

SOFT LAW AND THE GLOBAL FINANCIAL SYSTEM

Rule Making in the 21st Century

This book explains how international financial law “works” and presents an alternative theory for understanding its purpose, operation, and limitations. Drawing on a close institutional analysis of the post-crisis financial architecture, it argues that international financial law is often bolstered by a range of reputational, market, and institutional mechanisms that make it more coercive than classical theories of international law predict. As such, it is a powerful, though at times imperfect, tool of financial diplomacy.

Expanded and revised, the second edition of *Soft Law and the Global Financial System* contains updated material as well as an extensive new chapter analyzing how international standards and best practices have been operationalized in the US and EU in the wake of the financial crisis. It remains an essential tool for understanding global soft law for political scientists, lawyers, economists, and students of financial statecraft.

Chris Brummer is a professor of law at Georgetown University and the faculty director of the Institute for International Economic Law. He is also the C. Boyden Gray Fellow and project director of the Transatlantic Finance Initiative at the Atlantic Council and a senior fellow at the Milken Institute.

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CHRIS BRUMMER

Georgetown University Law Center



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Preface to the New Edition

One of the great rewards of writing the first edition of *Soft Law and the Global Financial System* was the enormous thanks received from people around the world – from Berlin to Bangladesh – grappling with the rapid changes in the infrastructure in international financial regulation following the 2008 crisis. My objectives were modest: to provide a short theoretical handbook for those of us in the midst of the change, while also giving an overview as to how the new “system” for financial supervision “works.” Since then it has been referred to by regulators, academics and law firm partners to orient their newcomers to the field, as well as to inform more seasoned practitioners as to key developments in the expanding universe of international financial regulation.

But the world changes, as does soft law. Which is, of course, in part the very purpose of informal, flexible rules. But in the seven years since I first embarked upon this project, dramatic changes have inhabited the international financial system and its accompanying regulatory apparatus, indeed even more than I had imagined when the new system was taking shape. Just to name a few:

- The Eurozone crisis that followed the 2008 financial crisis has given birth to a slew of new developments in European financial regulation, including the creation of the EU’s Banking Union;
- Both the Dodd-Frank Act (and subsequent SEC and CFTC regulations) as well as dozens EU Directives and Regulations have been largely operationalized to implement G20 commitments
- International standard setters like IOSCO have reorganized the way in which they do business in order to accommodate growing interest and influence from emerging markets;
- The FSB has adopted a more extensive charter outlining its relationship to other international agenda and standard setting bodies; and

- Peer review processes have proliferated at the FSB, IOSCO and, notably, the oldest standard setting body, the Basel Committee.

As these (and many other) changes have taken shape, so has the utility of updating the book to reflect some of the more salient developments. Moreover, certain reforms – and especially EU-US efforts to coordinate regulatory efforts – present an opportunity to not only theorize, but to also evaluate, how theory has worked in practice as regulators ignore, implement, comply and even in some instances “overcomply” with international standards. This new edition consequently includes, among other things, a new chapter evaluating how international soft law has been operationalized by transatlantic authorities since the crisis, and identifies work still left to be done. As such it is both a descriptive and theoretical contribution that, I believe, brings this book full circle.

Of course, as with the first edition, this second cut does not (and does not try to) speak to every change in international financial regulation since the book was written in 2011. Instead, my approach has been to target the issue areas that best speak to question of soft law’s usage as a coordinating or compliance enhancing device. As such, even as the breadth of the work has expanded, its focus has not.

I do hope you enjoy the new edition.

Chris Brummer
Washington, D.C. 2015

Acknowledgments

The prospect of writing a book on any subject can be daunting for just about anyone, law professors included. Indeed, unlike the eighty-page law review articles that dominate our field and are structured along consistent (and at times repetitive) patterns, books place unfamiliar demands on the academic lawyer. Not only are we tasked with pushing the boundary of knowledge, as we do in our more traditional scholarly journals, but we are also charged with doing so while writing for a broader, generalist audience. It thus opens new opportunities to have an impact on, and potentially even help to shape, policy debates, though it also places new demands on those of us more comfortable with shorter and more technical exercises.

Fortunately, I have benefited enormously from a wide range of support that has made the leap a little less forbidding. I owe an enormous debt of gratitude to my former colleagues at Vanderbilt University, where I started my career, who provided the perfect intellectual climate for learning how to execute large-scale projects, affect the course of scholarly debates, and nurture hazy hunches into full-blown academic theories and policy prescriptions. Subsequently, my new colleagues at Georgetown have provided invaluable input during the writing process and have both cheered and challenged my thinking and assumptions about markets, regulation and global governance. Finally, my research has benefited from my association with the Milken Institute's ever-expanding community of economic and financial policy thought leaders who have consistently helped me to maintain the energy and sense of purpose required to complete a project of this scope.

The book builds on earlier scholarship, including articles first published in the *California* (Berkeley), *Chicago*, *Georgetown*, *Southern California* (USC) and *Vanderbilt* law reviews, as well as *Oxford's Journal of International Economic Law*. The second edition also draws heavily on and updates further

the *Danger of Divergence* Report I wrote for the Atlantic Council, and my work on credit rating agencies with my wife Rachel Loko.¹ As such, the book benefits from the comments provided by many different scholars over time: Robert Ahdieh, Douglas Baird, Margaret Blair, William Bratton, Lisa Bressman, William Burke-White, Steven Davidoff, Anna Gelpern, Andrew Guzman, Paul Heald, Larry Helfer, Eva Huepkes, John Jackson, Don Langevoort, Adam Levitin, Kathleen Mc-Namara, David Millon, Erin O'Hara, Christoph Ohler, Saule Omarova, Katharina Pistor, Bob Rasmussen, Alvaro Santos, Heidi Schooner, Dan Sokol, Hans Stoll, Randall Thomas, Bob Thompson, Joel Trachtman, Pierre Verdier, Rolf Weber, and Todd Zywicki. I have also periodically enjoyed a unique glimpse into the thinking of regulators both in the United States and abroad. Above all else, my work would not have been possible without the opportunity to learn from and observe some of the most able “technocrats” in the business – Sherman Boone, Robert Fisher, Elizabeth Jacobs, Peter Kerstens, Robert Peterson, Paul Saulski, and Ethiopis Tafara.

Additionally, the book has benefited from a team of exceptionally strong editors who have worked tirelessly to keep it accessible (and in English). Many, many thanks to Mary Arutyunyan, Stephen Bowne, Alicja Kozłowska, Stephen Scher, and Professor Yesha Yadav – five people who have diligently and patiently waded through every word of this manuscript and offered consistently keen and thoughtful advice on to how to improve the book in both form and substance. The second edition has also benefitted from the invaluable assistance of Josh Nimmo and Scott Israelite, as well as Juan Marmolejo and Katie Collard. Marilyn Raisch, Yelena Rodriguez and Thanh Nguyen provided extraordinary library assistance. John Berger has had the patience and good humor to shepherd me through the process at Cambridge University Press and has given consistently good advice about the publishing process.

¹ See Chris Brummer, *Stock Exchanges and the New Markets for Securities Laws*, 75 U. CHI. L. REV. 1435–1491 (2008); *Corporate Law Preemption in an Age of Global Capital Markets*, 81 S. Cal. L. Rev. 1067–1114 (2008); *Post-American Securities Regulation*, 98 Cal. L. Rev. 327–383 (2010); *How International Financial Law Works (And How It Doesn't)*, 99 Geo. L.J. 257–327 (2011); *Why Soft Law Dominates International Finance – And Not Trade*, 13 J. Int'l Econ. L. 623–643 (2010); *Territoriality as a Regulatory Technique: Notes from the Financial Crisis*, 79 Cin. L. Rev. 499–526 (2010). For the second edition, see also *Danger of Divergence: Transatlantic Financial Reform & the G20 Agenda* (Chris Brummer, rapporteur) (2015) and Chris Brummer & Rachel Loko, *The New Politics of Transatlantic Credit Rating Agency Regulation*, in *Transnational Financial Regulation After the Crisis* 154–176 (Tony Porter ed.) (2014).

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Key Abbreviations

BIS	Bank for International Settlements
CPMI	Committee on Payments and Market Infrastructures
ECB	European Central Bank
ESMA	European Securities and Markets Authority
EU	European Union
FATF	Financial Action Task Force
FBO	Foreign Banking Organization
FSAP	Financial Sector Assessment Program
FSB	Financial Stability Board
FSF	Financial Stability Forum
G-20	Group of Twenty
GAAP	Generally Accepted Accounting Principles
IADI	International Association of Deposit Insurers
IAIS	International Association of Insurance Supervisors
IASB	International Accounting Standards Board
IASC	International Accounting Standards Committee
IFAC	International Federation of Accountants
IFRS	International Financial Reporting Standards
IMF	International Monetary Fund
IOSCO	International Organization of Securities Commissions
ISDA	International Swaps and Derivatives Association
OECD	Organisation for Economic Co-operation and Development
WTO	World Trade Organization