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Soft Law as Foreign Relations Law

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SOFT LAW AS FOREIGN RELATIONS LAW

Jean Galbraith[†] & David Zaring^{††}

The United States increasingly relies on “soft law” and, in particular, on cooperation with foreign regulators to make domestic policy. The implementation of soft law at home is typically understood to depend on administrative law, as it is American agencies that implement the deals they conclude with their foreign counterparts. But that understanding has led courts and scholars to raise questions about whether soft law made abroad can possibly meet the doctrinal requirements of the domestic discipline. This Article proposes a new doctrinal understanding of soft law implementation. It argues that, properly understood, soft law implementation lies at the intersection of foreign relations law and administrative law. In light of the strong powers accorded to the executive under foreign relations law, this new understanding will strengthen the legitimacy and legality of soft law implementation and make it less subject to judicial challenge. Understanding that soft law is foreign relations law will further the domestic implementation of informal international agreements in areas as different as conflict diamonds, international financial regulation, and climate change.

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INTRODUCTION

The problems that dominate our political discourse, ranging from economic policy to national security to the environment, increasingly have global causes and implications. But if our government has developed multinational solutions to those problems informally, through, say, arrangements among regulators, it has put itself at legal risk at home.

We offer a novel approach to address that legal risk, one that we think could make room for an embrace of global cooperation without disparaging our traditional and constitutional values. Our insight is that when international cooperation is the question, the deference afforded the President in foreign relations must inform the answer. We argue that the President’s authority should be broadly construed to apply not just to him but to his agents who execute the laws, thus increasing the flexibility available to U.S. agencies engaged in international cooperation.

We think that President Obama himself would welcome this sort of constitutional understanding. In 2010, he called for “stronger international standards and institutions” to deal with the modern problems that inevitably cross borders and that affect our citizens at home.¹ In 2012, he issued a landmark executive order, “Promoting

¹ President Barack Obama, Remarks by the President at United States Military Academy at West Point Commencement (May 22, 2010), *available at* <http://www.whitehouse.gov/the-press-office/remarks-president-united-states-military-academy-west-point-commencement> (explaining that an “international order” is needed to “meet the challenges of our generation,” including national security issues, global development, and climate change).

International Regulatory Cooperation,” instructing American regulators to coordinate with their foreign counterparts wherever possible.²

Moreover, from the perspective of his regulators, that coordination is well under way:

- In the wake of the financial crisis, the Chairman of the Federal Reserve Board (the Fed) acknowledged that “the world is too interconnected for nations to go it alone in their economic, financial, and regulatory policies.”³ The Fed has since devised rules designed to stabilize American financial institutions in concert with central bankers and bank supervisors in the rest of the world. This was done through a process coordinated not in Washington or through an established international organization like the International Monetary Fund, but through a series of informal meetings among various high- and mid-level banking regulators from Europe, the United States, and a small number of other countries in Basel, Switzerland.⁴ Among other things, this process has resulted in the designation of twenty-nine international banks, including eight American ones, as “globally systemically important” and therefore required to adopt special provisions to deal with the risk of financial crisis.⁵ The CEO of one of these banks, JPMorgan Chase & Co.’s Jamie Dimon, has claimed that the process will ruin American financial competitiveness.⁶
- In a 2012 speech, the Federal Bureau of Investigation (FBI) Director observed that “[f]or the FBI . . . the work we do will almost always have a global nexus,” emphasizing the need for “international partnerships.”⁷ The agency, accordingly, has conducted joint operations with European and other law

² Exec. Order No. 13,609, 77 Fed. Reg. 26,413 (May 1, 2012).

³ Julia Werdigier, *Stimulus Alone Won't End the Crunch, Bernanke Says*, N.Y. TIMES, Jan. 13, 2009, <http://www.nytimes.com/2009/01/13/business/worldbusiness/13iht-13fed.19314039.html>.

⁴ Basel is the location of the Basel Committee on Banking Supervision, which has supervised the harmonization of these rules. For a discussion of the way the committee works and the issues this raises for American regulators, see *infra* notes 242–51 and accompanying text.

⁵ Policy Measures to Address Systemically Important Financial Institutions, Fin. Stability Bd. (Nov. 4, 2011) [hereinafter Policy Measures], *available at* http://www.financialstabilityboard.org/publications/r_111104bb.pdf.

⁶ Dimon, the CEO and Chairman of JPMorgan Chase & Co., told the FINANCIAL TIMES that the proposed Basel III “capital rules are ‘anti-American,’” that the United States “should consider pulling out of the Basel group of global regulators,” and that he was “very close to thinking the United States shouldn’t be in Basel any more.” Tom Braithwaite & Patrick Jenkins, *JPMorgan Chief Says Bank Rules ‘Anti-US,’* FIN. TIMES (London), Sept. 12, 2011, <http://www.ft.com/cms/s/0/905aeb88-dc50-11e0-8654-00144feabdc0.html> (internal quotation marks omitted).

⁷ Robert S. Mueller III, Director, Fed. Bureau of Investigation, Remarks at the American College of Trial Lawyers 2012 Annual Meeting (Oct. 19, 2012), *available at* <http://www.fbi.gov/news/speeches/the-transformation-of-the-fbi-and-the-rule-of-law>.

enforcement officials,⁸ pushed its foreign counterparts to sign on to multinational standards on law enforcement surveillance,⁹ and, to facilitate both projects, pursued agreements outlining the terms of cooperation with its foreign agency counterparts¹⁰ and established sixty-four “legat” offices across the globe.¹¹

- While agencies have thus far mostly survived the judicial review of their international efforts,¹² there is a real sense that this review is about to turn much more searching as the degree of cooperation increases. In July 2013 alone, the Food and Drug Administration (FDA) announced a major initiative revising the inspection process for imported food, an approach designed to represent, in the words of the agency, “global solutions to food safety so that whether you serve your family food grown locally or imported you can be confident that it is safe.”¹³ During the

⁸ See, e.g., *Operation Atlantic: Taking International Aim at Child Predators*, FED. BUREAU OF INVESTIGATION (Mar. 1, 2012), http://www.fbi.gov/news/stories/2012/march/predators_030112/predators_030112 [hereinafter *Operation Atlantic*] (“Europol released the results of its first joint operation with the FBI against international child predators, announcing the identification of eight child victims and the arrest of 17 individuals for child sexual molestation and production of pornography.”).

⁹ See, e.g., *A Current Assessment of Money Laundering and Terrorist Financing Threats and Countermeasures: Hearing Before the Senate Committee on Banking, Housing, and Urban Affairs*, 109th Cong. 63 (2006) (statement of Michael Morehart, Chief, Terrorist Fin. Operations Section, Fed. Bureau of Investigation) (“As it relates to international money laundering enforcement, the FBI is an active participant in the Financial Action Task Force (FATF).”), available at <http://www.gpo.gov/fdsys/pkg/CHRG-109shrg39713/html/CHRG-109shrg39713.htm>. The FATF is an informal group of agencies concerned with developing common policies to combat money laundering and terrorism finance. See FATF-GAFI, <http://www.fatf-gafi.org/> (last visited Mar. 13, 2014). For more on the FBI’s role in the organization, see *United States*, FATF-GAFI, <http://www.fatf-gafi.org/countries/u-z/united-states/> (last visited Mar. 13, 2014).

¹⁰ See, e.g., Memorandum of Understanding for Chemical, Biological, Radiological, Nuclear, Radiological and Explosives Investigative Support Between the Federal Bureau of Investigation and the International Criminal Police Organization (Dec. 19, 2011), available at [http://www.interpol.int/content/download/17585/142100/version/1/file/37-en%20MoU%20for%20Chemical%20Biological%20radiological%20nuclear%20investigate%20support%20between%20the%20FBI%20and%20INTERPOL%20\(signed%20on%2019%20December%202011\).pdf](http://www.interpol.int/content/download/17585/142100/version/1/file/37-en%20MoU%20for%20Chemical%20Biological%20radiological%20nuclear%20investigate%20support%20between%20the%20FBI%20and%20INTERPOL%20(signed%20on%2019%20December%202011).pdf) (establishing “the framework for a cooperative Chemical, Biological, Radiological, Nuclear and Explosives . . . program to advance the investigative and overall operational capabilities of the FBI and INTERPOL”).

¹¹ See *International Operations*, FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/international_operations (last visited Mar. 13, 2014) (describing the FBI’s legal attaché, or “legat,” offices).

¹² For example, the Animal and Plant Health Inspection Service of the U.S. Department of Agriculture adopted a final rule concerning solid wood packaging material that would standardize requirements among several trading countries that have adopted the International Plant Protection Convention Guidelines. The Natural Resources Defense Council (NRDC) challenged the rule for violating the National Environmental Protection Act and the Plant Protection Act, but the court granted summary judgment to the agency; the Second Circuit affirmed on appeal. *NRDC v. USDA*, 613 F.3d 76 (2d Cir. 2010).

¹³ Press Release, Food & Drug Admin., FDA Takes Steps to Help Ensure the Safety of Imported Food (July 26, 2013) (to be codified at 21 C.F.R. pt. 1), available at <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm362610.htm>; see also Foreign Supplier Verification Programs for Importers of Food for Humans and Animals, 78 Fed.

same month, the Federal Circuit turned away an Administrative Procedure Act challenge to a deal concluded by the United States Trade Representative (USTR) and Canada's Ministry of Trade to settle a dispute over traffic in softwood lumber,¹⁴ even as the other appellate court in Washington—the D.C. Circuit—held unconstitutional a delegation of government authority to a private entity and a nongovernmental arbitrator because such a delegation gave those entities “an effective veto” over government action.¹⁵ There is reason to believe that the FDA rule, once finalized, will be subject to a lawsuit over how it has outsourced the inspection process, perhaps based in part on the D.C. Circuit's precedent.¹⁶

These are only a few of hundreds of instances of cross-border regulatory cooperation by American agencies.¹⁷ This cooperation has become a strikingly important aspect of U.S. foreign policy, even as it affects the content of domestic regulations—creating net losers likely to file suit in the process, as Jamie Dimon can attest.¹⁸ It also departs from the traditional mold of foreign policy in two important ways.

First, from a legal perspective, this rise in international cooperation does not take traditional doctrinal forms. While some of it is memorialized in legally binding international agreements, much of it—perhaps most of it—does not create international legal obligations. Instead, as the former Legal Adviser to the Department of State recently noted, the United States increasingly relies on “non-legal understandings” to achieve its global objectives.¹⁹ Prominent among such non-legal understandings are what we will call “soft law” commitments: agreements between executive branch actors in two or more

Reg. 45,730, 45,740–41 (proposed July 29, 2013) (proposing a rule “to help ensure that imported food is produced in a manner consistent with U.S. standards”).

¹⁴ *Almond Bros. Lumber Co. v. United States*, 721 F.3d 1320 (Fed. Cir. 2013).

¹⁵ *Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.*, 721 F.3d 666, 671 (D.C. Cir. 2013).

¹⁶ The agency has already been sued over delays in issuing the rules by the Center for Food Safety and the Center for Environmental Health. Carey Gillam, *FDA Seeks End of Lawsuit over Delayed Food Safety Rules*, REUTERS, Dec. 3, 2012, <http://www.reuters.com/article/2012/12/03/us-usa-food-lawsuit-idUSBRE8B212420121203>. Those groups have also expressed dissatisfaction with the proposals that have been issued.

¹⁷ See, e.g., Gabriella Blum, *Bilateralism, Multilateralism, and the Architecture of International Law*, 49 HARV. INT'L L.J. 323, 330 (2008) (acknowledging the “conclusion of hundreds of multilateral soft-law instruments” to date).

¹⁸ See, e.g., Duncan B. Hollis & Joshua J. Newcomer, *“Political” Commitments and the Constitution*, 49 VA. J. INT'L L. 507, 544 (2009) (“It is not surprising . . . that the executive now regards the political commitment [i.e., soft law] as an essential mechanism for advancing foreign policy interests.”).

¹⁹ Harold H. Koh, Legal Adviser, U.S. Dep't of State, Speech on Twenty-First Century International Lawmaking at the Georgetown University Law Center (Oct. 17, 2012), *available at* <http://www.state.gov/s/1/releases/remarks/199319.htm>; see also, e.g., David Kaye, *Stealth Multilateralism: U.S. Foreign Policy Without Treaties—or the Senate*, FOREIGN AFF., Sept.–Oct. 2013, at 122 (“[N]onbinding arrangements may now be the executive branch's preferred way of doing business.”).

countries that do not create legal obligations but which nonetheless contain substantive commitments that the parties are expected to take seriously.²⁰

Second, these initiatives bring new parties into the international sphere. While some soft law agreements, like the Washington Communiqué on nuclear security and the Copenhagen Accord on climate change, bear the imprimatur of the U.S. President and other heads of state,²¹ the bulk of these agreements are concluded entirely between bureaucrats. They represent agreements not between the United States and China or Europe, but between the Fed with the Bank of England²² and the FBI with Europol.²³ U.S. agencies outside of the State Department have become international actors in order to fulfill their own domestic regulatory missions, yet in doing so they have found themselves operating in a sphere traditionally understood to lie largely within the discretion of the President.²⁴

How should we understand these developments as a matter of law? The involvement of domestic agencies in U.S. foreign policy raises vexing issues of procedural legitimacy, separation of powers, and, in some cases, due process. But at the same time, it marks a promising—and at times, the only realistic—effort by the American government to address problems that cross borders with global solutions.²⁵ It is also taking place at a time when courts and commentators have expressed deep skepticism about foreign influences on American law. In recent years, the Supreme Court has cut back sharply on the role that traditional forms of international law can play

²⁰ We recognize that some scholars use the term “soft law” more broadly—for example, to encompass the decisions of international human rights committees or standards promulgated by nongovernmental organizations. *See, e.g.*, David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 834 (2012) (discussing “soft law” in the international human rights law context); Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AM. J. INT’L L. 1, 39 (2012) (discussing the role of nonstate actors and “soft law” in the production of international environmental law). Conversely, some scholars use terms like “political commitments” to refer to the kinds of agreements that we describe as “soft law.” *See, e.g.*, Hollis & Newcomer, *supra* note 18, at 516–25 (defining “political commitment” as “a nonlegally binding agreement between two or more nation-states in which the parties intend to establish commitments of an exclusively political or moral nature.”). We have chosen to use the term “soft law” to refer to nonbinding transnational agreements between executive branch actors because the term is both convenient and frequently used in this context.

²¹ *See* Koh, *supra* note 19.

²² *See* Maximillian L. Feldman, Note, *The Domestic Implementation of International Regulations*, 88 N.Y.U. L. REV. 401, 411–12 & n.47 (2013).

²³ *See Operation Atlantic*, *supra* note 8.

²⁴ *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319–20 (1936); *see also* discussion *infra* Part III.A.

²⁵ *Cf.* CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM 75 (2013) (noting that “[g]lobalization . . . revealed, and in many instances created, problems that could be addressed effectively only through international cooperation” in explaining the rise of executive agreements post-World War I).

in U.S. law,²⁶ and the D.C. Circuit has looked skeptically on delegations of lawmaking power to international organizations.²⁷ Even the European Court of Justice has struck down a deal between American and European regulators—though, of course, it did so not on the grounds that American law was violated but rather, that the European parties to the arrangement (an antitrust enforcement cooperation deal) did not have the authority to conclude the deal.²⁸ Commentators such as Curtis Bradley and Julian Ku have criticized arrangements that mean that foreign agencies have a voice in setting the terms of American rules.²⁹

There is a real need to respond to these concerns and to provide soft law with a sound domestic legal footing if America's regulators are to be permitted to continue working with their foreign counterparts. We believe they should, given the current globalized environment, where regulatory problems cross borders. While the implementation of soft law through ordinary administrative law works up to a point, or can if a number of assumptions about what administrative law requires are relaxed (as one of us has previously argued),³⁰ we think there may be a sounder legal basis for this phenomenon. Specifically, we argue that many problems of domestic administrative law would be solved by recognizing that principles of foreign relations law—the law of the

²⁶ See, e.g., *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013) (reading territorial limits into a statute that provides federal courts with jurisdiction over certain violations of customary international law); *Medellín v. Texas*, 552 U.S. 491, 522–25 (2008) (raising the standard for concluding that treaties are judicially enforceable domestic law in the absence of implementing legislation and further holding that the President cannot require the states to implement otherwise non-self-executing treaties); see also *Petition for Writ of Certiorari, Bond v. United States*, 2012 WL 3158880 (U.S. Aug. 1, 2012) (inviting the Supreme Court to reconsider Congress's power to implement treaties), *cert. granted*, 133 S. Ct. 978 (2013) (No. 12-158).

²⁷ See *NRDC v. EPA*, 464 F.3d 1, 9–10 (D.C. Cir. 2006) (noting that there is “significant debate over the constitutionality of assigning lawmaking functions to international bodies” and interpreting the Clean Air Act and Montreal Protocol as “creating an ongoing international political commitment rather than a delegation of lawmaking authority to annual meetings of the Parties”).

²⁸ See *Case C-327/91, French Republic v. Comm'n of the European Cmty.*, 1994 O.J. (C 275) 2, 3 (synopsis of judgment); see also *Re the E.C.-USA Competition Laws Cooperation Agreement: France v. Comm'n*, [1994] 5 C.M.L.R. 517 (unofficial report of case). For discussions, see Noreen Burrows, *No General External Relations Competence for the Commission*, 20 EUR. L. REV. 210 (1995); Derek Devgun, *Crossborder Joint Ventures: A Survey of International Antitrust Considerations*, 21 WM. MITCHELL L. REV. 681, 706 (1996).

²⁹ See, e.g., Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1558–60 (2003) (discussing the democratic accountability, aggrandizement, and federalism issues raised by the transfer of legal authority from U.S. actors to international actors); Julian G. Ku, *International Delegations and the New World Court Order*, 81 WASH. L. REV. 1, 5–9 (2006) (arguing that the power to enforce judgments of international tribunals properly falls within the foreign affairs powers of the President and Congress, rather than with the judiciary).

³⁰ David Zaring, *Sovereignty Mismatch and the New Administrative Law*, 91 WASH. U. L. REV. 59 (2013).

United States as it relates to foreign affairs—should apply to soft law agreements between American and foreign agencies.

By this, we do not mean that courts should refuse to decide lawsuits over rules resulting from soft law deals. Rather, they should presume, as one court has recently done for a rule with international implications³¹ promulgated by the Securities and Exchange Commission (SEC), that “judicial review is particularly deferential in areas at the intersection of national security, foreign policy, and administrative law.”³²

To be more precise, foreign relations law recognizes that the executive branch needs considerable flexibility in pursuing U.S. foreign policy and has developed a variety of doctrines that embrace this. These doctrines include acceptance of increased independent presidential power;³³ recognition that the executive branch receives greater flexibility with regard to delegations in the foreign policy context than in the domestic context;³⁴ a practice of frequent (though by no means uniform) judicial deference toward executive branch decisions that relate to foreign policy;³⁵ and a recognition that the certain principles and rules found in administrative law may be relaxed in the foreign affairs context.³⁶ We argue that these doctrines should be embraced by agencies and applied by courts to put a thumb on the scale in favor of deferring to the judgments of regulators that international cooperation, or the harmonization of our rules and those in foreign countries, represents the best solution to cross-border regulatory problems.

There are two other advantages to our approach. First, soft law agreements have been almost entirely ignored in the foreign relations scholarship, even as they are becoming a dominant sort of international arrangement.³⁷ While the two classic forms of international law, treaties and customary international law, have been heavily studied in foreign relations law (including by one of us),³⁸ soft law agreements usually receive only passing mention in foreign relations texts,³⁹ even as scholars in other disciplines have begun to pay them

³¹ The subject of the rule was conflict minerals, a topic to which we will return in Part IV of this Article.

³² *Nat'l Ass'n of Mfrs. v. SEC*, No. 13-CV-635 (RLW), 2013 WL 3803918, at *29 (D.D.C. July 23, 2013) (quoting *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 734 (D.C. Cir. 2007)) (internal quotation marks omitted).

³³ See *infra* Part III.A.

³⁴ See *infra* Part III.B.

³⁵ See *infra* Part III.C.

³⁶ See *infra* Part III.D.

³⁷ See discussion *infra* Part I.B.2.

³⁸ Jean Galbraith, *Prospective Advice and Consent*, 37 *YALE J. INT'L L.* 247 (2012).

³⁹ See *infra* note 94 and accompanying text.

plenty of attention.⁴⁰ To the extent that soft law agreements are discussed at all by foreign relations scholars, the discussion is almost always about their formation rather than their implementation.⁴¹ This Article shows how foreign relations doctrines can play an integral role in the justification of regulatory globalization through soft law, thus reading foreign relations doctrine into an increasingly vibrant field of foreign affairs practice.

Second, foreign relations law has long been attentive to the relationship between the President and Congress.⁴² Our approach, consistent with bedrock principles of the doctrine, offers courts some guidance as to how much deference to soft law arrangements is required with reference to that relationship. We think that it should be all but absolute when Congress has endorsed the regulatory pursuit of soft law arrangements, strong when Congress has not spoken one way or the other, and weak when Congress has expressed a preference that agencies do their work without turning to international regulatory cooperation.

We should acknowledge at the outset that our approach depends on a new understanding of the basis for independence in foreign relations held by the executive branch. That basis traditionally lies in the unique figure of the President, who is Commander in Chief of the armed forces, the appointer of ambassadors, and vested with the executive power of the United States—and therefore is the traditional focal point for foreign affairs powers.⁴³

In reality, however, the President is not a particularly important player in most soft law agreements, other than the handful of high-profile ones that he engages with personally. Our approach to soft law agreements therefore requires disaggregating the executive branch more than is commonly done in foreign relations law scholarship, even as we apportion powers that belong to the President in foreign relations doctrine to the bureaucracy under his putative command. In this sense, we are arguing for a legal understanding of the executive branch as “unitary,” that is, as a tool for the President to conduct foreign policy and to take care that the laws are faithfully executed, even as we recognize that the modern regulatory state is anything but unitary.⁴⁴

⁴⁰ See discussion *infra* Part I.B.1.

⁴¹ See discussion *infra* Part I.B.2.

⁴² See Louis Henkin, *Preface, The Constitution for Its Third Century: Foreign Affairs*, 83 AM. J. INT'L L. 713, 714 (1989) (identifying “[t]he most intractable issues of the constitutional law of foreign affairs” as those “disputing the allocation of power between President and Congress”).

⁴³ See U.S. CONST. art 2, § 2, cls. 1–2 (setting forth these powers).

⁴⁴ For enthusiastic paeans to the unitary executive, see STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO*

We also acknowledge that there are those who worry about the sort of executive deference we commend, especially in light of some unilateral and controversial actions taken by the President during the war on terror. We recognize these concerns, but we suggest that whatever the merits of executive deference in some contexts, when applied to the soft law arrangements that are our subject, that deference can legitimize multilateral solutions to global problems—an outcome that encourages cooperation rather than unilateralism.

The rest of the Article develops the argument presented above. Part I takes on soft law, explaining what it looks like and showing how it is increasingly accepted in international law and administrative law but overlooked in foreign relations law. Part II identifies the legal bases for challenges to soft law agreements. Part III demonstrates how doctrines from foreign relations law that provide the President with increased powers could address those challenges to soft law agreements. Part IV applies these insights to real-world examples, taking into account the nuances of how our broad approach will necessarily depend upon the particulars of the soft law agreements at issue, the domestic legal frameworks that overlap with the subject matter of these agreements, and the agencies charged with implementing these agreements. A brief conclusion follows.

I

A SOFT LAW PRIMER

This Part describes soft law and addresses how it has been approached in U.S. practice and scholarship to date. It will cover familiar ground for those already acquainted with the growth and spread of soft law, but for those new to the field, it gives an overview that offers a base of knowledge for Parts II, III, and IV of the Article, where we make our main argument.

We attribute the rise of soft law to the pressures of globalization and the difficulties inherent in creating “hard” legal responses to it. As for the scholarly embrace of the field, we discern differences in the way international law, foreign relations law, and administrative law scholars have analyzed the soft law phenomenon. Despite initial resistance, the field of international law has come to accept soft law as an important constraint on states and a source of business for lawyers.⁴⁵

BUSH (2008); CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT 170 (1991) (claiming that the unitary executive, as a concept central to the separation of powers, is supported by various methods of interpreting the Constitution). For a more nuanced account, more consistent with our view, see Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 25–26 (1994) (arguing that there is little historical evidence for the strong unitary executive theory but recognizing that there are places where the interpretation is appropriate).

⁴⁵ See discussion *infra* Part I.B.1.

This acceptance has been hastened by the work of U.S. legal scholars who draw upon the field of international relations to show that there are a variety of ways of creating governance constraints on states. On the domestic side, which is where soft law implementation occurs, the story is more mixed. In contrast with international legal scholarship, the field of law that deals with foreign affairs and the implementation of international law in the United States—foreign relations law—has almost entirely ignored soft law.⁴⁶ However, soft law implementation has been celebrated by some administrative lawyers—but more for its potential than as a problem destined for the courts.⁴⁷

A. The Rise of Soft Law

1. *The Rise of Soft Law*

As globalization has created markets, externalities, and public goods that cross borders, bureaucracies have begun to expand across borders as well. This is increasingly done through informal arrangements. The difficulties associated with the creation and implementation of “hard” international legal mechanisms—treaties and customary international law—have driven the U.S. executive branch and its agencies to consider and pursue less formal approaches to solving increasingly globalized problems.⁴⁸ The result has been an explosion in nonbinding transnational governance standards that were once scorned by international lawyers.⁴⁹ In fact, the turn to soft law in international governance has been one of the signature developments in the field over the past forty years.

When engaged in the creation of soft law, at least as we define it, substate actors meet with their peers from other jurisdictions to exchange information, coordinate enforcement, and harmonize the regulatory rules applied at home.⁵⁰ In the international law literature, this sort of collaboration is understood to have been pursued by

⁴⁶ See discussion *infra* Part I.B.2.

⁴⁷ See discussion *infra* Part I.B.3.

⁴⁸ Former State Department Legal Adviser Harold Koh has referred to these nontraditional arrangements variously as “non-legal understandings,” “layered cooperation,” and “diplomatic law talk.” See Koh, *supra* note 19.

⁴⁹ See Martti Koskenniemi, *International Legislation Today: Limits and Possibilities*, 23 WIS. INT’L L.J. 61, 74 (2005) (noting that by 2002, there had been an increase in the use of soft law, signaling a “turn from formal international legislation to what is usually called global ‘governance’”).

⁵⁰ This process is reflected in President Obama’s landmark Executive Order 13,609 on international regulatory cooperation. See *supra* note 2 and accompanying text; see also Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT’L ORG. 421, 445 (2000) (explaining how soft law negotiation facilitates compromise and “provides for flexibility in implementation, helping states deal with the domestic political and economic consequences of an agreement and thus increasing the efficiency with which it is carried out”).

so-called regulatory networks, a widely adopted term that is meant to underscore the informality and horizontality of the new regulatory globalization.⁵¹

Regulatory networks appear in myriad areas where globalization has affected a regulatory project shared across borders by agencies, industries, and interest groups.⁵² Banking is just one of the many areas where soft law agreements take place; it serves here as an example of how extensive soft law can become.⁵³

In the world of financial regulation, which has been particularly welcoming to such networks, American regulators have joined the International Organization of Securities Commissions (IOSCO) (founded in 1983),⁵⁴ the Basel Committee on Banking Supervision (founded in 1974),⁵⁵ the Participants Group of major export credit agencies (founded in 1978),⁵⁶ the Financial Action Task Force that deals with money laundering (founded in 1989),⁵⁷ the International Association of Insurance Supervisors (founded in 1994),⁵⁸ and the semiprivate International Accounting Standards Board (founded in 1973).⁵⁹ In addition, the new Financial Stability Board (FSB), founded in 2009, is meant to serve as a network of networks, coordinating the international harmonization of financial regulation done by other financial regulatory networks and staffed, like them, by

⁵¹ The foundational work on regulatory networks comes from Anne-Marie Slaughter. See, e.g., ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 12–69 (2004) (describing the spread of regulatory networks).

⁵² See *id.* at 45.

⁵³ See *infra* Part IV (discussing these and other areas).

⁵⁴ See *Ordinary Members of IOSCO*, OICU-IOSCO, http://www.iosco.org/lists/display_members.cfm?memID=1&orderBy=none (last visited Mar. 13, 2014); see also *About IOSCO*, OICU-IOSCO, <http://www.iosco.org/about/> (last visited Mar. 13, 2014) (identifying the responsibilities and founding date of the group).

⁵⁵ See *Basel Committee Membership*, BANK FOR INT'L SETTLEMENTS, <http://www.bis.org/bcb/membership.htm> (last visited Mar 13, 2014).

⁵⁶ See *The Participants to the Export Credit Arrangement*, OECD, <http://www.oecd.org/tad/xcred/participants.htm> (last visited Mar. 13, 2014) (identifying the participants, responsibilities, and founding date of the group).

⁵⁷ See *FATF Members and Observers*, FATF-GAFI, <http://www.fatf-gafi.org/pages/aboutus/membersandobservers/> (last visited Mar. 13, 2014); see also *Who We Are*, FATF-GAFI, <http://www.fatf-gafi.org/pages/aboutus> (last visited Mar. 13, 2014) (identifying the responsibilities and founding date of the group).

⁵⁸ See *IAIS Members*, INT'L ASS'N OF INS. SUPERVISORS, <http://www.iaisweb.org/IAIS-members-31> (last visited Mar. 13, 2014); see also *About the IAIS*, INT'L ASS'N OF INS. SUPERVISORS, <http://www.iaisweb.org/About-the-IAIS-28> (last visited Mar. 13, 2014) (identifying the responsibilities and founding date of the group).

⁵⁹ Int'l Fin. Reporting Standards Found., *About the IFRS Foundation and the IASB*, IFRS, <http://www.ifrs.org/The-organisation/Pages/IFRS-Foundation-and-the-IASB.aspx> (last visited Mar. 13, 2014) (identifying the responsibilities and founding date of the group).

domestic-agency officials from the various states that have joined the network.⁶⁰

This is all very well, but, as we will see, the legal risk for these networks lies in the fact that the rules agreed to by the financial networks affect, often adversely, American firms, as JPMorgan Chase & Co.'s Jamie Dimon has protested.⁶¹ Nor are the firms only financial: diamond importers and web designers have found their choices to be constrained by soft law institutions that seek to prohibit trade in so-called conflict diamonds and to control the basic architecture of the Internet.⁶²

And businesses are not the only ones affected by soft law institutions. The government-sponsored International Olympic Committee has agreed to be bound by the decisions of the Court of Arbitration for Sport,⁶³ which means that individual American athletes have been also bound by decisions of the tribunal on their eligibility to compete—sometimes against their will. We will return to these examples in Part IV.

2. *The Evolution of Soft Law*

The use of soft law agreements has grown and changed significantly since the 1970s. Important soft law agreements before then dealt mainly with traditional matters of international affairs—the treatment of aliens, military alliances, diplomatic relations, and the like—and they were concluded by traditional diplomatic actors within the executive branch.⁶⁴ More recently, however, soft law agreements have not only become more prevalent but have also emerged in areas of law classically associated more with domestic than with international affairs, such as financial regulation, consumer protection, and law enforcement.⁶⁵ This development is in keeping both with the increased globalization of traditionally domestic challenges and with the

⁶⁰ *History*, FIN. STABILITY BOARD, <http://www.financialstabilityboard.org/about/history.htm> (last visited Mar. 13, 2014) (discussing the history and founding date of the group).

⁶¹ See Braithwaite & Jenkins, *supra* note 6.

⁶² For a discussion of these instances of soft law, see Part IV, *infra*.

⁶³ See Int'l Olympic Comm., Olympic Charter Rule 61 (2013), available at http://www.olympic.org/Documents/olympic_charter_en.pdf [hereinafter Olympic Charter].

⁶⁴ Examples include the 1907 “Gentlemen’s Agreement” between the United States and Japan regarding Japanese immigration and the treatment of Japanese immigrants in the United States; the Atlantic Charter between the Allies during World War II; and the Shanghai Communiqué, which led to normalized relations between the United States and mainland China. Hollis & Newcomer, *supra* note 18, at 516, 510–11; see also Oscar Schachter, Editorial Comment, *The Twilight Existence of Nonbinding International Agreements*, 71 AM. J. INT’L L. 296, 297, 299–300 (1977) (discussing several other examples).

⁶⁵ See Robert Hockett, *The Limits of Their World*, 90 MINN. L. REV. 1720, 1748 n.146 (2006) (noting the “explosion of attention now being paid to both (a) ‘soft law’ that emerges from ‘networks’ or ‘epistemic communities’ of substate regulators, academics,

rise in transnational interactions among regulatory actors. But we see two reasons in particular for the growth of global soft law in the past four decades and its even-more-striking acceleration in the wake of the financial crisis:

- The difficulties and complexities associated with concluding “hard” international arrangements, either through treaty, executive agreement, or customary law; and
- The acceleration of globalization, throwing the viability of a purely domestic approach to any regulatory enterprise into question.

The growth in international agreements in traditionally domestic areas is not limited to soft law. Treaty practice has experienced a similar development, leading to a sharp increase in the regulation of domestic behavior through treaties.⁶⁶ But executive actors often find it advantageous to conduct their business through soft law rather than through treaties. Because soft law agreements constitute a lessened form of international commitment relative to treaties or executive agreements, they can be negotiated and renegotiated with greater ease and violated with lower reputational costs—and therefore they can potentially contain stronger substantive provisions.⁶⁷ In the human rights context, for example, the choice to make the Helsinki Accords a soft law agreement not only facilitated greater state acceptance but also produced an agreement with clearer and more specific substantive provisions than those found in many hard law human rights treaties.⁶⁸

and affiliates of nongovernmental organizations, and (b) the ‘disaggregated state’ whose officials belong to those ‘communities’”).

⁶⁶ See Jacob Katz Cogan, *The Regulatory Turn in International Law*, 52 HARV. INT’L L.J. 321, 349–52 (2011) (noting how international law “is reaching ever further into the domestic . . . process to control how it operates” (internal quotation marks omitted)).

⁶⁷ See Abbott & Snidal, *supra* note 50, at 423 (arguing that soft law arrangements are often “preferable on [their] own terms” because they give states a way to protect their sovereignty, deal with uncertainty, and facilitate compromise); Andrew T. Guzman, *The Design of International Agreements*, 16 EUR. J. INT’L L. 579, 611 (2005) (noting that “soft law represents a choice by the parties to enter into a weaker form of commitment” and emphasizing the trade-off between the credibility of a state’s commitments and the costs of a violation); Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT’L L. 581, 582–83 (2005) (distinguishing between the concepts of “pledge” and “contract” and arguing that the preference for the contract form “often unduly weakens the substance and structure of multilateral agreements” because states will hedge against their own noncompliance by weakening the monitoring mechanisms or “watering down” commitments).

⁶⁸ See Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832, 1840–41 (2002) (comparing the clear and detailed rules of the “soft law” Helsinki Accords with the “more ambiguous prescriptions” of the “hard law” International Covenant on Economic, Social and Cultural Rights).

Perhaps even more importantly, soft law agreements have the advantage of avoiding the cumbersome ratification processes that domestic law can require of traditional treaties. In the United States, hard law agreements above a certain threshold of significance require strong support from the legislature: either the advice and consent of two-thirds of the Senate under the Treaty Clause of the Constitution or the approval of a majority of both Houses of Congress as a congressional-executive agreement.⁶⁹ By contrast, soft law agreements “lie more completely within the domain of the executive branch of government.”⁷⁰

3. *Soft Law at Home*

The rise of international soft law has been accompanied by the need to implement it domestically. This raises the question of what laws or framework of laws can be used for its implementation. As suggested in the context of one international regulatory body, the answer depends on “the expectation that individual authorities will take steps to implement them through detailed arrangements—statutory or otherwise—which are best suited to their own national systems.”⁷¹

As a matter of practice, soft law implementation often falls naturally to administrative agencies.⁷² Due to their domestic statutory mandates and practice, these entities are used to operating under administrative law principles. Because of the rising need for cross-border cooperation in order to successfully solve regulatory problems, independent agencies or bureaus within Cabinet departments have become the primary negotiators and implementers of many soft law agreements.⁷³ To the extent that soft law implementation has attracted the attention of the executive branch more generally, the framing and tools of administrative law have similarly been employed. In 2012, for example, President Obama issued an important Executive Order on “Promoting International Regulatory Cooperation.”⁷⁴ This order focused on having agencies consider international regulatory

⁶⁹ See CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW* 479, 584 (4th ed. 2011).

⁷⁰ Guzman, *supra* note 67, at 592.

⁷¹ Daniel Lefort, *Bank for International Settlements (BIS): Basel, Switzerland*, in 1 INTERNATIONAL ENCYCLOPAEDIA OF LAWS: INTERGOVERNMENTAL ORGANIZATIONS 1, ¶ 172 (R. Blanpain et al. eds., 2009).

⁷² See Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 16–17 (2005) (describing how the regulatory decisions of international bodies may be directly implemented by those bodies themselves, “or, more commonly, through implementing measures [by administrative agencies] at the national level”).

⁷³ Some soft law agreements also require congressional legislation for implementation. See *infra* Part IV.A (discussing congressional legislation implementing the soft law Kimberley Process).

⁷⁴ Exec. Order No. 13,609, *supra* note 2.

options and report them through the reporting process used in the domestic regulatory context. It assigned the role of examining international regulatory cooperation to the Regulatory Working Group, traditionally a body that reviewed only domestic regulation.⁷⁵

Most agencies, for their part, have, like the FBI, created foreign affairs offices designed to deal with their foreign counterparts and to negotiate soft law arrangements.⁷⁶ Congress has occasionally, although not comprehensively, called for agencies to pursue international understandings—it did so in the Dodd-Frank Wall Street Reform Act,⁷⁷ and it has delegated to the USTR the ability to settle international trade disputes.⁷⁸ On other occasions, it has demanded that agencies eschew international collaboration.⁷⁹

B. Soft Law in Legal Scholarship

1. *International Legal Scholarship*

International lawyers and legal scholars used to ignore soft law and even deride it as unimportant because it lacked obligation, which

⁷⁵ See *id.* For the establishment of the Regulatory Working Group, see Exec. Order 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993) (rooting this group in administrative law principles); see also Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1816 & n.337 (2013) (noting that the Regulatory Working Group “currently meets only sporadically” but that Executive Order 12,866 “may revive the institution”). President Obama’s 2012 Executive Order came largely out of an administrative law background, as it followed a project on International Regulatory Cooperation undertaken by yet another administrative law body—the Administrative Conference of the United States. See *International Regulatory Cooperation*, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, <http://www.acus.gov/research-projects/international-regulatory-cooperation> (last visited Mar. 13, 2014) (describing Recommendation 2011-6).

⁷⁶ See, e.g., *About the Office of International and Tribal Affairs (OITA)*, U.S. ENVTL. PROT. AGENCY, <http://www2.epa.gov/aboutepa/about-office-international-and-tribal-affairs-oita> (last visited Mar. 13, 2014); *Office of Global Regulatory Operations and Policy*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/AboutFDA/CentersOffices/OfficeofGlobalRegulatoryOperationsandPolicy/default.htm> (last visited Mar. 13, 2014); *Office of International Affairs*, FED. TRADE COMM’N, <http://www.ftc.gov/about-ftc/bureaus-offices/office-international-affairs> (last visited Mar. 13, 2014).

⁷⁷ See Dodd-Frank Wall Street Reform and Consumer Protection Act § 175, 12 U.S.C. § 5373 (2012) (providing for the cooperation of U.S. regulators with foreign counterparts and international organizations). For a discussion of these requirements, see Alexander Goodenough, *Dodd-Frank: Regulating Systemic Risk in the Offshore Shadow Banking Industry*, 3 GEO. MASON J. INT’L COM. L. 137, 152–54, 160 (2011).

⁷⁸ See, e.g., 7 U.S.C. § 1854 (2012) (providing USTR with this sort of authority for textile trade deals). For a discussion, see Frederick Davis, *The Regulation and Control of Foreign Trade*, 66 COLUM. L. REV. 1428, 1458–60 (1966).

⁷⁹ For example, in 2011 Congress banned NASA and the White House Office of Science and Technology Policy from collaborating with cognate agencies in China. See William Pentland, *Congress Bans Scientific Collaboration with China, Cites High Espionage Risks*, FORBES, May 7, 2011, <http://www.forbes.com/sites/williampentland/2011/05/07/congress-bans-scientific-collaboration-with-china-cites-high-espionage-risks/>.

they viewed as a critical component of a “real” legal system.⁸⁰ But soft law, as it has developed, has become at least an internal constraint on what regulators see as their available options when engaged in matters with cross-border implications, has affected the practices of thousands of lawyers across the globe, and has managed to find creative mechanisms that have helped to ensure compliance.⁸¹

With soft law’s rise in international practice has come its increased acceptance by the international legal community. As far back as Philip Jessup, international legal scholarship has recognized the need to pay attention to nontraditional forms of international law.⁸² And as state practice has increasingly come to include nonbinding commitments which are taken seriously by the producers of international governance within states, international legal scholars have come to understand that excising soft law from the ambit of the discipline would mean ignoring a great deal of the work that international lawyers and government officials spend their time doing.⁸³ Soft law now is not only widely recognized within the broader field of international law but has also become the subject of extensive study by scholars within the discipline.⁸⁴ In the United States, the international legal

⁸⁰ See, e.g., Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT’L L. 413 (1983) (criticizing the emergence of soft law for transforming normativity in international law into a matter of degree, thereby diluting the certainty of rights and obligations under international law); see also, e.g., Jan Klabbers, *The Undesirability of Soft Law*, 67 NORDIC J. INT’L L. 381 (1998) (arguing that soft law is actually detrimental to international law and the rule of law because it contributes to “smokescreens” that obscure the law’s lack of autonomy from politics or morality).

⁸¹ See Chris Brummer, *How International Financial Law Works (and How It Doesn’t)*, 99 GEO. L.J. 257, 263 (2011) (“[R]eputational constraints inform the decision making of regulators in the same way that reputation disciplines heads of state who commit to international agreements. Furthermore, even where rules are not legally binding, they may still influence the behavior of regulators and market participants seeking to make credible commitments of efficiency, value, and strong corporate governance to investors.”); see also David Zaring, *Finding Legal Principle in Global Financial Regulation*, 52 VA. J. INT’L L. 683, 685 (2012) (noting the importance of peer review in assuring compliance with soft law requirements).

⁸² See PHILIP C. JESSUP, *TRANSNATIONAL LAW* 2 (1956) (defining “transnational law” as “all law which regulates actions or events that transcend national frontiers” and including “[b]oth public and private international law . . . [plus] other rules which do not wholly fit into such standard categories”); Schachter, *supra* note 64, at 301, 304 (recognizing that although “nonbinding agreements are not governed by international law[, that] does not however remove them entirely from having legal implications,” and concluding that their nonbinding character should not obscure their usefulness).

⁸³ See, e.g., Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS 171, 180 (2010) (attempting to “better understand the impact of soft law” in light of the fact that “[s]oft law has historically been relegated to the fringes of academic international law discourse, notwithstanding its importance in the actual practice of states”); Hollis & Newcomer, *supra* note 18, at 540 (arguing that “[m]odern political commitments,” i.e., soft law agreements, “function in ways that the political branches cannot (and should not) ignore”).

⁸⁴ See, e.g., David M. Trubek et al., ‘Soft Law,’ ‘Hard Law’ and EU Integration, in *LAW AND NEW GOVERNANCE IN THE EU AND THE US* 65, 69 (Gráinne de Búrca & Joanne Scott eds.,

scholarship on soft law draws strongly upon the field of international relations.⁸⁵ Anne-Marie Slaughter pioneered thinking about a variant of international law as generated by transnational networks comprised of national regulators, and much of the work studying soft law embraces this approach.⁸⁶ Scholars approaching international law from other international relations framings, most prominently institutionalism, have also extensively studied soft law as a complement or alternative to traditional treaties.⁸⁷

One rough but quantifiable way to illustrate the rise in the recognition and study of soft law within international law and international relations is to look at the appearances of the term in the flagship journal of international legal scholarship, the *American Journal of International Law* (*AJIL*), and in the flagship journal of international relations scholarship, *International Organization*. *AJIL* has used the term in an ever-increasing number of articles: between 1985 and 1999, the term appeared in an average of 5.2 articles per year in the journal; between 2000 and 2012, the average increased to 9.6.⁸⁸ An even more striking increase is present in *International Organization*, which used the term in 3 articles before 1998, and since then has used it in 27.⁸⁹ The interest

2006) (“In the literature in international relations (IR) and international law (IL) we see increasing attention being paid to the role of soft law in multilateral governance.”).

⁸⁵ See *id.*

⁸⁶ See SLAUGHTER, *supra* note 51; Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 STAN. J. INT’L L. 283, 285 (2004); see also Lawrence L. C. Lee, *The Basle Accords as Soft Law: Strengthening International Banking Supervision*, 39 VA. J. INT’L L. 1, 2 (1998) (reviewing the actions of the Basel Committee and promoting the adoption of the Basel Accords as soft law); Kal Raustiala, *The Architecture of International Cooperation: Trans-governmental Networks and the Future of International Law*, 43 VA. J. INT’L L. 1, 3–4 (2002) (explaining that “much contemporary international cooperation is not inter-national at all; rather, it is occurring among discrete, specialized agencies of governments” through an “adaptable and decentralized network model”); David Zaring, *Informal Procedure, Hard and Soft, in International Administration*, 5 CHI. J. INT’L L. 547 (2005) (discussing “regulatory globalization” and calling for an International Administrative Procedure Act); David Zaring, *Network and Treaty Performance During the Financial Crisis*, 103 AM. SOC’Y INT’L L. PROC. 63, 65 (2009) (assessing the role of financial regulatory networks in the international response to the financial crisis).

⁸⁷ See, e.g., Abbott & Snidal, *supra* note 50; Guzman & Meyer, *supra* note 83; Timothy Meyer, *Soft Law as Delegation*, 32 FORDHAM INT’L L.J. 888 (2009); Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706 (2010); Gregory C. Shaffer & Mark A. Pollack, *Hard Versus Soft Law in International Security*, 52 B.C. L. REV. 1147 (2011); see also Trubek et al., *supra* note 84 (approaching soft law from a constructivist perspective).

⁸⁸ Authors’ calculations using searches run on the Westlaw database through December 2012; more detailed results on file with authors. These results and the results for *International Organization* are likely both overinclusive (because the term “soft law” is sometimes used more broadly than we use it here) and underinclusive (because other terms are sometimes used instead of “soft law”), but they serve as a rough proxy.

⁸⁹ Authors’ calculations using searches run on the Cambridge Journals database through June 2013; more detailed results on file with authors.

in soft law of international law and international relations scholars, in sum, has grown measurably in the past decade or so.

2. *Foreign Relations Law Scholarship*

The intersection of U.S. law and international affairs has given rise to a set of doctrines that make up what we now call foreign relations law. Aside from international law, the forms of law that fall within foreign relations law—the Constitution, federal statutes, and executive practice—also appear in fields of purely domestic public law. Yet the understanding and interpretation of these forms of law in the foreign relations context often deviates from those in the domestic context. The Supreme Court has long recognized that differences exist “between the powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs,” observing the fact “that these differences are fundamental, may not be doubted.”⁹⁰ As we discuss in Part III, in general these differences result in considerably more acceptance of executive branch power in foreign relations law.

Foreign relations law concerns itself in detail with the formation and implementation of hard international law obligations—treaties and customary international law.⁹¹ Broadly speaking, foreign relations law recognizes three ways through which the United States can enter into binding international law agreements: treaties made through the process set forth in Article II, congressional-executive agreements, and sole executive agreements.⁹² There is an exhaustive academic literature dealing with the constitutional scope and limitations of these various types of agreements, with their implementation, and with their relationship to other aspects of foreign relations law. A similar literature exists with regard to the foreign relations law dimensions of customary international law.

Soft law agreements, by contrast, get barely a nod in the foreign relations law literature. To the extent that they are discussed, it is usually in the context of their formation rather than their implementation, and even here the discussion is sparse. The 1987 Restatement (Third) of Foreign Relations Law spends less than a page on soft law agreements, in contrast to at least eighty-four pages discussing hard international law agreements.⁹³ Although the use of soft law has

⁹⁰ *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 315 (1936).

⁹¹ See Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AM. J. INT'L L. 259, 269 (1992) (“Hard law in the international area comes mainly from custom or treaties.”).

⁹² See BRADLEY, *supra* note 25, at 31–32, 74–75.

⁹³ The Restatement devotes an entire part to “International Agreements.” See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW 144–229 (1987). Within this part, however, it only mentions soft law agreements briefly and does so mainly for the purpose of

grown considerably since then, the foreign relations law literature has not responded to this growth. The 2011 casebook by Curtis Bradley and Jack Goldsmith, for example, mentions soft law agreements only in passing, while devoting several hundred pages to treaties and custom.⁹⁴ Scholarship in legal journals shows a similar void. With the exception of an article by Duncan Hollis and Joshua Newcomer considering constitutional issues relating to the making of soft law agreements, there is virtually nothing written about these agreements in the foreign relations law literature.⁹⁵ Moreover, their frequency is not tracked in practice. Although reporting mechanisms exist for treaties under the Senate advice and consent process, and for congressional-executive agreements and sole executive agreements under the 1976 Case-Zablocki Act, these mechanisms do not apply to soft law agreements.⁹⁶

3. *Administrative Law Scholarship*

Instead of foreign relations law, soft law implementation in the United States now finds a doctrinal home in administrative law. However, administrative law scholars have embraced soft law more for its potential than as a problem to be squared with domestic legal doctrine; few have looked into it, and those who have tend to be regulatory scholars with international bents.

For example, there is a rising school of “global administrative law,” which has adherents in jurisdictions across the globe but is often associated with the NYU School of Law, that is engaged with cataloging and evaluating all of the ways in which regulatory governance has

stating that this part “does not apply to agreements not intended to have [a] binding character or consequences.” *Id.* § 301 cmt. e & reporters’ note 2.

⁹⁴ See BRADLEY & GOLDSMITH, *supra* note 69, at 479 & n.** (“Although not explored in this chapter, it should be kept in mind that the United States also often makes *non-binding* international commitments. These commitments, which are not ‘treaties’ under either U.S. law or international law, can nevertheless be an important component of U.S. foreign policy.”). See *generally id.* at 479–711 (discussing treaties and custom).

⁹⁵ See Hollis & Newcomer, *supra* note 18, at 512 (describing soft law agreements as “invisible” and noting that “[t]he question of whether and how the United States can enter into political commitments [that is, soft law arrangements] with other nations has received virtually no attention”); see also BRADLEY, *supra* note 25, at 95–96 (briefly noting existence of soft law agreements and observing that “it is difficult to discern constitutional constraints on executive authority to enter into these agreements”).

⁹⁶ Information about treaties is recorded in the THOMAS database of the Library of Congress, which is available online at <http://thomas.loc.gov/home/treaties/treaties.html>. The 1976 Case-Zablocki Act requires the executive branch to report international agreements other than treaties to Congress within several months of their ratification, but the executive branch does not interpret this requirement to apply to soft law agreements. See 1 U.S.C. § 112b (a), (d) (setting forth reporting requirements); 22 C.F.R. § 181.2(a)(1) (providing that for an agreement to constitute an international agreement for purposes of Case-Zablocki reporting requirements, “[t]he parties must intend their undertaking to be legally binding”).

become an international proposition.⁹⁷ Another collaborative effort along these lines might be found in Geneva, where Joost Pauwelyn, with a series of coauthors, has evaluated the quality of soft law. Pauwelyn calls it “informal law,” or IN-LAW, because it features informal processes, the capacious inclusion of new sorts of actors, and output informality—on the usual administrative law metrics of transparency and effectiveness.⁹⁸

Of course, some scholars—not many, but Richard Stewart is notably among them—have specifically considered soft law implementation in the United States, emphasizing an administrative law approach.⁹⁹

It is perhaps natural that soft law implementation is understood as falling within the aegis of administrative law, since this is the field of law that traditionally addresses policy implementation in the United States. Yet as we show in the next Part, the fit is often an uneasy one. Because U.S. administrative law was designed for purely domestic decision making,¹⁰⁰ its laws and principles do not always map well onto the kind of cross-border policy setting that soft law generates.

II

ADMINISTRATIVE LAW PROBLEMS FOR SOFT LAW

Ordinary administrative law poses some uneasy problems for soft law, both conceptually and doctrinally. This Part reviews these problems and posits that as cross-border regulation becomes more and more important, the problems will only increase.

A series of foundational administrative law doctrines are difficult to square with the way that international soft law institutions increasingly work. Indeed, one of us has argued that under ordinary principles of administrative law, at least as they have been traditionally applied, regulatory globalization will never pass muster.¹⁰¹ This has

⁹⁷ See Kingsbury et al., *supra* note 72 (two of the three authors are NYU professors).

⁹⁸ Joost Pauwelyn, *Informal International Lawmaking: Framing the Concept and Research Questions* (Project Framing Paper, 2011), available at <http://ssrn.com/abstract=1738464>.

⁹⁹ See generally Richard B. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?*, 68 *LAW & CONTEMP. PROBS.* 63, 81–82 (2005) (briefly noting some foreign relations law connections); Richard B. Stewart, *The Global Regulatory Challenge to U.S. Administrative Law*, 37 *N.Y.U. J. INT'L L. & POL.* 695 (2005) [hereinafter Stewart, *The Global Regulatory Challenge*] (pursuing similar themes); see also Feldman, *supra* note 22, at 401 (similarly approaching the implementation of soft law agreements from an administrative law perspective).

¹⁰⁰ Cf. Stewart, *The Global Regulatory Challenge*, *supra* note 99, at 697 (“U.S. domestic regulation and administrative law . . . has until recently remained splendidly isolated from globalization.”).

¹⁰¹ See Zaring, *supra* note 30, at 38–63. If we relax those assumptions and look to the underlying policies of transparency and responsiveness to guide our evaluation of their legality, the right kind of institutions could pass muster—provided that Congress also endorses regulatory globalization more explicitly. See *id.* at 91–97.

not stopped American bureaucrats from eagerly embracing their foreign counterparts,¹⁰² nor should it. But it does expose them to significant legal risk—risks that, of course, grow as those regulators increasingly immerse themselves in an interlocking global regime.

These risks exist against a backdrop of suspicion about foreign influences on American law. Justice Antonin Scalia, for example, has argued that the idea “that American law should conform to the laws of the rest of the world . . . ought to be rejected out of hand.”¹⁰³

We have seen, and can expect to see in the future, challenges to American participation in regulatory networks regarding delegation, Administrative Procedure Act (APA) procedural requirements, and due process concerns.¹⁰⁴ As the Administrative Conference of the United States observed in 2011, some agencies have been wary of international regulatory cooperation because they consider “that they lack statutory authority to account for international effects when making regulatory decisions.”¹⁰⁵

The doctrinal problems with regulatory globalization proceed from a foundational disconnect between the local formality of administration and the informality of soft law generation. American agencies have particular procedural requirements, narrow grants of authority in various substantive issue areas, and careful methods of legitimization.¹⁰⁶ But the “rules” of soft law do not embrace any of these requirements. Instead, soft law has traditionally generated its commands through a negotiated process among institutions that cross borders.¹⁰⁷ For American regulators, this poses a serious mismatch of

¹⁰² See, e.g., *supra* note 76 (listing examples of agencies that have established foreign affairs offices for the purposes of negotiating and coordinating with their foreign counterparts).

¹⁰³ *Roper v. Simmons*, 543 U.S. 551, 624 (2005) (Scalia, J., dissenting). Justice Scalia was referring specifically to constitutional interpretation, but his statement bespeaks a broader theme of local democratic accountability.

¹⁰⁴ See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (establishing the three-factor test for determining the type of process due in administrative hearings); *NRDC v. EPA*, 464 F.3d 1, 8 (D.C. Cir. 2006) (explaining that the nondelegation doctrine prohibits an international body from dictating revision of standards to the EPA); *Metro. Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1164–65 (D.C. Cir. 1995) (stating that a commissioner must recuse himself if he had “made up [his] mind” on the merits of a case in advance of a hearing (alteration in original)). For the APA, see Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

¹⁰⁵ Admin. Conference of the U.S., Recommendation 2011–6 on International Regulatory Cooperation, at 4 (Dec. 8, 2011), available at <http://www.acus.gov/sites/default/files/documents/Recommendation%202011-6%20%28International%20Regulatory%20Cooperation%29.pdf>.

¹⁰⁶ See GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* 256 (6th ed. 2013).

¹⁰⁷ See SLAUGHTER, *supra* note 51, at 44–45. These values are the reason why a decision by the European Court of Justice, which has ruled that European antitrust regulators did not have the authority to conclude a cooperation agreement with the United States, is important. See *supra* note 28.

process, and even sovereignty. These regulators' work at home is authoritative, but when they go abroad, their agreements lack the indicia of formality.¹⁰⁸ The need for give-and-take at the international level—and the subsequent need for domestic implementation according to the terms reached internationally—fits uncomfortably with some of the premises underlying U.S. administrative law.

In this Part, we identify the doctrinal bases for these problems and note a few sorely needed first steps that soft law institutions have taken to address some of them. The amelioration is welcome, but the need for a sounder doctrinal footing to justify U.S. participation in regulatory globalization is required. We provide that justification in the next Part.

A. Nondelegation and Subdelegation

The nondelegation doctrine prevents anyone else from playing the legislature's role as the provider of laws.¹⁰⁹ Under it, Congress may delegate a portion of that lawmaking authority to another institution—say, a federal agency—but the delegate must be provided with an “intelligible principle” that cabins its discretion.¹¹⁰

Under current jurisprudence, this is not a high bar, as the Supreme Court has turned away at least five nondelegation challenges in the past two decades, and the votes have not been close.¹¹¹ But nondelegation nonetheless has teeth in two respects.

First, the courts of appeal keep sending up certiorari-worthy delegation rulings seemingly in the hope that the Court will crack down on delegations.¹¹² This concern about delegation is especially the case when the delegation is international. As Curtis Bradley has ob-

¹⁰⁸ Joost Pauwelyn notes that these agreements circumvent “formalities traditionally linked to international law” having to do with “output, process, or the actors involved.” Pauwelyn, *supra* note 98, at 15.

¹⁰⁹ See LAWSON, *supra* note 106, at 61.

¹¹⁰ See *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (articulating the “intelligible principle” test); *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (“Applying this ‘intelligible principle’ test to congressional delegations, our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”).

¹¹¹ See LAWSON, *supra* note 106, at 108–14.

¹¹² As Gary Lawson has observed,

In the slightly more than one decade from [1989] through [2001], the combined vote in the Supreme Court on the merits of nondelegation challenges was 53–0 against the challenges. Which is more impressive: the unanimous rejection of the challenges or the fact that the Court had to cast 53 votes during that time?

Id. at 114; see also, e.g., Richard J. Pierce, Jr., *The Inherent Limits on Judicial Control of Agency Discretion: The D.C. Circuit and the Nondelegation Doctrine*, 52 ADMIN. L. REV. 63, 64, 94 (2000) (criticizing the D.C. Circuit's original holding in *American Trucking Ass'ns v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999), *modified in part*, 195 F.3d 4 (D.C. Cir. 1999) (finding the EPA's

served, “transfers of authority by the United States to international institutions could be said to raise ‘delegation concerns’” because those institutions, unlike federal agencies or even American states, are not accountable to any organ of American government.¹¹³ The idea is that delegations to ungovernable, irreversible international institutions—even with an intelligible principle attached—are ones that ought to be treated with particular suspicion.

Second, as Cass Sunstein and others have argued, the nondelegation doctrine evinces its sharpest bite when it is applied as a canon of construction favoring narrow interpretations of statutory mandates.¹¹⁴ However, the more narrowly agency statutory mandates are construed, the less justification they provide for engaging in international process and the less room they offer to maneuver substantively.

The D.C. Circuit, the nation’s premier administrative law court, and hence ground zero for challenges to regulatory globalization, has proven to be particularly receptive to nondelegation challenges. Two judges on that court, for example, have cast doubt on the ability of the body designated by the Montreal Protocol on Substances that Deplete the Ozone Layer to dictate revised standards governing those substances to the Environmental Protection Agency (EPA) because of the nondelegation doctrine.¹¹⁵ They rejected the argument that “because the Protocol authorizes future agreements concerning the scope of the critical-use exemption, those future agreements must ‘define the scope of EPA’s Clean Air Act authority,’”¹¹⁶ because such a de facto amendment of the Clean Air Act’s powers would mean that “Congress either has delegated lawmaking authority to an international body or authorized amendments to a treaty without presidential signature or Senate ratification, in violation of Article II of the Constitution.”¹¹⁷

The court also, in the summer of 2013, rejected the delegation by Congress of rulemaking authority to a mix of public and private actors and to an arbitrator.¹¹⁸ The court held that this statute crossed the line between permissibly authorizing private parties to aid in rulemaking and impermissibly giving them “an effective veto” on the

interpretation of the Clean Air Act unconstitutional on nondelegation grounds and predicting the Supreme Court’s eventual reversal)).

¹¹³ Bradley, *supra* note 29, at 1558.

¹¹⁴ Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 331–32 (2000); John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223. For a recent take on the canon, see Adam B. Cox, *Deference, Delegation, and Immigration Law*, 74 U. CHI. L. REV. 1671, 1674–79 (2007) (applying such canons to the immigration context).

¹¹⁵ NRDC v. EPA, 464 F.3d 1, 8 (D.C. Cir. 2006).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Ass’n of Am. R.Rs. v. U.S. Dep’t of Transp., 721 F.3d 666, 670 (D.C. Cir. 2013) (“Federal lawmakers cannot delegate regulatory authority to a private entity.”).

process.¹¹⁹ Although this was a purely domestic case, it has potential consequences for delegations to international regulatory bodies, which the court might view as akin to private actors. In short, the court has embraced the nondelegation doctrine in ways that may pose problems for domestic regulators seeking to ground regulatory decisions legally or practically in an international consensus.

A further aspect of delegation doctrine—the subdelegation doctrine—is potentially even more problematic. While the nondelegation doctrine reserves some quantum of the power to legislate to Congress and Congress alone, the subdelegation doctrine further provides that powers delegated by Congress may not, absent a clear statement to the contrary, be delegated by the delegate to anyone else.¹²⁰

Accordingly, the D.C. Circuit has informed the Coast Guard that the uncritical adoption of standards propounded by the International Maritime Organization would violate the subdelegation doctrine.¹²¹ In that case, it warned that “if the Coast Guard had delegated some or all of its decisionmaking authority under the Ports and Waterways Safety Act to an outside body not subordinate to it, such as the International Maritime Organization, the delegation would be unlawful absent affirmative evidence that Congress intended the delegation.”¹²² By the same token, it has rejected the delegation of rulemaking authority by the Federal Communications Commission (FCC) under the Telecommunications Act of 1996 to an internal sovereign—a state public utility commission.¹²³

B. APA Procedural Requirements

Procedural disconnects also exist between the emerging prominence of soft law institutions and domestic administrative law requirements. Under the APA, the rulemaking process begins with a notice announced to the world in the Federal Register, after which a comment period follows.¹²⁴ After consideration of the comments, agencies may promulgate their final rules, with an explanation of the reasons for the rule appended, and the prospect of judicial review to

¹¹⁹ *Id.* at 671.

¹²⁰ Discussions of the doctrine may be found in David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201; Jason Marisam, *The Interagency Marketplace*, 96 MINN. L. REV. 886, 951 (2012); Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2176 (2004) (“The exclusive delegation doctrine suggests that the President and executive branch agencies can subdelegate only if and to the extent Congress has authorized subdelegation. The exclusive delegation understanding tells us the Executive has no inherent authority to exercise legislative power.”).

¹²¹ *See* *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913 (D.C. Cir. 2008).

¹²² *Id.* at 927.

¹²³ *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 568 (D.C. Cir. 2004).

¹²⁴ 5 U.S.C. § 553(b)–(c) (2012).

follow.¹²⁵ But, of course, soft law institutions do not require notice and do not publicize their work in the Federal Register (or, sometimes, anywhere), nor are they required to offer comment periods.¹²⁶ Moreover, they have different approaches to responding to outside inquiries than do American agencies, which culminate not in direct judicial review but rather in the domestic implementation of the agreed-upon international rules or policies.¹²⁷

These procedural differences create serious tensions. While a federal agency would have difficulty proposing a rule before soft law negotiations (since the content of the rule would presumably depend upon the outcome of these negotiations), it could try both proposing and then finalizing its rule after a soft law consensus has been reached. But this approach would be at odds with the point of ventilating an administrative proposal before the public. In implementing the first Basel Accord in the late 1980s, for example, the Fed rejected various features proposed by commentators on the simple ground that “the [Basel] Accord does not recognize” these features and therefore they “would be inconsistent with the framework agreed upon by the G-10 countries.”¹²⁸ The more an agency relies on this kind of reasoning, the less meaningful the notice-and-comment process is. Indeed, the charade can create litigation risk; if an agency’s mind is unalterably fixed before it begins the rulemaking, courts have found its process to be lacking.¹²⁹

C. Due Process Concerns

Finally, there are due process concerns inherent in the fact that when soft law institutions make particularized determinations they will

¹²⁵ *Id.* § 553(c)-(d).

¹²⁶ Recall that these procedural safeguards required by the Administrative Procedure Act do not apply to soft law institutions, which are international entities not governed by statute. *Cf.* Kingsbury et al., *supra* note 72, at 33 (noting that while “some federal regulatory officials afford notice and comment when participating in international standard-setting on certain topics,” so far “these types of efforts are episodic and fragmented”).

¹²⁷ *See* Lefort, *supra* note 71 and accompanying text.

¹²⁸ Feldman, *supra* note 22, at 416 (quoting Risk-Based Capital Guidelines, 54 Fed. Reg. 4186, 4190-91 (Jan. 27, 1989) (codified as amended at 12 C.F.R. pts. 208, 225)) (internal quotation marks omitted); *see also id.* at 415-20 (describing how, while the Fed changed its proposed approach in response to some of the six issues substantially contested by commentators, in no case did the Fed act inconsistently with the Basel Accord). Feldman does find occasional willingness by the Fed to deviate from the framework of the second Basel Accord in ways that were inconsistent with that Accord. *See id.* at 424-25.

¹²⁹ “[W]e will set aside a commission member’s decision not to recuse himself from his duties only where he has ‘demonstrably made up [his] mind about important and specific factual questions and [is] impervious to contrary evidence.’” *Metro. Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1165 (D.C. Cir. 1995) (quoting *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1209 (D.C. Cir. 1980)); *see also C & W Fish Co. v. Fox*, 931 F.2d 1556, 1565 (1991) (identifying an “unalterably closed mind” as the test for disqualifying a rule maker (internal quotation marks omitted)).

not necessarily offer the kind of hearing to affected American businesses and individuals that ordinarily would be required.¹³⁰ As Margaret Chon has explained, “[t]he questions of due process within the standard-setting process, potential abuse of market position, and related issues have long been a concern with respect to the decentralized promulgation of standards.”¹³¹ Determining the kind of process due in these cases usually requires a look at the oft-invoked three-factor test in *Mathews v. Eldridge*:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.¹³²

Due process’s reach in international matters depends, as we will see, on the matter at issue. In American administrative law jurisprudence, due process is invoked to protect citizens faced with individualized determinations of their rights and duties, and traditionally requires “some kind of hearing” when a deprivation of life, property, or liberty is at issue.¹³³ But internationally, when the goal is harmonization, or mutual recognition, or something as diffuse as enforcement cooperation or the devising of best practices, there is unlikely to be a clear link between the global rule and any individualized deprivation. But increasingly, international soft law is striving to make more calibrated decisions; those decisions do create a domestic due process problem out of a global process.

An example might be found in the Basel Committee on Banking Supervision and FSB’s determination of which institutions constituted Global Systemically Important Financial Institutions (G-SIFIs).¹³⁴ The

¹³⁰ See 5 U.S.C. § 553 (2012).

¹³¹ Margaret Chon, *Marks of Rectitude*, 77 *FORDHAM L. REV.* 2311, 2318 (2009).

¹³² *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (citing *Goldberg v. Kelly*, 397 U.S. 254, 263–71 (1970)).

¹³³ See Henry J. Friendly, “*Some Kind of Hearing*,” 123 *U. PA. L. REV.* 1267, 1267–68 (1975).

¹³⁴ The FSB made the determination using a methodology developed by the Basel Committee. See *BASEL COMM. ON BANKING SUPERVISION, GLOBAL SYSTEMICALLY IMPORTANT BANKS: ASSESSMENT METHODOLOGY AND THE ADDITIONAL LOSS ABSORBENCY REQUIREMENT* (2011), available at <http://www.bis.org/publ/bcbs207.pdf>; Policy Measures, *supra* note 5. For a discussion of G-SIFIs, see Edward F. Greene & Joshua L. Boehm, *The Limits of “Name-and-Shame” in International Financial Regulation*, 97 *CORNELL L. REV.* 1083, 1087 (2012) (“For global systemically important financial institutions (G-SIFIs), where active oversight and prompt enforcement are indispensable, only deeper and binding efforts can ensure effective supervision, recovery, and resolution.”); Randall D. Guynn, *Are Bailouts Inevitable?*, 29 *YALE J. ON REG.* 121, 122 (2012) (“Policymakers have therefore been searching for ways to make taxpayer-funded bailouts of systemically important financial institu-

Basel Committee and Financial Stability Board identified twenty-nine such institutions in its initial G-SIFI determination, and it has updated the list annually.¹³⁵ Eight of the institutions on the first list are American; the FSB has since instructed American regulators to increase the capital requirements on these institutions.¹³⁶ It is precisely these kinds of particularized determinations that might lead to a deprivation of property that American courts since the turn of the twentieth century have subjected to the requirement of “some kind of hearing.”¹³⁷

III

REFRAMING SOFT LAW AS FOREIGN RELATIONS LAW

The imperfect fit between administrative law and the implementation of soft law agreements demonstrates the need for a better framework going forward. We argue here that foreign relations law can give soft law a much firmer conceptual and doctrinal footing in U.S. law and help further empower this useful form of law. Our argument, however, depends on a broadening of the traditional basis of foreign relations deference from the President alone, to the President and his agents.

The application of different constitutional principles to foreign affairs and domestic ones has long-standing roots. It goes back to the nation’s founding, as exemplified by Thomas Jefferson’s vision of the states being “one as to everything connected with foreign nations, and several as to everything purely domestic.”¹³⁸ While these differences have been and continue to be contested, as a matter of practice they have become ingrained in a distinctive set of doctrines that make up the “foreign affairs constitution.”¹³⁹

tions (SIFIs) a thing of the past.”); David Zaring, *Who Are the G-SIFIs?*, THE CONGLOMERATE (Dec. 21, 2011), <http://www.theconglomerate.org/2011/12/who-are-the-g-sifis.html>.

¹³⁵ See Policy Measures, *supra* note 5, at 4.

¹³⁶ See Jonathan Macey, *It’s All Shadow Banking, Actually*, 31 REV. BANKING & FIN. L. 593, 607 (2012) (“In late 2011, the FSB embraced the view that risk to the global financial system was posed by what are known as ‘global systemically important financial institutions,’ or G-SIFIs. G-SIFIs are defined as those financial institutions ‘whose distress or disorderly failure, because of their size, complexity and systemic interconnectedness, would cause significant disruption to the wider financial system and economic activity.’”); David Zaring, *The 28 G-SIFIs, As Selected by the Financial Stability Board*, THE CONGLOMERATE (Nov. 7, 2012), <http://www.theconglomerate.org/2012/11/the-28-g-sifis-as-selected-by-the-financial-stability-board.html> (“Lawyers have a term for that sort of determination: it is called an ‘adjudication.’”).

¹³⁷ See Friendly, *supra* note 133, at 1278–79 (describing the jurisprudence on when such hearings are required).

¹³⁸ Thomas Jefferson, Letter to Edward Carrington (Aug. 4, 1787), in LETTERS AND ADDRESSES OF THOMAS JEFFERSON 63 (William B. Parker & Jonas Viles eds., 1905).

¹³⁹ There is a rich debate over the extent to which the foreign affairs constitution does and should differ from domestic constitutional law. See, e.g., Henkin, *supra* note 42, at 716 (noting “the need for a fresh look at old dogma” but also observing that “[f]oreign affairs

A key feature of the foreign affairs constitution is that the President assumes the “lion’s share” of foreign affairs power under it,¹⁴⁰ with the President embodying the executive branch in some ill-defined way. This development, which stems from historical and functional reasons, at first applied mainly to international dealings such as diplomatic relations and international negotiations.¹⁴¹ But gradually it has also come to influence the implementation within the United States of decision making based on foreign affairs concerns, as we will discuss below. The doctrines that make up the foreign affairs constitution boost the executive branch’s power in several different ways. Some increase the power of the executive branch to act despite the absence of statutory authority (and sometimes even in opposition to this authority). Perhaps more importantly, other doctrines expand the range of powers that are available to the President in interpreting and implementing statutes, in part by empowering the President and in part by depowering the courts and the states. We focus here on four aspects of foreign relations law: presidential power over foreign affairs, acceptance of broader delegations, increased deference, and reduced procedural obligations.¹⁴²

Applying these principles to soft law agreements, however, requires expansive understandings of the reach of the President’s foreign affairs powers within the executive branch and of the foreign affairs exemption in the APA. As to the former, foreign affairs deference is often justified with reference to the unique constitutional role given the President to conduct foreign affairs.¹⁴³ Because the

are likely to remain constitutionally ‘special’ in the next century, as they have been in the past two”); Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 649 (2002) (arguing that the foreign affairs constitution rests on outdated premises in light of trends accompanying the rise of globalization). We do not engage these debates here but rather focus on considering what the current set of doctrines that exist in practice may have to offer to soft law. It may well be that principles of foreign relations law need reexamining. Our argument here is simply that, conditional on their existence, they should apply to soft law agreements.

¹⁴⁰ EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 208 (3d ed. 1948).

¹⁴¹ See Henkin, *supra* note 42, at 713–14.

¹⁴² We focus here on the set of foreign relations law principles that we think are likely to increase executive branch strength and flexibility in soft law practice. This set is not exhaustive. For example, we do not discuss the reduced application of federalism canons in the foreign relations law, even though this could arguably assist the executive branch in soft law implementation in certain contexts. Nor do we discuss Appointments Clause issues, although foreign relations law may authorize greater reliance than administrative law on the use of officials who have not undergone the Senate confirmation process. Our focus is on the doctrines that we perceive as addressing the tensions identified in Part II. It is also worth noting that nonbinding international cooperation can occur through actors other than the federal executive branch—such as through the actions of U.S. state governments and nonstate actors. Our argument here does not address these forms of cooperation (other than to the extent that there is federal executive branch involvement in them).

¹⁴³ See, e.g., *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) (asserting that “[i]n [the] vast external realm [of foreign affairs], with its important,

President has never exercised those unique powers alone without the help of subordinates, we argue that they rub off on the other agencies in the government—in this sense, you might call us enthusiasts of a form of unitary executive theory who nonetheless have welcomed the fragmentation of the administrative state. And as to the foreign affairs exemption in the APA, we see no reason to apply it solely to the work of the President and his generals and diplomats, given that so many other agencies are necessarily involved in international affairs in their own right.

One way to think about how these doctrines might apply is to consider them in relation to the continuum proposed by Justice Robert Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*.¹⁴⁴ In his continuum, congressional endorsement is presumed to mark the apogee of presidential authority, congressional silence creates a zone under which the President is often empowered to act under his independent powers, and congressional disapproval puts the President's power at its "lowest ebb."¹⁴⁵

This continuum applies in foreign relations law as in domestic law, and we think it is useful in understanding the power of agencies to engage in soft law. Where Congress has encouraged overseas collaboration, courts should be especially deferential when reviewing the fruits of such collaboration; where Congress has not spoken to the issue, the inherent foreign affairs powers located in the executive branch suggest that agencies still should be presumed to have the right to pursue their objectives through soft law, cabined in ways that we will discuss; and, if Congress has expressly discouraged agencies from soft law, those agencies should be especially leery of implementing such agreements. In determining which category an agency is acting under in a particular case, however—an issue that often turns upon statutory interpretation—considerable deference should be paid to the agency's view of the matter. This is consistent with the way in which, in foreign relations law, courts are typically generous to the President in determining under which *Youngstown* category he is operating.¹⁴⁶

complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation," and therefore he "must necessarily be most competent to determine when, how, and upon what subjects [international] negotiation may be urged" (internal quotation marks omitted)).

¹⁴⁴ 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

¹⁴⁵ See *id.*

¹⁴⁶ *Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981) ("[I]t is doubtless the case that executive action in any particular instance falls, not neatly in one of three [categories], but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition. This is particularly true as respects cases such as the one before us, involving responses to international crises the nature of which Congress can hardly have been expected to anticipate in any detail."). The Court then interpreted the

A. Presidential Power over Foreign Affairs

In *United States v. Curtiss-Wright Export Corp.*, Justice George Sutherland famously described “the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress.”¹⁴⁷ Although the legitimacy and reach of this power has been contested,¹⁴⁸ in practice executive branch actors and the courts have relied on it in defending aggressive uses of presidential power on matters that relate to foreign affairs.¹⁴⁹

In *Curtiss-Wright*, Justice Sutherland went on to discuss the President’s foreign affairs power in connection with diplomatic interactions with other nations, emphasizing that the President’s diplomatic sources, combined with the often “highly necessary” need for secrecy, leave him better positioned than Congress to conduct international negotiations.¹⁵⁰ Since *Curtiss-Wright*, however, this power has also been used to justify the domestic implementation of some international agreements and foreign policy decisions made solely by the executive branch. In the 1930s and 1940s, the Supreme Court relied on the understanding of the President as the sole organ of foreign affairs in holding that a sole executive agreement entered into by the President that settled claims between actors in the United States and the Soviet Union was domestically enforceable and preempted state law.¹⁵¹ Indeed, the Court has said that the fact that “the President’s control of foreign relations includes the settlement of claims is indisputable.”¹⁵² After World War II, the executive branch relied on its

relevant statutes generously to support a favorable *Youngstown* category for the President. *Id.* at 677–80. *But see* Ingrid Wuerth, *Medellín: The New, New Formalism?*, 13 LEWIS & CLARK L. REV. 1, 6–7 (2009) (observing that in its 2008 decision in *Medellín v. Texas*, the Supreme Court applied Justice Jackson’s framework unfavorably against the President when it concluded that his efforts to enforce a non-self-executing treaty fell under *Youngstown* category three).

¹⁴⁷ 299 U.S. 304, 320 (1936). Justice George Sutherland borrowed the term “sole organ” from a speech by John Marshall in the House of Representatives in 1800, *see id.* at 319, and it reflects a concept with roots in both international and constitutional law. *See* Jean Galbraith, *International Law and the Domestic Separation of Powers*, 99 VA. L. REV. 987, 1012–15, 1029 (2013).

¹⁴⁸ Harold Koh, for example, has criticized *Curtiss-Wright* and remarked that “[a]mong government attorneys, Justice Sutherland’s lavish description of the president’s powers is so often cited that it has come to be known as the ‘Curtiss-Wright, so I’m right’ cite.” HAROLD H. KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 94 (1990) (internal quotation marks omitted).

¹⁴⁹ *See* Galbraith, *supra* note 147, at 1014–15, 1018.

¹⁵⁰ 299 U.S. at 320–24 (citing historical sources for this proposition).

¹⁵¹ *See* *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937).

¹⁵² *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 415 (2003) (quoting *Pink*, 315 U.S. at 240 (Frankfurter, J., concurring)) (internal quotation marks omitted).

sole organ power to enter into the “provisional” General Trade and Tariff Agreement (GATT).¹⁵³ Despite never receiving a clear endorsement from Congress or the Senate, the GATT was implemented in the United States in ways that preempted contrary state law until its replacement by the World Trade Organization (WTO) Agreement in the 1990s.¹⁵⁴ As these examples suggest, the sole organ power has helped enable the President to implement some hard international law agreements in U.S. law under his own authority. There is necessarily an upper limit on this power—a point at which approval from the Senate or Congress will be necessary for such presidential implementation—but it is unclear where exactly this limit lies.¹⁵⁵

Although the President’s foreign affairs powers are often discussed in the context of hard international law agreements, this is not a prerequisite. In *American Insurance Ass’n v. Garamendi*, for example, the Supreme Court held that a California law regarding insurance policy disclosures was preempted by the President’s foreign affairs powers even though no hard international agreement signaled the intent to preempt such laws.¹⁵⁶ Indeed, some of the important agreements of the twentieth century made under the President’s foreign affairs powers have been nonbinding soft law agreements.¹⁵⁷ The President’s foreign affairs powers thus authorize him to make soft law.

It is this theory that forms the basis for our view that a particular sort of deference to the foreign affairs work of agencies is warranted; that deference builds on the idea that the executive branch, through the President’s constitutional powers, must have a relatively untrammelled role to play in international affairs. Like other parts of the Constitution that have evolved and broadened from narrow original

¹⁵³ See *Extension of the Reciprocal Trade Act: Hearings on H.R. 1211 Before the S. Comm. on Fin.*, 81st Cong. 1051 (1949).

¹⁵⁴ See Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CALIF. L. REV. 671, 751–57 (1998) (describing the Executive’s use of the “provisional” GATT until it was replaced by the 1994 agreement which established the WTO).

¹⁵⁵ In *Youngstown*, the Supreme Court concluded that the President’s foreign affairs powers did not authorize him to seize domestic steel mills despite a proclaimed need based on the President’s decision to engage in the Korean War. 343 U.S. 579, 587–88 (1952); see also *id.* at 645–46 (Jackson, J., concurring) (drawing a distinction between what the President can do “when turned against the outside world for the security of our society” and what he can do “inward” even where the inward acts are “important or even essential for the military and naval establishment”); *Medellín v. Texas*, 552 U.S. 491, 530–32 (2008) (holding that the President’s foreign affairs powers do not enable him to preempt state criminal law in order to enforce an international law obligation of the United States under a non-self-executing treaty).

¹⁵⁶ 539 U.S. 396, 421 (2003) (finding a “consistent Presidential foreign policy” to “encourage European governments and companies to volunteer settlement funds in preference to litigation or coercive sanctions” even though no sole executive agreement or specific executive branch representations prohibited the content of the California law at issue).

¹⁵⁷ See examples *supra* note 64.

grants, we think it is reasonable to impute the basis for foreign affairs deference to not just the President, but to the representatives of the executive branch who make it possible for the United States to speak with a consistent voice in all of the specific issue areas where soft law plays a role. In other words, we suggest that executive branch regulators engaged in soft law should similarly be understood to partake of the President's foreign affairs powers—and thus to have a source of authority for going beyond their statutory mandates in international negotiation.

Foreign relations law rarely grapples directly with the question of the extent to which President's powers extend to the executive branch more generally.¹⁵⁸ In administrative law, however, unitary executive theory helps explain the connections between the President and executive branch agencies. This theory finds its roots in Article II of the U.S. Constitution, which states that “[t]he executive Power shall be vested in a President of the United States of America.”¹⁵⁹ The fact that the framers of the Constitution chose to assign this power to one individual rather than accepting a proposal to allocate it to members of an executive council, proponents say, should be interpreted as giving the President authority over all executive branch officers.¹⁶⁰ Moreover, unitary theorist adherents argue that the “Take Care” clause within Article II mandates that the President himself is charged with deploying enumerated powers granted by the Constitution.¹⁶¹ Academic literature discussing the unitary executive theory in relation to administrative agencies generally speaks in terms of the President's authority to direct agency regulatory decisions¹⁶² and the President's authority to remove agency officials from office without cause.¹⁶³ Steven Calabresi and Christopher Yoo have accordingly argued that

¹⁵⁸ Cf. Henkin, *supra* note 42, 715 & n.8 (suggesting that scholars turn to “explore the foreign affairs applications of . . . executive privilege and delegation of authority . . . especially within the executive branch” and urging that “there may be something still to be said about legislative veto and presidential impoundment where foreign affairs are concerned”).

¹⁵⁹ U.S. CONST. art. II, § 1, cl. 1.

¹⁶⁰ See Robert V. Percival, *Who's in Charge? Does the President Have Directive Authority over Agency Regulatory Decisions?*, 79 *FORDHAM L. REV.* 2487, 2491 (2011).

¹⁶¹ U.S. CONST. art. II, § 3 (stating that the executive must “take Care that the Laws be faithfully executed”).

¹⁶² See Percival, *supra* note 160, at 2488.

¹⁶³ The authority to remove agency officials without cause is the characteristic traditionally associated with an “executive,” as compared to an “independent,” administrative agency. See generally Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 *ADMIN. L. REV.* 1111, 1141–46 (2000) (discussing the respective roles of the President and Congress in the removal of administrators who perform “quasi-legislative” or “quasi-judicial,” as opposed to “purely executive,” functions); Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 *CORNELL L. REV.* 769, 775–76 (2013) (describing the traditionally conceived difference between “independent” and “executive” administrative agencies—the presence of a

“[t]he Constitution’s creation of a unitary executive eliminates conflicts in law enforcement and regulatory policy by ensuring that all of the cabinet departments and agencies that make up the federal government will execute the law in a consistent manner and in accordance with the president’s wishes.”¹⁶⁴

The concept of a unitary executive branch is particularly natural in the area of foreign policy, which the Supreme Court has described as a “vast external realm, with . . . important, complicated, delicate and manifold problems,” in which “the President alone has the power to speak or listen as a representative of the nation.”¹⁶⁵ We differ from unitary-executive theorists, however, in attributing that power to agencies—even independent agencies like the Fed that are relatively free of executive oversight. Indeed, while we see agencies pursuing a welter of soft law projects on their own initiative without necessarily evincing a great deal of direction from the White House itself, we suspect that the complex, modern, globalized world admits of no alternative.

Understanding the President’s foreign affairs power to extend to other executive branch actors is in many ways a straightforward move. In practice a broad extension is already tolerated. No one thinks the President can or should personally involve himself in all the foreign policy work of the United States, and actors in the State Department and the military are commonly taken to act for him in foreign affairs. The same functionalist considerations that Justice Sutherland pointed to in justifying the President’s foreign affairs powers apply to soft law creation by regulatory agencies.¹⁶⁶ The agencies are negotiating on behalf of the United States in an international forum and their expertise makes them best positioned to accomplish these negotiations. Moreover, the President has now personally endorsed international regulatory cooperation in Executive Order 13,609, declaring that “[i]n an increasingly global economy, international regulatory cooperation . . . can be an important means of promoting” regulatory goals, including where national differences “might not be necessary” and “[i]n meeting shared challenges.”¹⁶⁷

“for-cause removal protection clause”—as specious and concluding that no “binary” distinction exists).

¹⁶⁴ CALABRESI & YOO, *supra* note 44, at 3.

¹⁶⁵ *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936).

¹⁶⁶ Indeed, we think it likely that administrative agencies can partake sufficiently of the President’s sole-organ powers that they can negotiate at the international stage for positions that are in contradiction to their statutory mandates (although domestic implementation would await congressional approval). See *Curtiss-Wright*, 299 U.S. at 319 (“[T]he President alone has the power to speak or listen as a representative of the nation Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.”).

¹⁶⁷ Exec. Order No. 13,609, *supra* note 2.

In addition, as a practical matter, agencies' interactions with their international counterparts may raise the profile of their actions and lead to greater supervision from the President and other executive branch actors. Because soft law negotiations are also diplomatic negotiations, they may receive more initial attention within the executive branch, such as triggering involvement from the State Department.¹⁶⁸ Where international soft law fora cover issues relevant to multiple agencies, as with the Basel Committee on Banking Supervision, agencies may need to engage more with each other than they ordinarily would. At the Codex Alimentarius, for example, an important soft law food organization, the FDA must collaborate with the Department of Agriculture and USTR because both food safety and trade interests are at issue.¹⁶⁹ Particularly high-profile negotiations may even lead to the personal involvement of the President, as was the case with the soft law agreement on climate change negotiated at Copenhagen in 2010.¹⁷⁰ Indeed, as in this case, lower-level executive branch actors may sometimes need the President's personal involvement in order to get foreign nations to accept a soft law agreement.

The President's foreign affairs powers, when leavened through the rest of the administrative state, thus provide a doctrinal basis for addressing some of the administrative law concerns with regard to soft law agreements. They not only provide the executive branch with the power to conduct soft law negotiations at the international level but also can increase the power and flexibility of the executive branch

¹⁶⁸ Jennifer Nou has proposed using a public-choice framework to understand how agencies can help "self-insulate" themselves from review by the President by employing strategies that increase the costs of this review. Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1760–61 (2013). Although she only discusses purely domestic regulations, this framework may be helpful in thinking about intra-executive branch dynamics in the soft law context. When agencies act internationally in setting soft law, they may be less able to self-insulate because of the greater interagency cooperation required in this process. Once a soft law agreement has been reached, however, the agencies may have greater power to self-insulate during its implementation because the Office of Information and Regulatory Affairs (OIRA) and other executive branch agencies may find it more costly to upset an agency policy that is embedded in an international consensus.

¹⁶⁹ See Patti A. Goldman, *Resolving the Trade and Environment Debate: In Search of a Neutral Forum and Neutral Principles*, 49 WASH. & LEE L. REV. 1279, 1288 (1992) (describing the roles played by the U.S. Department of Agriculture and FDA with regard to public participation in the process); Lucinda Sikes, *FDA's Consideration of Codex Alimentarius Standards in Light of International Trade Agreements*, 53 FOOD & DRUG L.J. 327, 328 (1998) (discussing food safety interests in cases where Codex standards fall below the minimum required by the FDA and U.S. Department of Agriculture).

¹⁷⁰ That is, the Copenhagen Accord, Dec. 18, 2009, United Nations Framework Convention on Climate Change, Rep. of the Conf. of the Parties on its 15th Sess., Dec. 7–19, 2009, U.N. Doc. FCCC/CP/2009/11/Add.1, at 4–7 (Mar. 30, 2010), available at <http://unfccc.int/resource/docs/2009/cop15/eng/11a01.pdf>. For a discussion, see Hannah Chang, *International Executive Agreements on Climate Change*, 35 COLUM. J. ENVTL. L. 337 (2010).

where domestic implementation is concerned. As an example of how this can matter in the regulatory context, consider the proposed and existing Keystone oil pipelines running from Canada to the United States.¹⁷¹ The President's foreign affairs powers give him the power to require that such a transboundary project obtain a federal permit—and thus effectively to require executive branch approval—even though no statute of Congress requires it.¹⁷² Relying largely on the sole-organ doctrine, two federal district courts have further held that the State Department, acting on behalf of the President, can decide whether or not to issue these transboundary permits without needing to comply with the requirements of the National Environmental Policy Act (NEPA).¹⁷³ As this example suggests, the President's foreign affairs powers can increase the executive branch's flexibility in the context of transnational regulatory decisions.

B. Delegation Principles

Considering the foreign relations law dimensions of soft law agreements adds flexibility to their implementation in a way that reduces administrative law delegation concerns. This is because foreign relations law takes a looser approach to delegation than does administrative law in several important respects.

To begin with, foreign relations law is more tolerant than administrative law of delegations from Congress to the President. As the Supreme Court has concluded, "Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with

¹⁷¹ For background on this project, see generally CONG. RESEARCH SERV., PROPOSED KEYSTONE XL PIPELINE: LEGAL ISSUES (Jan. 20, 2012).

¹⁷² The original executive order requiring permits emphasized this foreign relations perspective. Exec. Order No. 11,423, 3 C.F.R. § 441 (1970), 33 Fed. Reg. 11,741 (Aug. 20, 1968) ("[T]he proper conduct of the foreign relations of the United States requires that executive permission be obtained for the construction and maintenance at the borders of the United States of facilities connecting the United States with a foreign country."); see also CONG. RESEARCH SERV., *supra* note 171, at 4–6 (concluding that, as several district courts have held, the President's authority to require a permit rests in his foreign affairs powers, including his Commander in Chief power).

¹⁷³ *Sisseton-Wahpeton Oyate v. U.S. Dep't of State*, 659 F. Supp. 2d 1071, 1079–82 (D.S.D. 2009) (citing the sole-organ doctrine in concluding that no proper challenge lies through the APA and NEPA because the permit is presidential rather than agency action); *NRDC v. U.S. Dep't of State*, 658 F. Supp. 2d 105, 112–13 (D.D.C. 2009) (reaching a similar conclusion). *But see Sierra Club v. Clinton*, 689 F. Supp. 2d 1147, 1156–57 (D. Minn. 2010) (concluding without any discussion of foreign relations law that NEPA applies via the APA to the State Department's permitting decision particularly given that it had in fact prepared an environmental impact statement). In analyzing these various opinions, a report prepared by the Congressional Research Service suggested that the executive branch could choose whether or not to make itself subject to NEPA based on whether or not it chose to conduct a NEPA review, at least for cross-border projects. See CONG. RESEARCH SERV., *supra* note 171, at 25–26.

a brush broader than that it customarily wields in domestic areas.”¹⁷⁴ A long line of cases dating back at least to the Supreme Court’s 1892 decision in *Field v. Clark*¹⁷⁵ recognizes this principle.¹⁷⁶ The importance of this distinction has dwindled since the Supreme Court relaxed its approach to domestic delegations during the New Deal, yet courts continue to draw upon it in upholding broad delegations to the President in foreign relations law cases.¹⁷⁷

This relaxed delegation standard can make it easier for courts to accept agency implementation of soft law agreements under statutes delegating broad authority to the agencies. Quite often, Congress empowers executive branch actors to seek international cooperation or international agreements (without specifying whether these are to be hard or soft) in particular subject areas while providing little guidance on the content of these agreements.¹⁷⁸ For example, Congress has authorized the President to “conclude agreements . . . with other countries” to control aspects of the drug trade,¹⁷⁹ to have his intellectual property appointees “work[] with other countries to establish international standards and policies for the effective protection and enforcement of intellectual property rights,”¹⁸⁰ and to have the Secretary of Health and Human Services “participate and otherwise cooperate in any international health or medical research or research training meetings, conferences, or other activities.”¹⁸¹ A foreign relations law approach reduces the doctrinal delegation concerns with these kinds of delegations. Of more practical importance, it also reduces the risk that courts will narrowly construe these and other statutes that agencies act under in implementing soft law agreements

¹⁷⁴ *Zemel v. Rusk*, 381 U.S. 1, 17 (1965).

¹⁷⁵ 143 U.S. 649, 690 (1892) (“[Precedent shows] that, in the judgment of the legislative branch . . . it is often desirable, if not essential . . . to invest the President with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations.”).

¹⁷⁶ See, e.g., *Haig v. Agee*, 453 U.S. 280, 292 (1981); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 321–24 (1936).

¹⁷⁷ Examples from the courts of appeal in recent years include *United States v. Kuok*, 671 F.3d 931, 939 (9th Cir. 2012) (“The ‘[d]elegation of foreign affairs authority is given even broader deference than in the domestic arena.’” (alteration in original) (quoting *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1438 (9th Cir. 1996))); *United States v. Amirnazmi*, 645 F.3d 564, 578–79 (3d Cir. 2011) (“Mindful of the heightened deference accorded the Executive in this field [i.e., foreign affairs], we decline to interpret the legislative grant of authority parsimoniously.”); and *United States v. Dhafir*, 461 F.3d 211, 215 (2d Cir. 2006) (noting that foreign affairs is “a sphere in which delegation is afforded even broader deference”).

¹⁷⁸ See, e.g., Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 *YALE L.J.* 140, 159–66 (2009) (listing a selection of thirty-six such authorizing statutes in twenty different subject areas and observing that “many of the authorizations provide relatively few specific substantive limits”).

¹⁷⁹ 22 U.S.C. § 2291(a)(2) (2012).

¹⁸⁰ 15 U.S.C. § 8113(a)(6) (2012).

¹⁸¹ 22 U.S.C. § 2102(b)(4) (2012).

in order to avoid delegation concerns, since the delegation concerns are less in the first place.

Foreign relations law can also help ease concerns about delegations from the United States to international institutions in several ways. First, the greater tolerance of delegations from Congress to the executive branch in the foreign relations law context may justify a relaxing of the subdelegation doctrine: if Congress need not be as specific in its delegations of power, then presumably it also does not need to be as specific about delegations of the delegations. Second, there is reason to think that as a constitutional matter, delegations outside the federal government may be less problematic where foreign affairs are concerned.¹⁸² The United States participates in a number of international organizations in ways that could be said to raise delegation concerns under the domestic constitutional principles applicable in the ordinary administrative law context.¹⁸³ Although some commentators have raised these concerns, others have disputed them,¹⁸⁴ and the United States is building up an impressive amount of historical practice to support the more relaxed position.

Perhaps even more importantly, taking into account the foreign relations law dimensions of soft law agreements permits a functional compromise on the constitutional question of delegation of decision-making authority to international organizations. This compromise is to accept that the domestic agencies may almost always follow the international consensus which they have helped to develop but nonetheless to find the delegation problem soothed by the fact that domestic law does not legally obligate the agencies to implement this consensus. This is the approach that the D.C. Circuit ultimately embraced in relation to hard law in the Montreal Protocol case discussed

¹⁸² In the foreign affairs context, such delegations go at least back to the Jay Treaty of 1796, which provided for a mixed arbitration tribunal. Opponents of the treaty unsuccessfully protested this provision as an unconstitutional delegation. See David Golove, *The New Confederatism: Treaty Delegations of Legislative, Executive, and Judicial Authority*, 55 STAN. L. REV. 1697, 1745–46 (2003).

¹⁸³ See, e.g., Bradley, *supra* note 29, at 1578–82, 1594 (giving various examples, including the Chemical Weapons Convention, which relies on verification through the use of international inspectors who are by design unaccountable to domestic governments); Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492, 1495, 1516–17 (2004) (describing the “inexorable” growth of international delegations and giving the example of a U.N. Security Council Resolution compelling all nations to take specific actions against the financing of terrorist activities); see also Barbara Koremenos, *When, What, and Why Do States Choose to Delegate?*, 71 LAW & CONTEMP. PROBS. 151, 159–60 (2008) (finding based on a random sample of treaties filed with the U.N. that more than half of the international agreements call for some form of foreign delegation).

¹⁸⁴ For those raising concerns, see, e.g., Bradley, *supra* note 29; Ku, *supra* note 29. For those rebutting concerns, see, e.g., Kristina Daugirdas, *International Delegations and Administrative Law*, 66 MD. L. REV. 707 (2007); Golove, *supra* note 182. For more intermediate views, see Evan J. Criddle, *When Delegation Begets Domination: Due Process of Administrative Lawmaking*, 46 GA. L. REV. 117, 201–08 (2011); Swaine, *supra* note 183.

in Part II. The court concluded that the delegation problem there was avoided by construing the statute in question to give the executive branch the option of choosing to implement the international consensus, reasoning that “[t]he Executive has the power to implement ongoing collective endeavors with other countries.”¹⁸⁵ By framing the executive branch’s ultimate decision as optional and nodding to the value that the executive branch gains from coordination with other countries, the court suggested that a formalist, easy-to-satisfy understanding of the nondelegation doctrine could be applied in the soft law context.

C. Deference to the Executive Branch

Courts tend to give special deference to the views of the executive branch where foreign relations law is implicated. Typically grounded in functionalist justifications, this deference can occur with regard to treaty interpretation, to factual determinations, to presidential policy judgments, and to the interpretation of statutes dealing with foreign affairs or implicating foreign affairs.¹⁸⁶ To be sure, this deference is not always present and courts can be unpredictable in their use of it. In a recent, nuanced account of the issue, Ingrid Wuerth has described the Supreme Court’s approach to foreign affairs deference as a “doctrinal mess” and suggested that the Supreme Court is increasingly wary of it in many contexts.¹⁸⁷ But the concept persists, and lower courts in particular frequently apply foreign affairs deference both in justiciability determinations and in evaluating the merits of various claims.¹⁸⁸

Emphasizing the foreign relations dimensions of soft law agreements could increase the scope available to the executive branch in its statutory interpretation and the deference that courts extend it in litigation. Executive branch actors implementing statutory schemes already typically receive some deference under administrative law principles, such as *Chevron* deference for notice-and-comment rulemaking, *Auer* deference for an agency’s interpretation of its own regulations, and arbitrary-and-capricious review under the APA for

¹⁸⁵ *NRDC v. EPA*, 464 F.3d 1, 10 (D.C. Cir. 2006). Curtis Bradley has proposed a more stringent position, arguing that decisions of international organizations which the United States belongs to under treaties should be understood as non-self-executing and should require congressional implementation. Bradley, *supra* note 29, at 1587–95.

¹⁸⁶ See BRADLEY, *supra* note 25, at 19–21.

¹⁸⁷ Ingrid Wuerth, *Kiobel v. Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort Statute*, 107 AM. J. INT’L L. 601, 613–14 (2013).

¹⁸⁸ See Daniel Abebe & Eric A. Posner, *The Flaws of Foreign Affairs Legalism*, 51 VA. J. INT’L L. 507, 509–10 (2011) (describing the “avoidance doctrines” that courts have developed to limit their own capacity to adjudicate foreign affairs issues and citing examples of judicial deference to executive determinations on such issues).

various forms of agency action.¹⁸⁹ Foreign relations law principles can boost these levels of deference, sometimes by increasing the formal level of deference at issue¹⁹⁰ and sometimes by providing courts with a basis for being particularly generous in how they apply the relevant level of administrative deference.

By way of example, in a recent case involving the power of the Secretary of State to issue regulations preempting a New York property tax on residences of foreign diplomats, Judge Guido Calabresi observed for the Second Circuit that:

When Congress expressly confers to an agency interpretive authority over a statute that the agency is administering, our review of the agency's interpretation is limited and deferential. . . . Our deference is especially substantial with respect to the State Department's administration of its delegated responsibilities under the [Act at issue] because the Act deals with an area "bound up with security concerns and issues of reciprocity among nations."¹⁹¹

This extra boost to deference can widen the functional scope of a statutory mandate. Agency action in the soft law context typically deals with "issues of reciprocity among nations" and thus provides leeway for particularly wide interpretation of congressional statutes, especially those signaling support for cooperative international approaches.¹⁹² Although this additional scope will appear only on the margins and will often be hard to isolate, it suggests that agencies will

¹⁸⁹ See, e.g., *Chevron v. NRDC*, 467 U.S. 837, 842–43 (1984); *Auer v. Robbins*, 519 U.S. 452, 462–63 (1997); 5 U.S.C. § 706(2)(a). Indeed, there is a literature looking at how administrative deference and foreign affairs deference connect up. See Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 *YALE L.J.* 1170 (2007); Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 *VA. L. REV.* 649 (2000).

¹⁹⁰ *Jensen v. Nat'l Marine Fisheries Serv.*, 512 F.2d 1189, 1191 (9th Cir. 1975) ("Since presidential action in the field of foreign affairs is committed to presidential discretion by law, it follows that the APA does not apply to the action of the Secretary in approving the regulations here challenged." (citations omitted)); *Dist. No. 1 v. Mar. Admin.*, 215 F.3d 37, 41–42 (D.C. Cir. 2000) (rejecting an APA claim to federal approval of a shipping transfer on the grounds that a decision driven by "national defense, the adequacy of the merchant marine, foreign policy, and the national interest" was a matter committed to agency discretion by law).

¹⁹¹ *City of New York v. Permanent Mission of India to the United Nations*, 618 F.3d 172, 181 (2d Cir. 2010) (citations omitted); see also *id.* at 189 (describing the delegation of authority as "exceptionally broad" and noting the foreign affairs dimensions in deferring to the State Department's interpretation of the preemptive scope of the statute); see also *INS v. Abudu*, 485 U.S. 94, 110 (1988) (concluding that because "INS officials must exercise especially sensitive political functions that implicate questions of foreign relations . . . therefore the reasons for giving deference to agency decisions on petitions for reopening or reconsideration in other administrative contexts apply with even greater force in the INS context"); *Paradissiotis v. Rubin*, 171 F.3d 983, 988 (5th Cir. 1999) (concluding in a case about financial sanctions related to Libya that "[i]n matters like this, which involve foreign policy and national security, we are particularly obliged to defer to the discretion of executive agencies interpreting their governing law and regulations").

¹⁹² *Permanent Mission of India*, 618 F.3d at 181.

benefit from framing the implementation of soft law agreements as actions with foreign relations dimensions.

D. Reduced Procedural Obligations

Foreign relations law may also bring flexibility to the procedural requirements of administrative law where soft law implementation is concerned. This helps get around the awkward fit between notice-and-comment rulemaking, with its presumption of a discrete decision-making body, and the realities of international regulatory cooperation, which can require domestic flexibility prior to the negotiations and consistency after them. It also may ameliorate some procedural due process concerns.

Doctrinally, the foreign affairs cast to soft law implementation may make the notice-and-comment procedures of the APA inapplicable in certain circumstances. For one thing, these APA procedures may not apply at all where the agency is understood to be exercising power delegated from the President, since the President is not an “agency” within the meaning of the APA. The recent case of *Ancient Coin Collectors Guild v. United States Customs & Border Protection* illustrates this principle.¹⁹³ A congressional statute authorizes the President to impose import limitations on cultural property where he has entered into agreements with other countries to do so.¹⁹⁴ Pursuant to an agreement with Cyprus, the State Department issued a rulemaking barring the importation of certain coins.¹⁹⁵ When coin collectors sued, claiming a violation of the APA’s notice-and-comment procedures, the federal district court held that the APA did not apply because “the State Department . . . [was] acting on behalf of the President,” reasoning that this “conclusion is particularly justified here, because the Department . . . act[ed] in the realm of foreign affairs.”¹⁹⁶

Moreover, the APA’s notice-and-comment provisions do not apply to “a military or foreign affairs function of the United States.”¹⁹⁷ This foreign affairs function exception could conceivably be used to exempt at least some regulations based on soft law agreements from

¹⁹³ 801 F. Supp. 2d 383 (D. Md. 2011), *aff’d*, 698 F.3d 171 (4th Cir. 2012).

¹⁹⁴ 19 U.S.C. § 2602 (2012).

¹⁹⁵ See *Ancient Coin Collectors Guild*, 801 F. Supp. 2d at 392.

¹⁹⁶ *Id.* at 403; see also *id.* at 404 (noting that decision making about what countries to reach agreements with “will involve a variety of considerations beyond those set out in [the statute]” and observing that “Congress likely concluded that deference to the President was appropriate given the foreign policy considerations inherent in deciding whether to impose import restrictions”). On appeal, the Fourth Circuit did not reach this issue, but it signaled the importance of deference to the executive branch in light of the foreign affairs nature of the issue. See *Ancient Coin Collectors Guild*, 698 F.3d at 183–84 (4th Cir. 2012).

¹⁹⁷ 5 U.S.C. § 553(a)(1) (2012).

traditional notice and comment. The inclusion of this exception was probably motivated by congressional concerns about the need for secrecy in military and foreign affairs.¹⁹⁸ But the language reaches farther and has been applied more broadly, including where a “rule does no more than carry out obligations to a foreign nation undertaken for purposes of resolving a problem requiring coordination.”¹⁹⁹ Courts have found the foreign affairs function exception applicable in contexts as wide-ranging as Federal Highway Administration regulations implementing transnational trucker-licensing agreements,²⁰⁰ FCC regulations implementing international agreements on broadcasting power,²⁰¹ State Department regulations on benefits to foreign missions and consular offices,²⁰² and immigration regulations where “public rulemaking provisions should provoke definitely undesirable international consequences.”²⁰³ Of course, not every soft law agreement can justify discarding the notice-and-comment process, but the foreign affairs function exception provides a statutory basis for flexibility in at least some circumstances. Even if this exception does not apply, we think judges could appropriately take into account the foreign affairs context of soft-law-based rulemaking in determining how stringently to apply the APA’s procedural requirements.

In suggesting that the foreign relations law nature of soft law agreements can justify more procedural flexibility in rulemakings implementing these agreements, we do not mean that secrecy and lack of public notice are always necessary or wise. Our claim is simply that the current system of notice-and-comment rulemaking is designed for

¹⁹⁸ See, e.g., S. Rep. No. 79-248, at 12 (1946) (discussing “foreign affairs functions” in terms of whether they “requir[e] secrecy in the public interest”). The Attorney General’s Manual on the APA suggests that while this exception does not apply to everything extending beyond the borders of the United States, it is implicated where relations with other states are affected, and that it is not limited to merely diplomatic functions. See U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 26–27 (1947). The Administrative Conference of the United States has long recommended eliminating this exception, but it would retain an exception where specific foreign affairs secrecy interests are at stake. It emphasizes that the APA’s general exception for situations where notice-and-comment is “impracticable, unnecessary, or contrary to the public interest,” 5 U.S.C. § 553(b)(3)(B) (2012), would continue to apply as well to foreign affairs issues. See ADMIN. CONFERENCE OF THE U.S., RECOMMENDATION 73–5: ELIMINATION OF THE “MILITARY OR FOREIGN AFFAIRS FUNCTION” EXEMPTION FROM APA RULEMAKING REQUIREMENTS (adopted Dec. 18, 1973), available at <http://www.acus.gov/sites/default/files/documents/73-5.pdf>. This exception might also apply with regard to some soft law agreements, but we do not analyze that issue here.

¹⁹⁹ Int’l Bhd. of Teamsters v. Pena, 17 F.3d 1478, 1486 (D.C. Cir. 1994).

²⁰⁰ See *id.* It is unclear whether the agreement with Mexico that gave rise to this was a soft law obligation or a hard one.

²⁰¹ WBEN, Inc. v. United States, 396 F.2d 601, 616 (2d Cir. 1968).

²⁰² City of New York v. Permanent Mission of India to the United Nations, 618 F.3d 172, 201 (2d Cir. 2010).

²⁰³ Zhang v. Slattery, 55 F.3d 732, 744 (2d Cir. 1995) (quoting Yassini v. Crosland, 618 F.2d 1356, 1360 n.4 (9th Cir. 1980)) (internal quotation marks omitted).

executive branch decision making on purely domestic issues and works less well where the global nature of problems makes international cooperation important. In the absence of a congressional fix aimed at directly dealing with this tension,²⁰⁴ the foreign affairs function exception can authorize agencies to forego the ill-fitting processes and instead design ones more fitting to the circumstances of global regulatory cooperation.

Finally, we note that a foreign relations perspective may also ease procedural due process issues that arise in relation to particularized soft law decision making. The traditional balancing test for procedural due process includes consideration of the government interests at stake and the burdens that greater process would create for the government.²⁰⁵ To the extent that international cooperation implicates the government interests and burdens at stake, a court could consider this in the appropriate case. In addition, to the extent that claims of United States citizens against foreign countries are concerned, historical practice in foreign relations law provides strong support for executive branch action that settles these claims “‘without [the citizens’] consent, or even without consultation with them, usually without exclusive regard for their interests, as distinguished from those of the nation as a whole.”²⁰⁶

IV

DEFENDING SOFT LAW INSTITUTIONS WITH FOREIGN RELATIONS DOCTRINES

Our approach to justifying international regulatory cooperation can make a difference in a number of areas at the cutting edge of globalization. In this Part, we illustrate how our approach could apply to five very different issues: conflict diamonds, the Internet, financial regulation, sports arbitration, and climate change. These topics showcase the diversity of present and potential international regulatory cooperation.²⁰⁷ Some are discrete and some are broad; some have well-developed practices already in place and others represent only future

²⁰⁴ See Zaring, *supra* note 30 (calling for an International Administrative Procedure Act to address these issues).

²⁰⁵ See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 529–32 (2004) (plurality opinion) (discussing the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), in the context of a national security issue).

²⁰⁶ *Dames & Moore v. Regan*, 453 U.S. 654, 680 (1981) (quoting LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 262–63 (1972)).

²⁰⁷ Many other areas of soft law constitute new sources of obligation for American rulemakers—obligations that those regulators are taking seriously. Even the conduct of war, seemingly the most sovereign of sovereign powers, is not immune from the adoption of soft law. To give one example, the United States has committed to informal norms of detainee treatment through the so-called Copenhagen Principles. For a discussion of these principles, see Jacques Hartmann, *The Copenhagen Process: Principles and Guidelines*,

possibilities; some involve soft law institutions that have developed their own mechanisms of international public participation, while others are less transparent; and some have been crafted entirely or primarily by the executive branch, while others involve congressional statutes that directly help or hinder international cooperation. As we discuss below, these differences affect the extent to which bringing foreign relations law principles to bear can increase the flexibility available to the executive branch in forming and implementing soft law agreements.²⁰⁸

A. Conflict Diamonds and Delegations

The United States has joined a multinational effort to restrict trafficking in conflict diamonds—a worthy commitment but one that shows how participation in a soft law organization is furthered by foreign relations law principles related to the nondelegation doctrine and the procedural exemptions that we think should be applied to soft law processes.²⁰⁹

Limiting reliance on so-called conflict minerals has become an important part of America's relationship with the developing world. Among other actions, the United States has joined an international soft law agreement, known as the Kimberley Process, aimed at preventing conflict diamonds from crossing borders.²¹⁰ As Lesley Wexler has observed, this scheme was devised by nothing more than “a coalition of states, NGOs, and corporations interested in the diamond trade.”²¹¹ John Ruggie views this form of organization as a plus. “Soft law hybrid arrangements like the Kimberley Process,” in his view, “represent an important innovation by embodying such a concept: combining importing and exporting states, companies, and civil

EJIL: TALK! (Nov. 3, 2012), <http://www.ejiltalk.org/the-copenhagen-process-principles-and-guidelines/>.

²⁰⁸ In exploring these different issues, we do not judge the substance of the soft law described. Our goal is to consider the executive branch's power to make and implement these commitments, not to evaluate the underlying merits of the commitments themselves.

²⁰⁹ There have been recent challenges by the National Association of Manufacturers, the Chamber of Commerce, and the Business Roundtable to the conflict-minerals rule under Dodd-Frank. See *Nat'l Ass'n of Mfrs. v. SEC*, No. 13-cv-635 (RLW), 2013 WL 3803918 (D.D.C. July 23, 2013) (challenging the SEC rulemaking under the APA and the final rule's disclosure requirements as compelling speech in violation of the First Amendment).

²¹⁰ See *Kimberley Process Certification Scheme*, U.S. DEP'T OF STATE (Nov. 5, 2002), <http://www.state.gov/e/eb/diamonds/c19974.htm>. The Kimberley Process, which is described in the Certification Scheme, is essentially a working group that supervises the Certification Scheme at the international level. See *id.* Another step taken by the United States in regard to conflict minerals is the Dodd-Frank Wall Street Reform Act's requirement that publicly traded companies report on their use of conflict minerals from the Democratic Republic of Congo and adjoining countries. See 15 U.S.C. § 78m(p) (2012).

²¹¹ Lesley Wexler, *Regulating Resource Curses: Institutional Design and Evolution of the Blood Diamond Regime*, 31 CARDOZO L. REV. 1717, 1729–30 (2010).

society actors, as well as integrating voluntary with mandatory elements.”²¹²

Unusually for a soft law agreement, for the conflict-diamond agreement Congress has passed specific legislation authorizing and directing the implementation process in the United States. The 2003 Clean Diamond Trade Act (CDTA) spells out a multitude of interactions between soft law, hard law, congressional statutes, and executive action.²¹³ It directs the President to “prohibit the importation into, or exportation from, the United States of any rough diamond, from whatever source, that has not been controlled through the Kimberley Process Certification Scheme.”²¹⁴ The seeming clarity of this directive is modified, however, in several ways. First, the CDTA is only effective if the President has certified to Congress that it does not conflict with certain hard international law obligations of the United States, which in turn depend upon steps taken by the WTO or the U.N. Security Council.²¹⁵ Second, the CDTA contains a further grant of authority to the President to waive this prohibition for any country for up to a year if, among other things, “the President determines that the waiver is in the national interests of the United States.”²¹⁶ Other sections provide that “[t]he President is authorized to and shall as necessary issue such proclamations, regulations, licenses, and orders, and conduct such investigations, as may be necessary to carry out this chapter” and may delegate these duties as appropriate.²¹⁷ Individuals who violate the CDTA and its regulations are subject to civil and criminal penalties.²¹⁸

While the specific congressional authorization of the Kimberley Process powerfully legitimizes its domestic implementation, from an administrative law standpoint it poses other problems. Most significantly, the statute and its implementation raise two delegation concerns. First, the trigger based on U.N. or WTO action is an international trigger foreign to administrative law—one that raised such substantial constitutional concerns that President George W. Bush declared his intent to construe this trigger as discretionary

²¹² John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT’L L. 819, 839 (2007).

²¹³ Clean Diamond Trade Act, 19 U.S.C. §§ 3901–3913 (2012).

²¹⁴ *Id.* § 3903(a). For a judicial discussion of the statute, see *United States v. Approximately 1,170 Carats of Rough Diamonds Seized at John F. Kennedy Int’l Airport on January 13, 2004*, No. 05-CV-5816 (ARR)(MDG), 2008 WL 2884387 (E.D.N.Y. July 23, 2008). For a scholarly critique, see Edward R. Fluet, Note, *Conflict Diamonds: U.S. Responsibility and Response*, 7 SAN DIEGO INT’L L.J. 103, 115 (2005) (arguing that the statute will fail to be effective absent an increase in inspections and oversight).

²¹⁵ See Clean Diamond Trade Act, Pub. L. 108-19, § 15, 117 Stat. 631, 637 (2003) (uncodified section).

²¹⁶ 19 U.S.C. § 3903(b)(2) (further providing that the President must report any waivers and the reasons for them to congressional committees).

²¹⁷ *Id.* §§ 3904(a), 3913.

²¹⁸ *Id.* § 3907.

rather than mandatory.²¹⁹ Second, the CDTA gives the President broad discretionary powers, including the ability to determine waivers in the “national interest” and arguably the ability to terminate it at his discretion—a broad delegation indeed.²²⁰

A foreign relations law perspective provides a new frame for analyzing these delegation issues. As to the trigger, a foreign relations law perspective offers reason to think that it is constitutional, although there is room for debate on the issue. As mentioned above, practice and some commentators accept more delegations in the international context than the domestic one.²²¹ Furthermore, foreign relations law offers a backdrop of practice for analyzing termination questions. In some sense, every treaty is potentially a delegation of termination power to a foreign actor.²²² As to the broad discretion vested by the statute in the President, this seems unproblematic from a foreign relations law perspective. The authority for the President to waive the statute’s application in the “national interest” seems appropriate under the lessened standard for delegation set forth in *Curtiss-Wright* and other Supreme Court cases. Indeed, the authority to terminate the statute’s application more generally also seems appropriate; it is not inconsistent with other statutes that authorize the President to take unilateral action in trade disputes or the like.

Approaching the statute from a foreign relations law perspective builds in further flexibility for the executive branch in several respects. First, the President’s foreign affairs powers give executive branch officials the ability to continue coordination with other nations under the Kimberley Process without undue concern about the extent to which the statute authorizes this.²²³ Second, this approach can justify deviations from ordinary APA procedures. The option is arguably available—although the rulemakers do not seem to have

²¹⁹ See Swaine, *supra* note 183, at 1519–20 & n.100.

²²⁰ See Fluet, *supra* note 214, at 116.

²²¹ See *supra* Part III.B.

²²² Treaties are the “supreme law of the land” under the Supremacy Clause, U.S. CONST. art. VI, yet, because they are contracts, they can be terminated under certain circumstances by the actions of other states. Congressional statutes can also potentially be terminated in similar ways. See An Act for Giving Effect to Certain Treaty Stipulations Between This and Foreign Governments, for the Apprehension and Delivering Up of Certain Offenders, 9 Stat. 302, 303 (1848) (providing that this statute was to “continue in force during the existence of any treaty of extradition with any foreign government, and no longer”).

²²³ The CDTA expresses the “sense of Congress” that the Kimberley Process is “ongoing” and that the President should work with it to adopt measures to track statistics and to monitor the Process’s effectiveness in controlling the diamond trade. 19 U.S.C. § 3909; see also *id.* §§ 3906, 3908 (expressing congressional support for presidential support and technical assistance for the adoption and implementation of the Kimberley Process by other countries). In light of the President’s foreign relations powers, executive-branch officials involved in the Kimberley Process could undertake other forms of international engagement if necessary.

exercised it—to interpret the CDTA as a delegation to the President rather than to administrative agencies and therefore to find the APA to be generally inapplicable.²²⁴ Moreover, regulations enforcing this statute are good candidates for the foreign affairs function exception to notice-and-comment rulemaking. There is intriguing variation in the extent to which agencies have applied this exception or instead followed the rote paths of the APA process. The Department of the Treasury has tended to invoke this exception on CDTA regulations,²²⁵ while other agencies have not done so or have taken a mixed approach.²²⁶

B. The Internet and Delegations to a Firm and a Regulatory Network

The government has, in an effort to smooth the concerns of other countries about American domination of cyberspace, delegated much of its power over cyberspace's architecture to a private corporation supervised by a council of regulators from over fifty countries. The effort has been accused by a respected American scholar of violating the nondelegation doctrine, and subdelegation claims might be made about the Department of Commerce's decision to share its supervisory role with a regulatory council of agencies from across the world. But a foreign relations perspective makes the American decision to retreat from dominance over the architecture of cyberspace appear to be a sensible exercise of the government's foreign affairs powers.

The Internet Corporation for Assigned Names and Numbers (ICANN), sets the ground rules for domain names on the Internet, which in turn makes it an important component of the Internet's architecture, which in turn makes it a subject of consistent interest among IP scholars.²²⁷ ICANN began as an American corporation supervised by the Department of Commerce; now it is supervised by the Governmental Advisory Committee (GAC), composed of a variety of

²²⁴ See *supra* Part III.D (discussing how some district courts have applied similar reasoning).

²²⁵ See, e.g., 73 Fed. Reg. 29,433, 29,433 (May 21, 2008); 69 Fed. Reg. 56,936, 56,937 (Sept. 23, 2004); see also 68 Fed. Reg. 45,777, 45,778 (Aug. 4, 2003) (invoking the exception but nonetheless making the rule interim to allow an opportunity for comments).

²²⁶ The one time the Treasury Department joined with the Department of Homeland Security in a CDTA rulemaking, they did not invoke this exception. See 77 Fed. Reg. 48,918, 48,918 (Aug. 15, 2012). The Census Bureau has varied its approach. Compare 70 Fed. Reg. 2072, 2072–73 (Jan. 12, 2005) (notice of proposed rulemaking without mentioning the exception), with 68 Fed. Reg. 59,877, 59,878 (Oct. 20, 2003) (final rule invoking the exception).

²²⁷ The quintessential commitment to this sort of focus comes from LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (1999). For a discussion, see David G. Post, *What Larry Doesn't Get: Code, Law, and Liberty in Cyberspace*, 52 STAN. L. REV. 1439 (2000).

national regulators. The members of the GAC to provide input into its particularly hot-button issues, such as whether create an .xxx domain or whether some domain names ought to be barred for public safety reasons.²²⁸ Here too, American perspectives are mediated by those of the rest of the world.²²⁹ The GAC itself reports that it “is regularly attended by approximately 50 national governments, distinct economies, and global organisations such as the ITU, UNESCO, the World Intellectual Property Organisation . . . , INTERPOL and regional organisations such as the OECD, Asia Pacific Forum, and Council of Europe.”²³⁰

In administrative law, the delegation of the authority to design and oversee the architecture of something as important as the Internet to a private corporation, in consultation with a committee on which the United States putatively has less than one-fiftieth of a voice, seems like the informal ceding of an important government function in ways that might raise constitutional concerns—all the more so, given that before, the Department of Commerce had exclusive regulatory authority over ICANN. Michael Fromkin has argued that “if ICANN is, in fact, independent, then the federal government’s decision to have ICANN manage a resource of such importance and to allow—indeed, require—it to enforce regulatory conditions on users of that resource violates the nondelegation doctrine of the U.S. Constitution.”²³¹ Moreover, the D.C. Circuit has recently been per-

²²⁸ See *Governmental Advisory Committee*, GOVERNMENTAL ADVISORY COMM., <https://gacweb.icann.org/display/gacweb/Governmental+Advisory+Committee> (last visited Mar. 13, 2014).

²²⁹ See Paul J. Cambria, Jr., *ICANN, the “.xxx” Debate, and Antitrust: The Adult Internet Industry’s Next Challenge*, 23 STAN. L. & POL’Y REV. 101, 104 (2012) (discussing how the ICANN Board sought and subsequently disregarded guidance from the GAC and through public comment before approving the “.xxx” top-level domain); Jonathan Weinberg, *Governments, Privatization, and “Privatization”: ICANN and the GAC*, 18 MICH. TELECOMM. & TECH. L. REV. 189, 203 (2011) (“After further rounds of debate, with the GAC weighing in at all stages, ICANN ended up withdrawing its approval.”).

²³⁰ *About the GAC*, GOVERNMENTAL ADVISORY COMM., <https://gacweb.icann.org/display/gacweb/About+The+GAC> (last visited Mar. 13, 2014).

²³¹ A. Michael Fromkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17, 20 (2000). Delegation challenges have not been made yet, but there has been acceptance that the Department of Commerce has ceded its control to ICANN. See *Bord v. Banco de Chile*, 205 F. Supp. 2d 521 (E.D. Va. 2002) (affirming ICANN’s role in domain names); *Island Online, Inc. v. Network Solutions, Inc.*, 119 F. Supp. 2d 289 (E.D.N.Y. 2000) (same). Nonetheless, the prospect of special influence by the Department of Commerce remains murky. See *ICM Registry, LLC v. U.S. Dep’t of Commerce*, 538 F. Supp. 2d 130 (D.D.C. 2008) (suggesting that the Department has little control over ICANN decisionmaking); see also COUNCIL ON FOREIGN RELATIONS, DEFENDING AN OPEN, GLOBAL, SECURE, AND RESILIENT INTERNET 25 (2013) (“Many states are already skeptical of ICANN’s autonomy from U.S. government control, given its history and the Commerce Department’s contract with ICANN.”).

sued by these sorts of concerns regarding delegations to private entities.²³²

But other observers like the way that the existence of ICANN keeps the government away from the First Amendment implications of creating domain names on the Internet and harnesses the power of the private sector to efficiently distribute the resources identification offers to the Internet.²³³ And some are glad that the GAC mediates what might otherwise be American dominance of the granting of Internet rights.²³⁴

In evaluating the legality of the delegation to ICANN, we think it would be appropriate to draw from foreign relations law principles as well as administrative law ones. The involvement of the soft law GAC signals that foreign policy interests underlie in part the U.S. government's decision to pass the baton. It is understood that the executive may wish to trade independent authority for the international stability promised by global institutions, or that a willingness to divest America of its power in certain areas, such as Internet architecture, may enhance its reputation.²³⁵ The foreign policy strands of ICANN and its actions are demonstrated by continued State Department concerns about ICANN's decisions and its ability to remain the dominant actor on domain names²³⁶ and by appreciation from abroad that the GAC mediates what might otherwise be American dominance of the granting of Internet rights.²³⁷ Once we approach ICANN from the perspective of foreign relations delegations—unlike taking the ordinary

²³² Ass'n of Am. R.Rs. v. U.S. Dep't of Transp., 721 F.3d 666, 671 n.3 (D.C. Cir. 2013). There are also some antitrust concerns over ICANN's administration of the domain names. See Coalition for ICANN Transparency, Inc. v. VeriSign, Inc., 611 F.3d 495 (9th Cir. 2010) (challenging the agreement between VeriSign and ICANN under which Verisign is paid for registering domain names).

²³³ See, e.g., Sidney A. Shapiro, *Matching Public Ends and Private Means: Insights from the New Institutional Economics*, 6 J. SMALL & EMERGING BUS. L. 43, 44 (2002) (arguing that recent history "confirms the potential of private groups, such as ICANN, to serve governmental interests"). It might also underscore the public nature of ICANN. See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 298 (2001) (concluding that a state athletic association was a state actor because a state agency—the state's education department—was sufficiently entwined with the actions of the association).

²³⁴ See, e.g., Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT'L L. 369, 406 (2005) (expressing concern about American dominance in the area).

²³⁵ See, e.g., Swaine, *supra* note 183, at 1562 ("[C]redibility is a more pervasive issue in negotiating the terms of international institutions, where nations have a plainer interest in inhibiting defection in order to promote stable, collaborative investment in the regime."); *id.* at 1591–92 (employing this rationale to explain some of "the more unlikely delegations (like those to the UN and WTO) that appear to have most compromised U.S. sovereignty").

²³⁶ See *ICM Registry*, 538 F. Supp. 2d at 134; see also COUNCIL ON FOREIGN RELATIONS, *supra* note 231 (emphasizing that U.S. government actions in relation to ICANN "reverberate abroad").

²³⁷ See Krisch, *supra* note 234.

administrative law approach that the D.C. Circuit has used to skeptically police delegations—then there is a potentially stronger footing for this sort of delegation in light of lessened concern for delegations in the foreign relations law context.²³⁸

C. Financial Regulation and Deference Where Congress Has Spoken

Financial regulation represents the apogee of commitment to soft law, and we briefly discuss it here for two reasons. First, its importance—a subject one of us has discussed in more detail in a series of other articles²³⁹—illustrates just how essential our foreign relations frame for soft law could be; an entire sphere of regulation depends entirely upon it. Second, recent developments in financial regulation—specifically parts of the Dodd-Frank Wall Street Reform Act passed in the wake of the financial crisis—offers an illustration of a way to rein in American regulators from collaborating with their foreign counterparts in unwelcome ways, even under our deferential approach.

Congress has broadly blessed international cooperation in finance, making the nondelegation questions rather easy. However, it has required financial regulators to diverge from the international approach to financial stability in a few ways; in such a case, we think it clear that regulators should not look to the foreign affairs power to permit them to ignore congressional commands.

But first, the context. The entire burgeoning field of international financial regulation is governed by soft-governance standards, with no prospect of a treaty in sight and very little appetite for one by the regulators and participants in developed financial markets.²⁴⁰ Up to now, the Treasury Department and other U.S. agencies involved in international financial regulation have wholeheartedly embraced global standard setting and, perhaps relatedly, have exhibited a

²³⁸ See, e.g., *Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.*, 721 F.3d 666 (D.C. Cir. 2013) (holding a delegation to a private corporation and mediation process to be unconstitutional); *NRDC v. EPA*, 464 F.3d 1, 8 (D.C. Cir. 2006) (questioning the resort to international environmental standards as a potentially unconstitutional delegation).

²³⁹ See, e.g., Zaring, *supra* note 81, at 686 (asserting that the international financial regulatory process is “likely to be a foremost achievement of international cooperation in the twenty-first century”).

²⁴⁰ See CHRIS BRUMMER, *SOFT LAW AND THE GLOBAL FINANCIAL SYSTEM: RULE MAKING IN THE 21ST CENTURY* 3 (2012) (“[G]lobal rules and standards [in international financial law] are promulgated as informal, nonbinding ‘soft law’ agreements, often between regulatory agencies—and by international institutions with amorphous legal identities.”); Pierre-Hugues Verdier, *The Political Economy of International Financial Regulation*, 88 *IND. L.J.* 1405, 1405 (2013) (“In sharp contrast with other international regimes . . . , [international financial regulation] relies not on treaties and formal international organizations but on ‘soft law’ standards designed by informal networks of national regulators . . .”).

willingness to take the bedrock requirements of administrative law with a large grain of salt.²⁴¹

In the wake of the financial crisis, however, these tensions have increased in ways that foreign relations law principles can partially—but only partially—help smooth.

The problem is not the policy, but is the process, specifically the process by which American regulators have committed themselves to a minimum set of capital adequacy standards.²⁴² Basel III, the post-financial crisis iteration of the rules on the amount of money banks must hold on hand as safety cushions against panics or unexpected losses, was devised by global negotiation among domestic bank regulators.²⁴³ The result is a set of rules that are legislative in nature and regulate the future conduct of financial institutions—in the United States, such rules would have to go through notice and comment.²⁴⁴ But these rules only do so very late in the process of their provenance; once the Basel Committee has agreed on them, its American members must implement them.²⁴⁵ But rules, at least in

²⁴¹ See Zaring, *supra* note 30, at 66; see also *id.* at 89 (describing how this “not-so-punctilious observance” results in informal policy formation that in turn leads to formally promulgated rules).

²⁴² See *Basel Regulatory Framework*, FEDERAL RESERVE, <http://www.federalreserve.gov/bankinforeg/basel/default.htm> (last updated Oct. 25, 2013). One of us has also made the following observations regarding Basel III in a previous article. See Zaring, *supra* note 30.

²⁴³ See Pierre-Hugues Verdier, *U.S. Implementation of Basel II: Lessons for Informal International Lawmaking*, in *INFORMAL INTERNATIONAL LAWMAKING* 1, 16 (Joost Pauwelyn, Ramses Wessel & Jan Wouters eds., 2012), available at <http://ssrn.com/abstract=1879391> (“[T]he only formal constraints on implementation [of Basel II] arose from US administrative law.”). This is not to suggest that the American response to the second iteration of Basel was the only problem with that particular accord. See Jeffery Atik, *Basel II: A Post-Crisis Post-Mortem*, 19 *TRANSNAT’L L. & CONTEMP. PROBS.* 731, 734–35 (2011) (identifying three weaknesses in Basel II, specifically “the illusion of safety that Basel II engendered—an illusion that compliance with Basel II meant that bank capital would be ‘adequate’ to withstand a crisis;” “the use of credit ratings (as a proxy for credit sensitivity) to determine the regulatory capital needed to support the holding of particular financial assets;” and “the negative spiral effect resulting from the interplay between asset value declines occasioned by market-to-market [sic] accounting and Basel II’s rigid capital demands, generally (and perhaps incorrectly) described as procyclicality”).

²⁴⁴ *Cf. Nat’l Petroleum Refiners Ass’n v. FTC*, 482 F.2d 672, 683 (D.C. Cir. 1973) (noting differences between rulemaking and adjudications and claiming the existence of a “judicial trend favoring rule-making over adjudication for development of new agency policy”). For discussions about the nature of a rule and its comparative advantage (or not) over adjudication, see Ronald M. Levin, *The Case for (Finally) Fixing the APA’s Definition of “Rule,”* 56 *ADMIN. L. REV.* 1077, 1080–83 (2004) (discussing the APA’s definition of what a “rule” is); M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 *U. CHI. L. REV.* 1383, 1390–98 (2004) (describing the implications of agency rulemaking versus adjudication); David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 *HARV. L. REV.* 921, 954–58 (1965) (discussing the consequences of “the form in which a rule is declared”).

²⁴⁵ See Basel Comm. on Banking Supervision, *Implementation of Basel III Regulations: Regulatory Consistency Assessment Programme (RCAP)*, BANK FOR INT’L SETTLEMENTS, <http://www.bis.org/bcbs/implementation.htm> (last visited Mar. 13, 2014).

the United States, are subject to a variety of constraints, culminating in judicial review, and Basel itself offers virtually none of these constraints.²⁴⁶

Nonetheless, under the foreign relations doctrines we have already discussed, Basel should pass muster for the same reasons that ICANN, the GAC, and the Kimberley Process should pass muster. We will not recount the steps of the argument here given that it tracks the ones made in the context of other case studies. We merely note that Basel represents the apportioning of a highly important domestic regulatory issue—the safety and soundness of the financial system—to a global soft law process.

But in another way, it shows how congressional direction can constrain agencies from running riot on the global stage through the commitment to soft law arrangements. When international standards are not consistent with specific congressional direction, the international process, of course, must give way.²⁴⁷ Such is the case with the Dodd-Frank Wall Street Reform Act, which set its own priorities for the regulatory state. Dodd-Frank, for example, requires bank regulators to develop alternatives to the use of credit ratings in evaluating the quality of bank reserve assets.²⁴⁸ But these alternatives are extremely hard to reconcile with the Basel III process's commitment to credit ratings of capital reserves.²⁴⁹ The quality of capital required under Basel III makes extensive use of credit ratings, even as Dodd-Frank underlines Congress's clear instruction that American regulators spurn them.²⁵⁰

Because here there is a stark conflict between the dictates of Congress and of Basel III, Congress's will must control regardless of whether or not foreign relations law principles are brought to bear in

²⁴⁶ Cf. Verdier, *supra* note 240, at 1432–33 (noting that “[i]n recent years, TRNs such as the Basel Committee have voluntarily adopted similar procedures [to APA notice-and-comment procedures] in an effort to increase transparency,” but only discussing judicial review as a recourse against domestic agencies).

²⁴⁷ See, e.g., Swaine, *supra* note 183, at 1593–97 (discussing the primacy of federal legislation over agreements produced through international delegations, as evidenced by doctrines including non-self-execution and the last-in-time rule); Verdier, *supra* note 243, at 13 (noting Congress's power to “nix” the implementation of the international standards set out in Basel II).

²⁴⁸ For an overview of the issue, see Melvyn Westlake, *Newsletter January 2011: Dodd-Frank Bar on Ratings Hinders Basel III Adoption*, GLOBAL RISK REGULATOR, <http://www.globalriskregulator.com/article.php?pgkey=2483> (last visited Mar. 13, 2014).

²⁴⁹ For the Committee's rule on credit ratings, see Arturo Estrella et al., *Credit Ratings and Complementary Sources of Credit Quality Information* (Basel Committee on Banking Supervision, Working Paper No. 3, 2000), available at http://www.bis.org/publ/bcbs_wp3.htm.

²⁵⁰ See Richard Smith, *Basel III vs Dodd-Frank on Ratings Agencies and Risk Weights*, NAKED CAPITALISM (Sept. 23, 2010), <http://www.nakedcapitalism.com/2010/09/basel-iii-vs-dodd-frank-on-ratings-agencies-and-risk-weights.html> (noting the “striking disagreement” between Dodd-Frank and Basel III in their respective approaches to ratings agencies).

the matter. And so in this way, despite the need for soft law deference in financial regulation, the way to avoid soft law constraints is clear: as some banking lawyers have observed, “Dodd-Frank’s capital rules will necessarily be consistent with some of the Basel capital requirements and inconsistent with other Basel capital requirements.”²⁵¹

D. Sports Arbitration and Due Process

A foreign relations perspective can also go some distance toward justifying individualized determinations (as opposed to the broad rules set forth by ICANN’s GAC and the Basel process) made by soft law institutions. It makes peace with international soft law process as sufficiently consistent with domestic due process standards.

A small but high-profile problem faced by American athletes concerns the relationship between domestic due process and the Court for Arbitration in Sport (CAS), which handles a number of sports-related adjudication and, by Article 61 of the Olympic Charter, all disputes arising from the Olympic Games.²⁵² The American government has created a number of entities like the U.S. Olympic Committee and other national sports organizations that in turn have agreed with their foreign counterparts to resolve disputes in international competition through the CAS as the court of last resort.²⁵³ Well-known American athletes, such as the Tour de France winner Floyd Landis, have lost prominent cases before the CAS.²⁵⁴

The CAS is a very fast-moving tribunal that Lorenzo Casini has suggested is beginning to develop a “Lex Sportiva.”²⁵⁵ As James Nafziger has explained, the CAS

addresses such important issues as the eligibility and suspension of athletes, the adequacy of protections for individual athletes during drug testing, breaches of contract between an athlete and a sports

²⁵¹ Jerome Walker et al., *Reconciling the Dodd-Frank and Basel Committee Capital Requirements*, 129 BANKING L.J. 627, 643 (2012).

²⁵² See Olympic Charter, *supra* note 63. The CAS has held, for example, that lifetime doping bans are inconsistent with the charter. See Colin Jackson, *London 2012: Dwain Chambers Eligible After Court Ruling*, BBC SPORT (Apr. 30, 2012, 8:38 PM), <http://www.bbc.co.uk/sport/0/olympics/17853070>.

²⁵³ See Jason Gubi, Note, *The Olympic Binding Arbitration Clause and the Court of Arbitration for Sport: An Analysis of Due Process Concerns*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 997, 1003, 1007, 1011 (2008).

²⁵⁴ See Ian Austen, *Landis Loses Final Doping Appeal*, N.Y. TIMES (July 1, 2008), <http://www.nytimes.com/2008/07/01/sports/othersports/01cycling.html> (“The Court of Arbitration for Sport . . . upheld a United States Anti-Doping Agency panel’s decision that synthetic testosterone contributed to his victory.”).

²⁵⁵ “The number of decisions rendered by the CAS has increased to the point that a set of principles and rules have been created specifically to address sport: This ‘judge-made sport law’ has been called *lex sportiva*.” Lorenzo Casini, *The Making of a Lex Sportiva by the Court of Arbitration for Sport*, 12 GERMAN L.J. 1317, 1319 (2011).

club, the validity of contracts for the sale of sports equipment, and the nationality of athletes for purposes of competition.²⁵⁶

The CAS renders its decisions within days, and it upholds real deprivations of the property and liberty (like bans on competition and the forfeiture of medals, and the accompanying stigmatization as a cheat) of athletes, charged with, say, drug-related offenses, including American ones,²⁵⁷ without permitting them to receive the full benefits of what might ordinarily constitute bedrock procedural values in the United States.²⁵⁸ As Michael Straubel has said, “From the athletes’ perspective, the cases are evidence of a system that ignores basic notions of due process by incorrectly assigning burdens, issues punishment before holding a hearing and uses biased arbitrators.”²⁵⁹ Others have also expressed concern about reconciling the process requirements of individualized determinations with the value of having a cross-border adjudicator.²⁶⁰

Nonetheless, there are reasons to believe that the CAS offers benefits to the world of sport, including placing American and foreign athletes on a level procedural playing field. Moreover, a multinational rule enforcer like the tribunal is more likely to be immune from charges of parochialism than domestic courts hearing the complaints of domestic athletic heroes would be.

A foreign relations perspective can justify the turn to the CAS and the possible due process risks in a way that administrative law might not.²⁶¹ Administrative law has developed a rather specific set of requirements for the sorts of individualized determinations made by the

²⁵⁶ James A.R. Nafziger, *Dispute Resolution in the Arena of International Sports Competition*, 50 AM. J. COMP. L. SUPP. 161, 167 (2002).

²⁵⁷ See Abbas Ravjani, *The Court of Arbitration for Sport: A Subtle Form of International Delegation*, 2 J. INT’L MEDIA & ENT. L. 241, 248 (2009).

²⁵⁸ See *id.* at 242–47.

²⁵⁹ Michael S. Straubel, *Doping Due Process: A Critique of the Doping Control Process in International Sport*, 106 DICK. L. REV. 523, 531 (2002). Indeed, the track athlete Mary Slaney challenged an international sporting determination in federal court, although not on due process grounds. See *Slaney v. Int’l Amateur Athletic Fed’n*, 244 F.3d 580, 591 (7th Cir. 2001).

²⁶⁰ See, e.g., Kingsbury et al., *supra* note 72, at 23, 45–46 (noting that “[s]ignificant normative and practical problems arise in proposals to extend administrative law approaches” to organizations such as the CAS).

²⁶¹ But it might: the U.S. Olympic Committee is exempt from the process requirements that government agencies must provide. See *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 542–44 (1987) (holding that the U.S. Olympic Committee is a private corporation and not a government agent). A similar rule would apply to any athletic organization set up as a private entity, rather than a government agency, provided that the private entity was not overly “entwined” with the government entity. See *id.* If American athletic federations are not state actors, they need not provide the athletes they sponsor with due process, or any process at all not required by other federal laws. *But see Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 291 (2001) (concluding that a state athletic association was a state actor because of the degree of oversight provided by the state education department).

CAS. Courts evaluate the risk of error through the procedures used by the institution and the likely value of additional or alternative procedural safeguards, balancing the government's interest in finality against the individual's interest in more process. This is the *Mathews* test discussed in Part II of this Article.²⁶²

But under foreign relations law, the President's authority to enter into executive agreements that resolve claims without necessarily providing strict levels of process helps to justify American participation in the CAS. As the Supreme Court reminded us in *Garamendi*, the government has precisely this sort of authority.²⁶³ It has used it to consign claims against the Iranian government in the wake of the Iranian Revolution to an international tribunal; to settle claims against the Soviet government for nationalizing Russian industries, some of which were supported with American investments; and to discourage court claims for property lost during the Holocaust in France, Germany, and Austria.²⁶⁴

By the same token, American government or quasi-government agencies surely have the right to assign disputes raised by their athletes regarding international competitions to an international process. The case for the CAS shows how soft law commitments to tribunals that make individualized determinations can overcome due process hurdles that might be insurmountable in the domestic context.

E. Climate Change: The Future

So far, we have focused on areas where a clear international soft law process already exists. International environmental law has historically followed a different pattern, however, with a heavy reliance on treaties.²⁶⁵ Soft law agreements have typically served as precursors to these treaties rather than as substitutes.²⁶⁶ While soft law engagement does happen at the international level, there is a lessened assumption of direct implementation, and the EPA and other executive branch environmental actors have not proved to be as focused on soft law as agencies like the FDA and Treasury.

But this may change, and our foreign relations lens would provide the EPA with direction as to areas where it should be presumed to have the authority to enter into cross-border arrangements that address climate change, as well as guidance as to where congressional

²⁶² *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

²⁶³ See cases cited *supra* notes 151–52 for a discussion of this power.

²⁶⁴ *See id.*

²⁶⁵ *See Palmer*, *supra* note 91 (explaining that international hard law in the environmental law context has come primarily from treaties).

²⁶⁶ For example, the hard law Montreal Protocol was preceded by the soft law Helsinki Declaration on the Protection of the Ozone Layer. *See id.* at 269–70.

direction admits of no room for an international collaborative process. Climate change is an issue that must be tackled internationally, yet achieving a meaningful hard law agreement that the United States and its treaty partners can ratify under their constitutional processes has proved exceptionally difficult.

One or more long-term soft law agreements might prove the most feasible solution.²⁶⁷ The most high-profile international agreement in recent years on the subject, the Copenhagen Accord, was a soft law agreement, although one that was intended as a precursor to a hard law agreement and that, from the U.S. perspective, could not be implemented without congressional legislation.²⁶⁸

Drawing on foreign relations law principles as well as administrative law principles would maximize the scope of the executive branch's ability to make and implement a long-term soft law agreement on climate change. To see how, consider a soft law agreement under which the United States agrees to a certain level of emissions reductions, such as a pledge to reduce its emission levels by seventeen percent from its 2005 emissions.²⁶⁹ We think that the executive branch could undertake such a commitment under its soft law powers

²⁶⁷ See, e.g., Andrew N. Keller, *From Counterterrorism to Climate Change: Are Treaties Necessary to Solve International Problems?*, 104 AM. SOC'Y INT'L L. PROC. 185, 187–89 (2010) (discussing the treaty-based approach toward climate change). In an interesting example of how foreign relations law approaches can ignore soft law, several scholars have discussed how the United States might avoid the treaty problem by entering into other forms of hard international law agreements—sole executive agreements and congressional-executive agreements—without considering the prospect of soft law. See, e.g., Chang, *supra* note 170, at 341–44 (discussing the use of executive agreements as alternatives to treaties); Nigel Purvis, *The Case for Climate Protection Authority*, 49 VA. J. INT'L L. 1007, 1027–37 (2009) (comparing sole executive agreements, treaty-executive agreements, and congressional-executive agreements for use as substitutes for treaties). Yet a soft law approach offers greater scope for the executive branch than a sole executive agreement, because soft law agreements are not currently subject to the same limit on importance that is understood to exist for sole executive agreements. See *supra* note 174 and accompanying text; see also Hollis & Newcomer, *supra* note 18, at 509–10, 582–83 (noting the prospect that a soft law agreement can avoid the constitutional limits set on sole executive agreements, although arguing that some international soft law agreements should require congressional involvement).

²⁶⁸ Among other things, the Copenhagen Accord included market mechanisms and expectations for appropriations that would have required congressional action. See Copenhagen Accord, Dec. 18, 2009, United Nations Framework Convention on Climate Change, Rep. of the Conf. of the Parties on its 15th Sess., Dec. 7–19, 2009, U.N. Doc. FCCC/CP/2009/11/Add.1, at 4–7 (Mar. 30, 2010), available at <http://unfccc.int/resource/docs/2009/cop15/eng/11a01.pdf>.

²⁶⁹ This was the level the United States specified in its submission pursuant to the Copenhagen Accord, *id.*, although it conditioned this submission on congressional action. See Letter and Attachment from Todd Stern, U.S. Special Envoy for Climate Change, to Yvo de Boer, Exec. Sec'y, U.N. Framework Convention on Climate Change (Jan. 28, 2010), available at http://unfccc.int/files/meetings/cop_15/copenhagen_accord/application/pdf/unitedstatescphaccord_app.1.pdf (specifying the seventeen-percent goal and conditioning that goal on pending legislation).

despite uncertainty about whether statutory change would be needed to implement it.²⁷⁰ We also believe the executive branch would have tools available to implement this commitment into U.S. law as it now stands. Under a purely administrative law framework, the prospects for implementation would be limited to considering what the Clean Air Act and other relevant statutes now authorize the EPA and other agencies to do as a matter of administrative law. By also drawing on foreign relations law principles, the executive branch could claim additional deference in the application of these statutes and could potentially benefit from the President's independent foreign policy powers.²⁷¹

While the text of the Clean Air Act fixes the EPA's power to regulate, interpretations can vary as to what this text permits the EPA to do. Framing climate change as a foreign relations issue could lead administrators and judges to take a wider interpretation of the EPA's discretion, either by explicitly adding the foreign relations law deference canons to the administrative law deference canons or by tacitly affecting how they apply these latter canons. Indeed, this issue arose in *Massachusetts v. EPA*, the Supreme Court's pathbreaking decision on climate change.²⁷² The majority favored a strictly administrative law approach, emphasizing that "while the President has broad authority in foreign affairs, that authority does not extend to the refusal to execute domestic laws."²⁷³ In dissent, however, Justice Scalia and the three justices who joined him suggested that the EPA Administrator could "and *ought* to take into account[] . . . the impact [EPA regulations] would have . . . on foreign policy" in deciding whether or not to make a judgment about carbon dioxide emissions.²⁷⁴ On the particular issue at stake in that case, the statute was clear enough to justify the majority's ultimate conclusion, but the suggested approach could affect the interpretation of other statutory provisions on the margin.

For example, the EPA regulates emissions from new power plants by seeking "the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements)

²⁷⁰ *But see* Chang, *supra* note 170, at 364–65 (concluding that the President likely would not have the power to enter into a binding sole executive agreement along these lines).

²⁷¹ *See id.* at 353 (suggesting that the sole-organ doctrine provides the President with independent authority to engage in information sharing and science and technology cooperation across borders).

²⁷² *Massachusetts v. EPA*, 549 U.S. 497, 534, 552 (2007).

²⁷³ *Id.* at 534.

²⁷⁴ *Id.* at 552 (Scalia, J., dissenting).

the Administrator determines has been adequately demonstrated.”²⁷⁵ Suppose that in determining the “best system of emission reduction,” the EPA took into account the importance of meeting the hypothetical seventeen percent national emission reduction described earlier because it reasoned that meeting this cap would encourage other countries to meet their caps and therefore promote the best overall outcome.²⁷⁶ Would this be permissible? From a purely administrative law approach, a court could go either way on whether the statute requires the EPA to focus only on balancing the level of emissions with the cost and other factors mentioned, or whether, instead, the statute gave the EPA discretion to draw upon other factors or to interpret these specific factors so broadly as to justify the EPA’s actions. Recognizing that an executive-branch foreign policy interest consistent with the overall statutory goal of emissions reduction is at stake, however, might lead a court to give special deference to the EPA’s interpretation, and this deference might tip the balance. Foreign relations law principles would matter here only on the margin—but the margin might matter. Given the low prospects of future congressional support for any measures that mitigate climate change, the executive branch needs to consider every option for maximizing its existing powers to address the issue.

CONCLUSION

Many observers view the globalization of law as a threat to transparency and accountability. Because the ordinary doctrines of administrative law are concerned with those two subjects above all else, reconciling regulatory globalization and domestic administrative law has been hard to do. Indeed, some readers will be wondering if the strongest argument against our proposal is not whether it is *possible* to

²⁷⁵ 42 U.S.C. § 7411(a)(1) (2006). The EPA is presently undertaking a rulemaking under these provisions. By contrast, the standard for emissions from new vehicles is sufficiently strict that a foreign affairs approach may not give the Administrator any additional flexibility. See 42 U.S.C. § 7521(a)(3)(A)(i) (2006) (providing that the EPA is to set “standards [for new vehicle emissions] which reflect the greatest degree of emission reduction achievable through the application of technology which the Administrator determines will be available”).

²⁷⁶ The EPA has engaged in reasoning along these lines in setting requirements for other forms of pollution under the Clean Air Act. See *Bluewater Network v. EPA*, 372 F.3d 404, 409, 412 n.3 (2004) (describing how the EPA reasoned, with regard to a similarly worded statutory provision, that waiting for the adoption of international standards could “maximize the control of emissions from U.S. and foreign vessels,” although not reaching the extent to which the EPA could permissibly consider this issue) (internal quotation marks omitted); *Nat’l Ass’n of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1229–30 (D.C. Cir. 2007) (concluding that the EPA could permissibly be influenced by the standards called for by the International Civil Airline Organization in setting emission standards for airplanes).

devise a doctrinal defense of the explosion of global soft law, but whether it is *worth* doing.

We endorse regulatory globalization and posit that a cosmopolitan approach to what governments must do is desirable—indeed, it might be the only viable approach. Now that the world is truly flat,²⁷⁷ financial crises are evidently contagious,²⁷⁸ and global warming cares not for national borders, it is naive to hope that regulators can meet their regulatory missions without cooperating with their foreign counterparts. By the same token, it is obstinate—and isolationist—to hope that sticking within the country's borders could result in a fulfilled set of regulatory objectives. Moreover, we cannot depend solely on the passage of international treaties because of the delays in negotiation, the problems with ratification, and the control of the process by diplomats rather than experts.

In such a world, a crucial alternative way forward is through soft law agreements that cross borders. For this alternative to succeed, those agreements must be given a stable legal footing. In our view, it is possible to root the legitimacy of international governance in traditional domestic institutions using traditional doctrines, though we have indicated some ways that those doctrines must be modernized.

There is more to be done to make regulatory globalization domestically accountable, of course. Congressional action, for example, is always valuable, and it makes administrative soft law much easier to justify. But in some cases, Congress has not made such an endorsement, and waiting for it is something that agencies cannot afford to do if they want to meet their regulatory objectives. They need a basis for their increasingly international remits, and they need it now.

Our approach offers them a solution by taking the problems posed by traditional doctrines of administrative law and the separation of powers seriously but showing how the extra degrees of deference and independence afforded to regulatory initiatives taken in the course of foreign affairs can mitigate some of the concerns of those doctrines. Our approach also reorients a literature—the foreign relations literature—that, in our view, needs to readjust its focus as to both substance and process. While the topics of war, human rights, and traditional international legal forms that currently drive the literature are undeniably important, much of the future of American foreign policy lies in the ways in which its regulators match their standards to those of the rest of the world.

²⁷⁷ See THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* (2005).

²⁷⁸ See CHARLES P. KINDLEBERGER & ROBERT Z. ALIBER, *MANIAS, PANICS, AND CRASHES: A HISTORY OF FINANCIAL CRISES* (5th ed. 2005) (describing the contagious nature of financial panics).

Soft law has become a critical part of the foreign relations toolkit. It is accordingly necessary for foreign relations law to recognize and to think critically about how foreign policy is carried out by actors within the executive branch other than the President—actors whose actions are to some extent subject to agency mandates set by statute. Even as the executive branch splinters and agencies pursue international programs that are difficult for the White House to control, the need to think of the authority of the President's delegates in the administrative state as stemming from a more unitary vision of that branch is a paradoxical but vital move.