United States was initially impervious to its reach, it has been largely neglected and understudied to date.

ICL is not monolithic, but fragmented, diverse, highly networked, and dynamic. Although the first ICL initiatives focused on the shareholder value model described by convergence theorists, more recent instruments have embraced a broader array of objectives, such as the reduction of systemic risk, the control of climate change, and the promotion of human rights. ICL has also gone beyond merely prescribing an Anglo-Saxon model of corporate governance to also promoting legal innovations, including some disfavored by the US.

Not all dimensions of corporate law are equally likely to be covered by international coordination efforts. ICL focuses primarily on dimensions of corporate law that may produce negative interjurisdictional externalities—be they in the form of harm to foreign investors, global financial stability,

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320. *See* CHRIS BRUMMER, MINILATERALISM: HOW TRADE ALLIANCES, SOFT LAW, AND FINANCIAL ENGINEERING ARE REDEFINING ECONOMIC STATECRAFT 3 (2014) ("Whatever its challenges, the increasing multipolarity of the international system is actually leading to *more*, not less, institution building and cross-border cooperation.").

321. *See*, *e.g.*, the initiatives by the Asian Development Bank, the Asian Corporate Governance Association, and the OECD Corporate Governance Roundtable focusing specifically on Asia. For relevant resources, *see*, *e.g.*, *OECD-Asian Roundtable on Corporate Governance*, OECD, https://www.oecd.org/daf/ca/oecd-asianroundtableoncorporategovernance.htm [https://perma.cc/D92Q-NLSL]; ASIAN CORP. GOVERNANCE ASS'N, https://www.acga-asia.org/ [https://perma.cc/5TP9-UMRW]; *Governance Issues: Corporate Governance*, ASIAN DEV. BANK, https://www.adb.org/sectors/governance/issues/corporate-governance [https://perma.cc/5BEX-N3Y7].

climate change, or human rights. It is therefore less likely to address potential components of corporate law that primarily affect domestic efficiency, equity, or competitiveness, such as the promotion of business groups or employee board representation.

It is time to move beyond an exclusive comparative focus on legal transplants and to also examine international legal implants. This Essay's aim is not to conclude the study of ICL, but to start it. Although the field is multifaceted and defies simplification, some things are clear. ICL has influenced domestic corporate lawmaking, but has not—and certainly should not and could not—produced full convergence. There is also potential promise for ICL to mitigate some of the most flagrant sources of externalities that distort chartering competition and national regulatory strategies, such as the obfuscation of beneficial ownership and the limited liability of parent companies for environmental degradation and human rights abuse.

But exactly how much ICL should we have? And what form should it take? What should it cover? What implementation strategies are most influential? Is ICL driven by policy entrepreneurs, economic actors, or country interests? Does it favor the Global North or the Global South? Large or small jurisdictions? Capital importers or exporters? What are its implications for wealth creation and distribution? Why and when do jurisdictions resort to real or fake convergence? These are only some of the pertinent questions in the road ahead.

Figure 2. *Networks of International Corporate Law*