

THE COVID-19 CONTAINMENT IN INDONESIA AND SOFT LAW: A RISK-TO-OBJECTIVE ANALYSIS

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Abstract

This article illustrates how Basel III, a soft law legal framework guiding how regulators supervise financial institutions in order to prevent and mitigate systemic financial crises, especially the requirement regarding the governance of sovereign debt, is being implemented in Indonesia. The analysis was done by scrutinising the relevant authority's responses and monetary policy during COVID-19. Also, it examines whether the applicable regulations and other related policies align with the grand objectives of the financial sector. This article provides several important takeaways. First, benefiting from the soft traits of Basel III, the oversight authorities (OJK and BI) have tried to enshrine the government's resilient and prudent financial state through flexibility. Second, instead of taking expansionary legal measures to stimulate the state's income and limit the state's expenses, BI and the government have worked together to contain the damage of the pandemic through a quasi-fiscal program (burden-sharing program, BSP). Third, the legislation of Law No. 3/2023 did not make the BI's objective less risky. It also suggests that more could have been done to prevent the fiscal deficit, especially by the government, through fiscal consolidation (limiting or decreasing the state's expenses).

Keywords: *basel III, burden-sharing program, risk-to-objective framework, soft law, COVID-19 pandemic*

I. INTRODUCTION

The pandemic put unprecedented constraints on implementing the Basel III framework in many jurisdictions, including Indonesia. In early July 2020, COVID-19 was reported to have infected 10.357.662 people in 216 countries, resulting in 508.055 casualties. Yet, the end seems still far away since the World Health Organization has not firmly concluded if the pandemic will stop anytime soon. In March 2020, soon after the unprecedented outbreak of SARS-COV 2, popularly known as COVID-19 (the coronavirus-19 disease), as countries struggled to cope with the pandemic, the effects unavoidably struck the banking sector in Indonesia.

The Basel III framework is a global, international standard designed for the financial sector, and regulatory authority governance has played a crucial role in preventing and mitigating systemic financial crisis risks and vitality through its adjustability traits (soft law). In a global financial industry where domestic regulations among countries are highly divergent and, simultaneously, socio-economic, and political systems are significantly uneven, soft laws, i.e., soft regulations (hereafter used interchangeably), retain features advantageous to financial regulation convergence. Looking at it from a different angle, the special characteristics and unique challenges faced by financial institutions across the globe have contributed to the proliferation of soft regulations and international finance standards published by international finance institutions like the IMF and BIS.¹

Two occasions drew the public's concern regarding Bank Indonesia's (BI) and the Ministry of Finance's (MoF) initiatives in response to the collateral effect of the pandemic that suppressed the state's balance (a substantial fiscal deficit). This initiative was not possible without evading what had been set forth by the Basel III framework, especially regarding the governance and prudential conduct of sovereign debt. First, a joint decree to contain the pandemic and the government deficit allowed BI to fund the government deficit directly through the primary market.² Second, this arrangement became permanent through Law No. 3/2023 on Financial Sector Development and Strengthening, or UU PPSK. The joint decree or the Burden Sharing Program (BSP), has deteriorated monetary policy effectiveness due to pressure on BI's balance sheet. Additionally, the latter marked a significant deviation from Law No. 23/1999, which had prominently gained a satisfactory level of central bank independence (CBI).

This paper sits on the intersection of two streams of literatures debate: i) the governance of sovereign debts (SD, also known as SBN – *Surat Berharga Negara*) in times of crisis, the COVID-19 pandemic; and ii) the adoption of an international finance regulatory framework, specifically Basel III, in times of crisis. The first debate has been addressed by several studies which generally give warnings on political interests and accountability risks behind policies allowing

¹ Chris Brummer, "Why Soft Law Dominates International Finance—and Not 'Trade,'" *Journal of International Economic Law* 13, no. 3 (2010): 623–43.

² This is a joint initiative program between BI and Ministry of Finance to finance the state budget (APBN) through the purchase of Government Bonds (SBN) in the primary market. See Article 16, Law No. 2 of 2020 on the Fiscal Policy Strategy of the Government of the Republic of Indonesia in Dealing with the Impact of the Covid-19 Pandemic.

central banks to purchase large amounts of government bonds.³ Grenville and Rajah's work deserves special mention here as they comprehensively analysed the costs and benefits of the SBN. However, as their work was written before the bill had been approved, they did not explore the legal issues and risks of this law in the long run. Domestically, there are also several studies which analyse the legal foundation of the policy i.e., the Government Regulation in Lieu of Law (Perppu) No. 1 of 2020 which was later ratified into Law No. 2/2022.⁴ However, despite their constructive legal conclusions, these studies do not consider the burden sharing policy in the analysis, hence they lack analysis regarding the long-run macroeconomic impact of policy. On the other hand, the current studies about Basel III implementation in Indonesia mainly adopt quantitative analysis that ranges from the effects of Basel III on banking financing performance⁵ and credit growth⁶ to forecasting banking sectors' readiness to practice Basel III.⁷ On top of these, there are studies which focus on the implementation stage in various jurisdictions and the endogenous factors.⁸ This article, unfortunately, is not primarily intended to address this issue (the implementation of international financial regulation/regulatory

³ Stephen Grenville and Roland Rajah, "COVID-19 and Monetary Policy," in *Economic Dimensions of Covid-19 in Indonesia*, ed. Blaine Lewis and Firman Witoelar (Singapore: ISEAS–Yusof Ishak Institute Singapore, 2021), 24–43, <https://doi.org/10.1355/9789814951463-006>; Hasan Ersel and Fatih Özatay, "Fiscal Dominance and Inflation Targeting: Lessons from Turkey," *Emerging Markets Finance and Trade* 44, no. 6 (November 1, 2008): 38–51, <https://doi.org/10.2753/REE1540-496X440603>; Hans J. Blommestein and Philip Turner, "Interactions Between Sovereign Debt Management and Monetary Policy Under Fiscal Dominance and Financial Instability" (Paris: OECD, February 20, 2012), <https://doi.org/10.1787/5k9fdwrnd1g3-en>.

⁴ Blucer Wellington Rajagukguk and Muhammad Najib, "The Effect of Legal Political Determination of Perpu Number 1 of 2020 on Financial Markets in Indonesia During the COVID-19 Pandemic," *The Journal of Asian Finance, Economics and Business* 8, no. 3 (2021): 655–64; Ana Sopanah and Mohammad Fauzi Fikri Haikal, "The Effectiveness of Law No. 2 of 2020 Concerning the Fiscal Policy Strategy of the Government of the Republic of Indonesia in Dealing with the Impact of the Covid-19 Pandemic," *Wiga: Jurnal Penelitian Ilmu Ekonomi* 12, no. 1 (2022): 46–54; Aulia Kartika Putri, Hinza Praitma Adli, and Akhmad Habibullah, "Analysis of Government Regulations in Lieu of Law No. 1 of 2020: As a Response to the Urgency of the COVID-19 Pandemic," *Jurnal Studi Ilmu Pemerintahan* 4, no. 1 (2023): 179–88.

⁵ Bambang Pramono et al., "Key Indicators, Reciprocity and Regulation of the Countercyclical Capital Buffer in Indonesia," Working Paper (Bank Indonesia, 2015).

⁶ Dadang Agus Suryanto, "Pertumbuhan Kredit Di Indonesia: Sebuah Analisis Kepatuhan Bank Terhadap Implementasi Basel Accord I-III," *Jurnal ASET (Akuntansi Riset)* 11, no. 2 (2019): 224–37.

⁷ Dian Nuriyah Solissa, "Kesiapan Perbankan Syariah Di Indonesia Dalam Penerapan Liquidity Coverage Ratio Basel III," *EkBis: Jurnal Ekonomi Dan Bisnis*, 1, No 2 (2017): 165–86; Mohamad Adam, Taufik, Muhammad Aditya Erfiyan, "Bank Liquidity-Stress Testing and Basel III Implementation in Indonesia," *Economic Journal of Emerging Markets*, 7, no. 1, (2015): 12–23, <https://dx.doi.org/10.20885/ejem.vol7.iss1.art2>.

⁸ Andrew Walter, "Emerging Countries and Basel III: Why Is Engagement Still Low?," 2015; Narissa Lyngen, "Basel III: Dynamics of State Implementation," *Harvard International Law Journal* 53, no. 2 (2012): 520–35.

standard in a domestic law system). The exposition of the implementation of Basel III vis-à-vis soft law in Indonesia is used to illustrate how the standard has been used to “rubberstamp” policies despite its prominence as the global “best-practice” guidance.

In this very paper, the implementation of Basel III⁹ and the deficit burden due to the pandemic is analysed for its intersection with the overall objectives of the financial authorities i.e., central bank (Bank Indonesia or BI) to maintain financial stability and, at the same time, support the economic development plans of the government. In other words, this study examines whether the responsive policies that inevitably affected the state balance are in line with the overall objectives of financial stability mandated to BI. In order to analyse and determine the effectiveness of the responses, the burden sharing program is considered a representative departure. There are a few reasons for this choice (the burden sharing program as the background): i) the burden sharing program is a crucial arrangement by which the governance of sovereign debt (SD) is cautiously set in Basel III (and other international financial governance standard and literature); ii) it tests the impartial judgement of BI (BI instrument independence) in times of crisis and when it needed to coordinate with the fiscal authority; and iii) it stand in the epicentre of relevance discourse of law in times of crisis.

Despite its inevitable importance, the implementation of Basel III after the crisis or the amendment to Basel 3.1 or IV are beyond the scope of this paper. Also, this paper does not discuss and analyse the costs and benefits resulting from Basel III implementation set to the background of commercial banks performance. The term crisis in this paper refers to lengthy and systemic (financial or non-financial) stress affecting the general economy and finance that is usually responded to by post-ante policies. Hence, an individual institutional crisis like the Silicon Valley Bank collapse is usually responded to by a non-legal approach, falling outside the scope of this paper. This kind of crisis is usually contained through conventional monetary policies led by a central bank e.g., in the EU case, the Asset Purchase Program (APP) and Emergency Liquidity Assistance (ELA).¹⁰

⁹ Basel Committee on Banking Supervision, “Basel Committee on Banking Supervision International Convergence of Capital Measurement and Capital Standards” (Basel: Bank for International Settlement, 2004).

¹⁰ For the details of the APP and ELA practice see: René Smits, “A Central Bank in Times of Crisis: The ECB’s Developing Role in the EU’s Currency Union,” *Research Handbook on Central Banking*, 2018, 184; for general survey of laws which legalize and govern the private asset purchase program by central banks, see: Bryane Michael and Svitlana Osaulenko, “Toward A New Comparative Public Law Of Central Bank Legislation: Designing Legislative Mandates for Central Bank Private Securities Assets Purchases and Nominal GDP Targeting,” *Journal of Central Banking Theory and Practice* 10, no. 1 (2021): 5–38, <https://doi.org/10.2478/jcbtp-2021-0001>.

The principal argument advanced in this paper is twofold. First, the crisis containment due to the pandemic in Indonesia is owed to a non-binding feature enshrined in the Basel III framework. Second, the crisis containment due to the pandemic in Indonesia was legitimized through several legal initiatives that, if seen from the broader perspective of monetary issues, may hold some risks. As a basis for these propositions, it is necessary to bring together policy perspectives from the risk-to-objective framework. This article contributes to the understanding of how law, including international financial regulation (IFR), is organized, administered, and implemented in times of crisis, in this specific case to enable the burden sharing program.

Risk-to-objective regulatory framework not only is in line with Basel III which is a standard for anticipating and mitigating risks but is also favourable to domestic interests that have distinct objectives relative to those of other countries. The Risk-to-Objective Regulatory Framework (RORF) aims to analyze a particular policy, in this case the promulgation of the burden sharing program setting on the background of several law related to the pandemic containment and Basel III provisions about sovereign debt governance. In the other words, the analysis goes further by not only by checking whether it has been compatible with the BIS guidance or not, but by ensuring that it is not contrary to essential national objectives. It goes in line with the following statement, “*[I]egalization does not mean the law literally, but the process by which a distinctive style of rules-making pervades organizational life. From this point of view, the formal difference between laws, voluntary codes and in-house procedures matters very little; what matters is their effects.*”¹¹

This framework is suitable for analysing all possible threats, during and after the pandemic, that potentially hinder the objectives mandated by OJK (Indonesia Financial Service Authority) and BI. This approach falls under the law-economic system, which, to some extent, pertains to cost-benefit analysis.

The paper benefits from the legal analytical method (doctrinal) in evaluating the inter-relationship between COVID-19 containment and the Basel III framework, which is knowingly flexible in its enforcement (soft law). The author employs a risk-to-objective regulatory framework (RRF). Not only is RRF in line with Basel III, which is a global standard for anticipating and mitigating risks, but it is also a favourable tool in light of domestic interests. On top of this, RRF necessitates that a jurisdiction clearly define what the state agent's (here, BI) priorities are.

After the introduction in Section I, the theoretical review of soft law and the traits of the Basel III standard are described in Section II. Next, the

¹¹ Michael Power, “The Risk Management of Everything,” *Journal of Risk Finance* 5, no. 3 (2004): 58–65, <https://doi.org/10.1108/eb023001>.

general responses to the pandemic by BI and OJK, including how Basel III was implemented during this time, are presented in Section III. The fourth section discusses the risk of burden-sharing policies using the risk-to-objective framework. The final section, Section IV, is dedicated to the conclusion.

II. SOFT LAW IN INTERNATIONAL FINANCE REGULATION: BASEL III

Soft law, despite not having as coercive force as (usual) law, is a useful tool in international law, where it is considered an authoritative source of international law alongside custom, treaties, judicial decisions, writers/scholars, and others.¹² It theoretically falls under the umbrella and discourse of natural law.¹³ Natural law, in the simplest terms, is formed naturally with or without God's involvement. Theoretically, what ought to be done is mainly defended either by the theory of duty (deontological) or rational-based argument (or consequence-based arguments). From a religious standpoint, natural law was seminally formulated by St. Thomas Aquinas in *Summa Theologica* and then secularized by Hugo de Groot or Grotius in his prominent work *De Jure Belli ac Pacis*. Accordingly, what is in nature is good and humans ought to preserve and maintain it. Hence, customary international law tends to possess a non-compliance phase before entering a more firm and agreeable state where states involved try to conform their actions.¹⁴ This process implies that states under constant journey finding *what is* in the nature of international relationship.

As implied in its lexical arrangement, soft law can be intuitively categorised as law that does not impose rules or imperative values as “hard” as “normal” law does. However, this heuristic definition tends to be misleading. One can arbitrarily assume that soft law is in itself non-binding hence less useful or lawful. Therefore, the Oxford Dictionary of Law gives not only the definition but also the context in which the term is derived:

(in international law) Guidelines of behaviour, such as those provided by treaties not yet in force, resolutions of the United Nations, or international conferences, that are not binding in themselves but are more than mere statements of political aspiration (they fall into a legal/political limbo between these two states).

*Soft law contrasts with **hard law**, i.e., those legal obligations, found either in treaties or customary international law, that are binding in and of themselves.¹⁵*

¹² Malcolm N. Shaw, *International Law*, 5th ed. (Cambridge: Cambridge University Press, 2003).

¹³ Raymond Wacks, *Law: A Very Short Introduction* (New York: Oxford University Press, 2008).

¹⁴ Jonathan I. Charney, “The Power of the Executive Branch of the United States Government to Violate Customary International Law,” *The American Journal of International Law* 80, no. 4 (1986): 913, <https://doi.org/10.2307/2202073>.

¹⁵ Elizabeth A. Martin, *Oxford: Dictionary of Law*, 5th Edition (Oxford: Oxford University Press, 2003), 467.

As noted above, soft law grows in the international law environment.¹⁶ The role and operation evidently exist among countries, inter-governmental, and supra-national institutions.¹⁷ However, scholars are still inconclusive whether soft law belongs to a distinct independent source or is a mere character of the existing source of international law. Shaw¹⁸ stated that soft law is one important source in international law theory in which, among other sources of international law namely custom, treaties, judicial decisions, writers/scholars, and other possible sources, belongs to the latter. However, another scholar, Thirlway,¹⁹ refrains from accepting soft law as an international law source as he proposes only five sources i.e., treaties, conventions, customs, general principles, and subsidiary sources (judicial decisions and scholarship).

Based on the distinct characters of soft law that is described here further, this paper agrees with what Shaw has espoused. In brief, this paper agrees with the view that soft law is a derivate of international law, not merely utilized for its executable punishment or rewards, but more than that, obeyed and adopted as it promises a method for protecting and developing national interests, sometimes to advance national power and sovereignty on the background of global regulatory competitions.

This variation owes to dynamic traits of sources of international law. As the world does not have a global legislation body, every jurisdiction actively or by omission in responding to a particular international customary act among nations contributes to the formation of international law sources.²⁰ These contributions may not be clear enough to notice what they become, whenever a nation reacts at a time, yet the dynamic keeps rolling on and influencing many countries. Hence, soft law instruments expressed by Chinkin²¹ provide a better highlight in respect to the scope of soft law. He stated that soft law instruments are those which range from “legal soft law” (treaties, but that mandate only “soft” obligations), to “non-legal soft law” (non-binding or

¹⁶ Soft law can be found in other areas of governance. In administrative law that is domestically formulated soft law is sometimes utilized to design obedience. In corporate governance field, soft law exists as an alternative approach toward behavioral objective. Hence, in this context, soft law is often treated as an object in which quantitative approaches is utilized to analyze its effect to corporate governance such employee behavior, rule effectiveness etc.

¹⁷ Menno T. Kamminga, “International Law,” in *Introduction to Law*, ed. Japp Hage, Antonia Waltermann, and Bram Akkermans, 2nd ed. (Switzerland: Springer, 2017), 277–301.

¹⁸ Shaw, *International Law*.

¹⁹ Hugh Thirlway, “The Sources of Internatioal Law,” in *International Law*, ed. Malcolm D. Evans, 1st ed. (Oxford: Oxford University Press, 2003), 117–44.

²⁰ Carlo Focarelli, *International Law* (Edward Elgar Publishing, 2019).

²¹ C. M. Chinkin, “The Challenge of Soft Law: Development and Change in International Law,” *International and Comparative Law Quarterly* 38, no. 4 (1989): 850–66, <https://doi.org/10.1093/iclj/38.4.850>.

voluntary resolutions and codes of conduct formulated and accepted by international and regional organizations), to statements prepared by individuals in a governmental capacity, but which aim to lay down international principles.

A. The Characteristics of Soft Law

Literature in international law has uniformly categorized soft law based on its nonbinding strength. Aust²² stresses the non-binding feature because soft law may employ treaty-like language such as ‘shall’ but has as their purpose the promulgation of ‘norms’ in general or universal application. He also states that such non-treaty instruments are typically called Guidelines, Principles, Declarations, Codes of Practice, Recommendations, or Programs. Additionally, its non-binding character indicates a maturing of the legal system and international society.²³ In other words, its strengths and legal roles owe to the non-binding trait itself. Furthermore, he shares a similar view by stating that the urgency is in the parties’ intention and objective implied in the documents.

Having this quality does not mean that soft law can never adopt or indicate other characteristics. In the future, soft law may transform and embody harder characteristics. The indication of this already exists. A close study in respect to Sustainable-Development (SD) Oriented Initiatives of the United Nation finds that the aspects of SD framework, theory, principle and regulatory practice is increasingly backed by sovereign countries.²⁴ Subsequently, the study concludes that these soft law-oriented initiatives mechanisms are increasingly acquiring the compelling strength and effects of hard laws in sovereign states, especially developing countries, and specifically, resources-rich developing countries, which then eventually could lead to more sustainable, just, and fairer global development.

Looking at the global cooperate environment, soft law is a product of Trans-National Regulatory Networks (TRNs).²⁵ As a consequence, this approach does not view domestic financial regulators under BIS as mere entities that look for and protect national interests, but, rather as an illustration of regulatory competition in which the Basel framework is a mean of recognition and legitimisation, as well as often power and domination.

²² Anthony Aust, *Handbook of International Law* (New York: Cambridge University Press, 2005).

²³ Dinah Shelton, “International Law and Relative Normativity,” in *International Law*, ed. Malcolm D. Evans, 1st ed. (Oxford: Oxford University Press, 2003), 145–72.

²⁴ Edward T. Bristol-Alagbariya, “Sustainable Development: A Soft Law Concept Transforming SD-Oriented Initiatives of the UN System into Hard Law Instruments in UN Member-States and Promoting Partnerships Around the Globe,” *Journal of Law, Policy and Globalization* 94, no. 2 (2020): 40–52, <https://doi.org/10.7176/jlpg/94-06>.

²⁵ Emily Lee, “The Soft Law Nature of Basel III and International Financial Regulations,” *Journal of International Banking Law and Regulation* 29, no. 10 (2014): 603–12.

B. Arguments Against the Legitimacy of Soft Law

It is worth mentioning here a few objections to the term “soft law”. Usually, based on a positivism view, the binary framework of law in which there is law or no law at all, finds its root. Such critics argue that introducing soft law in the realm of law is redundant.²⁶ Soft law, he explained further, embodies some problems when it comes to domestic tribunals (it seems to keep maintaining law-binary fashion either legal or illegal), and judicial practice (binary dichotomy). His argument is in the same breath with D’Aspremont’s²⁷ who proposes two pairs of terms which, he assumes, fail to be sufficiently understood by the proponents of soft law, i.e., legal acts-legal facts and soft *instrumentum* – soft *negotium*. Generally viewed, these two scholars consistently hold to the binary characteristic of law mentioned above. Compared to Islamic law, a discourse familiar to Muslims in Indonesia and the world, the binary nature of law is just one possibility since in Islam, law has *quinary* nature.²⁸ However, this article will not address this issue further since it belongs to a different field of study and does not fall under the objectives of this article.

In response to the above objection, one must consider the intent or motive of a law and the expectations surrounding an agreement that contains non-binding provisions. Peters²⁹ made detailed arguments about these. The intent of an agreement may require a non-binding provision whenever the objectives are far-reaching and impossible to achieve in immediate timeframe. Also, when the content of the agreement requires a step-by-step implementation as well as adjustment, then binding enforcement or implementation will reap unwanted results, hence non-binding and flexible provisions are preferable. The second rebuttal is related to *ex-ante* expectation management. For example, reputational consequences manage expectations. Reputational constraints imply that incorporation of soft law is an important building block of reputation. In other words, to gain acceptance and appropriate attribution, a country must employ a soft law or regulation. Otherwise, the country will be left behind in regulatory competition and suffer from, in the case of international intellectual property law or investment law, low foreign investment.

²⁶ Jan Klabbers, “The Redundancy of Soft Law,” *Nordic Journal of International Law* 65, no. 2 (1996): 167–82, <https://doi.org/10.1163/15718109620294889>.

²⁷ Jean D’Aspremont, “Softness in International Law: A Self-Serving Quest for New Legal Materials,” *The European Journal of International Law* 19, no. 5 (2008): 1075–93, <https://doi.org/10.1093/ejil/chn057>.

²⁸ *al-abkam al-khamsa: wajib* (mandatory), *mandub* (advisable), *mubah* (permissible), *makruh* (detestable) and *haram* (prohibited)

²⁹ Anne Peters, “Soft Law as a New Mode of Governance,” in *The Dynamics of Change in EU Governance*, ed. Udo Diedrichs, Wulf Reiners, and Wolfgang Wessels (Edward Elgar, 2011), 21–51.

In international commercial law, the value of a global legal standard increases as the number of participants who use it grows.³⁰ He argues that companies will unlikely be favourable to diverse standards adopted across nations due to incurred costs to shift from one regulation to another (“switching cost”). Authorities see this as an un-interesting condition of foreign investments or other economic activities; hence they tend toward uniform domestic regulation to comply with so called soft law standards.

Learning from practices in four policy fields, i.e., financial market regulation, competition, environmental protection, and social policy, two factors are at play, a scrutiny to how EU soft laws were implemented in Germany promises fruitful insight. In their study, Hartlapp & Hofmann³¹ proposed that soft law can also be promulgated in domestic legal systems based on its relation to hard law and the level of maturity in the field in which the law is incorporated. The level of maturity refers to two things: First, the quantity of regulations has been published in a particular field; and Second, the length of time in which a specific field has been an object of soft law regulation. Turning to soft law’s similarities to hard laws, on some level, certain soft laws accompany and complement existing EU hard law. On the other hand, the abundance of supportive and light soft regulation is indicative of the state’s hesitation to adopt hard law on a domestic level. Hence, EU financial-market-regulation soft laws used by administrative actors in Germany are mainly those that are useful to address day-to-day issues.

III. BASEL III IN TIMES OF THE COVID-19 PANDEMIC

Basel III framework’s implementation in Indonesia was due to be fully implemented by 2021. Due to the Covid-19 pandemic, BI and OJK shifted the target to 2023. The date for full implementation of The Basel III framework among BCBS member has been repeatedly amended. The last stated deadline was on 1 January 2023, due to the COVID-19 pandemic.³²

³⁰ Bryan H. Druzin, “Why Does Soft Law Have Any Power Anyway?,” *Asian Journal of International Law* 7, no. 2 (2017): 361–78, <https://doi.org/10.1017/S2044251316000229>.

³¹ Miriam Hartlapp and Andreas Hofmann, “The Use of EU Soft Law by National Courts and Bureaucrats: How Relation to Hard Law and Policy Maturity Matter,” *West European Politics* 44, no. 1 (2020): 134–54, <https://doi.org/10.1080/01402382.2020.1738095>.

³² “Governors and Heads of Supervision Announce Deferral of Basel III Implementation to Increase Operational Capacity of Banks and Supervisors to Respond to Covid-19,” March 27, 2020, <https://www.bis.org/press/p200327.htm>.

A. Basel III as A Soft Law

In respect to soft law, are there any clues or prescriptions in existing legislation on how to respond to soft law? Or, at least, does the legislation, if any, recognized and anticipate such a concept?

The Republic of Indonesia Law Number 24 of 2010 on International Agreements regulates international agreements in Indonesia. Despite the absent of the term “soft law”, the act provides general principles for ratifying, accessing, or approving international agreements (Law No. 24 of 2000 on International Agreements, 2000). In this legal document, national interests are paramount and must act as a pivot point in all strategic involvement international agreement. An agreement pertaining to strategic issues needs parliamentary approval enact a law. Thus, the President must approve it first since, in Indonesia legal system, the President proposes a particular act before the parliament can be formally legal. These strategic agreements are related to politics, peace, defence, security, change in country’s border, sovereignty, human and environmental rights, issuance of new law principles, and foreign loan/grants.³³ Consequently, considering the above facts and the unique features of soft law, legal guidance regulations in national government level are empty not to mention unclear or unregulated. Hence, it is not an unreasonable suggestion to add an additional clause to incorporate dynamic in the development of soft law since, especially Basel III, pertains to an essential and strategic national interest i.e. financial sector.

The author has found few legal studies performed by Indonesian scholars about soft law in the context of financial regulation implementation. Not to mention, there is a lack of studies focusing on practices, urgencies or impacts of soft law on the Indonesian legal financial system. There may be many factors that have led to this. First, one of main studies in Indonesia, written by Mochtar Kusumaatmadja,³⁴ does not recognize soft law as an international law source. Second, soft law is explicitly absent in the Republic of Indonesia Law Number 24 of 2010 on International Agreements. The act puts forward the following forms, which possibly imply soft law, including treaties, conventions, agreements, memoranda of understanding, protocols, charters, declarations, final acts, arrangements, exchanges of notes, agreed minutes, summary records, processes verbal, *modus vivendi*, and letters of intent. However, the act does not clearly explain the position of these international laws are in the domestic legal system,³⁵ not to mention the position of soft law, when, Indonesia has long

³³ See Article 10, Law No.24 of 2010 on International Agreement

³⁴ Mochtar Kusumaatmadja, *Pengantar Hukum Internasional* (Bandung: Alumni, 2003).

³⁵ Ozy Diva Ersya, “Legal Perpsective on the Trade Facilitation Agreement (TFA): Indonesia Case Studies,” *Petita: Jurnal Kajian Ilmu Hukum Dan Syariah* 1, no. 1 (2016): 1–14, <https://doi.org/10.22373/petita.v1i1.75>.

been adopting soft law in its legal system despite there is no formal regulations, guidelines, policies, or other provisions of soft law incorporation into the domestic legal system. In practice, the non-binding character found in non-financial agreement or treaty has been encountered and Indonesia has tried to reap the benefit out of it.³⁶

The above factors not only show a vacuum in the understanding and anticipation of soft types of rules but also, more importantly, signify lost opportunities to reap benefits and maximize national interests through creative and proactive anticipation of soft law traits. Learning from the dissemination of Basel I and Basel II in which few countries set their own implementation stages which was not in line with that of BCBS,³⁷ Indonesia could have done the same things. However, it must not a mere re-scheduling but, more importantly, an *ex-ante* identification of risks and general objective of national economy.

That said, the endeavour of financial regulatory institutions to prepare a crisis prevention and mitigation plan has not been monotonous considering that BI is not the only regulatory body in Indonesia charged with ensuring the mentioned objectives. Since the enactment of the Law of the Republic of Indonesia Number 21 of 2011 on Financial Services Authority (OJK), BI has not been the sole authority to supervising and controlling banks and other relates institutions in Indonesia. BI, since then, mainly focuses on monetary and fiscal policy formulation. However, these two institutions work in a similar area. As a consequence, analysing banking sector in respect to pandemic crisis must not refrain examining the actions of BI and OJK. In addition, the CB Law No.23/1999 which was already amended twice has mandated the triple functions of BI, formulating, and implementing monetary policies, managing the payment system, and supervising bank integration. In this sense, despite a single-objective mandate enshrined in the law, there has been a bit of distraction by the above triple tasks.

Looking at the Basel III news releases from Bank Indonesia and OJK, both agencies offered rather technocratic arguments. The success of soft law enforcement, according to this idea, is influenced by reputations for technical proficiency and sound judgment.³⁸ Also, the notion of accountability and legitimacy is pivotal when an international standard setting organization is at

³⁶ Fuat Albayumi, "Soft Law Sebagai Sebuah Strategi: Studi Kasus Piagam Asean (Asean Charter)," *Spektrum: Jurnal Ilmu Politik Hubungan Internasional* 12, no. 2 (2012): 1–13; Bunga Lutfiana Sari, "Penerapan Guidelines for the Development of Measures to Combat Counterfeit Drugs WHO 1999 Di Indonesia," *Journal of International Relations* 3, no. 4 (2017): 106–14.

³⁷ Kern Alexander, Rahul Dhumale, and John Eatwell, *Global Governance of Financial Systems: The International Regulation of Systemic Risk* (New York: Oxford University Press, 2005), 44.

³⁸ Eilis Ferran and Kern K. Alexander, "Can Soft Law Bodies Be Effective? Soft Systemic Risk Oversight Bodies and the Special Case of the European Systemic Risk Board" (2012).

the centre of discussion and why any jurisdictions should comply with it.³⁹ Having said that, Indonesian financial authorities believe that the qualified benchmark is abroad. This indicates that domestic financial institutions seek to compete in the same industry as global financial organisations like HSBC and Visa.

By promulgating regulations embracing Basel III, rather than expecting international acceptance, BI and OJK endeavoured to maintain domestic economic stability. The last one might be due to a set of political priorities of the current government. Though this still needs further discussion, political pressure, either in the form of a group of professions or a political environment, is not yet seen or seemed powerful enough to influence this policy. Like in Italy, the mentioned initiatives from the private sector as well as from politician have contributed to advance the implementation of international golden practice of financial institution.⁴⁰ Equally important, the overarching crisscross between international standards and domestic interests may not only be pulled by a mere structure of legal system, but also philosophical and normative value seeks by each jurisdiction. In this regard, cosmopolitan jurisprudence, proposed by Jackson⁴¹ looks more fit for the phenomenon of soft law employed across national boundaries, international cooperation fields including division between low-income-high-income group of countries. This perspective encourages decentralized formulation of efficient and effective soft law.

On the variety of Basel III domestic incorporations, the literature shows the practical evidence and experts' opinions.⁴² In these studies, small interest group does not produce considerable impact in the domestication of such soft laws unless they unite themselves and purport their interests towards related authority. That situation seems unfit to what is happening in current economic and political fora in Indonesia where political interests might inspire the government to set lower weighted risk for government securities (sovereign debts) and pensioners saving than that of Basel III. Yet, since the decision made prior to the Covid-19 outbreak, that (the pandemic) must not

³⁹ Jan Riepe, "Basel and the IASB: Accountability Interdependencies and Consequences for Prudential Regulation," *Journal of International Economic Law* 22, no. 2 (2019): 261–83, <https://doi.org/10.1093/jiel/jgz012>.

⁴⁰ Lucia Quaglia, "The Politics of State Compliance with International 'Soft Law' in Finance," *Governance* 32, no. 1 (2019): 45–62, <https://doi.org/10.1111/gove.12344>.

⁴¹ Kevin Jackson, "Cosmopolitan Jurisprudence for Economic Governance," *Society and Business Review* 11, no. 3 (2016): 276–96, <https://doi.org/10.1108/sbr-08-2015-0041>.

⁴² Walter, "Emerging Countries and Basel III: Why Is Engagement Still Low?"; Beatrice Weder and Michael Wedow, "Will Basel II Affect International Capital Flows to Emerging Markets?," 2002, <https://www.oecd-ilibrary.org/content/paper/731072600818>; Milano and Zugliani, "Capturing Commitment in Informal, Soft Law Instruments: A Case Study on the Basel Committee."

be the driver of the mentioned decision. As this is not a political journal, what political interest lies behind the decision (lower or zero weighted risks for SDs) is beyond this article's scope. Whatever the reasons are all-interested parties across institutions must be aware of the risks to employ this policy (see sub-section V for the details of the economic and legal issues). Otherwise, participation and ratification in international organizations that published soft law is only a disguised act to gain legitimization of whatever domestic agendas aim for.

B. The “Softness” Characteristics in the Basel III Capital Accord

There are few types of instruments that are considered soft law. Brummer listed four, namely best practices, regulatory reports and observations, information-sharing, and enforcement cooperation.⁴³ Based on this categorization, Basel III may be grouped by the best practices.

1. Flexible Adoption

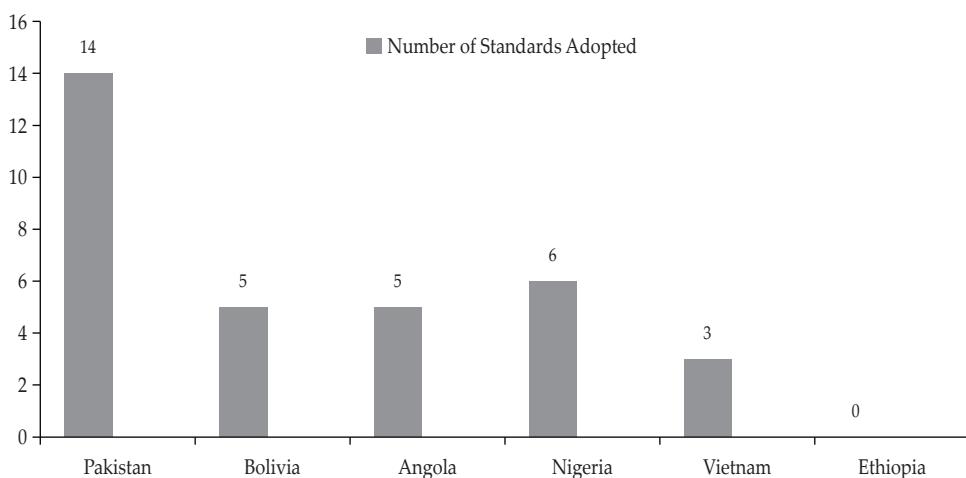


Figure 1. Level of Adoption of Basel II and Basel III Standards Across Developing Countries

The “softness” of soft law can be seen in its ‘weak’ enforcement and flexible governance, yet jurisdictions are keen to employ the respected standards or rules seen as beneficial in certain periods.⁴⁴ For instance, Basel III does not enforce domestic jurisdiction to employ a self-evaluation method internally

⁴³ Brummer, “Why Soft Law Dominates.”

⁴⁴ Kenneth W. Abbott and Duncan Snidal, “Hard and Soft Law in International Governance,” *International Organization* 54, no. 3 (2000): 445, <https://doi.org/10.1162/002081800551280>.

called modelled approaches. The standard gives financial oversight authorities in member countries considerable leeway to sensibly choose an appropriate method. By doing this, soft law retains its potential for changed into a more binding provisions since the network keeps its reputation as a mutual cooperation in the first place and no member will feel its interests at stake. Even more convincingly, Milano & Zugliani⁴⁵ saw Basel III as a successful model of a trans-national cooperation product where Basel III is incorporated into domestic jurisdictions.

Looking globally, Basel III implementation in developing countries are considerably varied in which there is country that does not adopt it at all (Ethiopia), adopt it partially (Nigeria, Bolivia, Angola, Vietnam) and tries to adopt it fully (Pakistan).⁴⁶ Looking at it in detail, table 2 shows how diverse the level of adoption in these countries.

The other substantial benefit is that it reduces regulatory costs and conflicts and non-uniformity among member countries.⁴⁷ furthermore, as mentioned earlier, the utilization of “soft” approach in introducing new rules will avoid unnecessary counter-productive result. In certain situation, like the EU economic and monetary integration, refraining the community to impose strict and compliance-based rule in order to maintain and prioritize the community’s unity. In this typical situation, soft regulations governance is necessary to maintain and mend the EU integration.⁴⁸

2. Subsidiarity

Though international law usually views agencies’ roles as lower than states as secondary, soft law such as Basel III and other international financial regulations (IFRs) tend to put these agencies in an essential position. This is because IFR relies on legislation of the regulation to domestic authorities which subsidiary to states. Hence, Zaring⁴⁹ listed this feature as one characteristic of (international) soft laws by adopting the term of “subsidiarity”. The concept of subsidiarity takes independence as a paramount issue meaning that financial supervisory agency in every country must be free from intervention imposed by higher state’s agencies or even domestic political groups.

⁴⁵ Enrico Milano and Niccolò Zugliani, “Capturing Commitment in Informal, Soft Law Instruments: A Case Study on the Basel Committee,” *Journal of International Economic Law* 22, no. 2 (2019): 163–76, <https://doi.org/10.1093/jiel/jgz009>.

⁴⁶ Emily Jones, “The Puzzle: Peripheral Developing Countries Implementing International Banking Standards,” in *The Political Economy of Bank Regulation in Developing Countries: Risk and Reputation*, by Emily Jones (Oxford University Press, 2020), 3–33, <https://doi.org/10.1093/oso/9780198841999.003.0001>.

⁴⁷ Chris Brummer, “Soft Law and the Global Financial Crisis,” in *Soft Law and the Global Financial System: Rule Making in the 21st Century* (Cambridge University Press, 2015), 218–75.

⁴⁸ Peters, “Soft Law as a New Mode.”

⁴⁹ David Zaring, “Legal Obligation in International Law and International Finance,” *Cornell International Law Journal* 48, no. 1 (2015): 175–217.

Under the same reasoning but with different emphasis, Lee⁵⁰ perceives this reliance as intentional. By making Basel III “soft” enough, it provides broad flexibility for domestic jurisdictions to adopt the framework based on each country’s need. She suggests this as a pre-condition for domestic adoption. Furthermore, she stated that institutional feature of Basel III appears equivocal in categorizing the standard as a soft law. In other words, Basel Committee as a soft law-making institution will produce a framework or standard which, in turn, non-binding regulations. The wording in frameworks, standards or guidance shows this clearly in which words such as “will”, “should” and “must” are perpetual instead of “shall” which frequently utilized in many hard (international) laws.

3. The Pandemic and the Role of Law

In times of crisis, monetary policies (as well as fiscal policies) may not work as in normal times. Listokin articulated this, and other issues of crisis containment, through a legal approach by advocating “expansionary legal policies” to stimulate the economy.⁵¹ The objective is to make sure there is a domestic spending movement that contributes to aggregate demand increases. However, this “pill” may not appropriate in all situations as he proposed it when monetary policy limited by the zero-lower bound. He also warns jurisdictions along with legislators, regulators and executives that choose this approach to act in unison by legislating, regulating or re-interpreting laws/regulations that induce spending the surge. Listokin listed more than enough model of initiatives to perform this approach. He listed it by large from law reducing regulatory implementation cost during recession, implementing reorganization rather than liquidation (bankruptcy law) to personal loan forgiveness (student loan).⁵²

He particularly envisioned five takeaways on the expansionary legal remedy during crisis.⁵³ First, jurisdiction must keep and ensure central banks legitimacy and independence by not overly rely on all the solution to them (central banks). This might be caused by the immunity enjoyed by the central bankers during crisis.⁵⁴ However, any non-monetary mandates assigned to central banks may reduce the effectiveness and independence of central bank in the long run. Second, in a situation where authorities facing zero lower bound are

⁵⁰ Lee, “The Soft Law Nature.”

⁵¹ Yair Listokin, *Law and Macroeconomics: Legal Remedies to Recessions* (Harvard University Press, 2019), 8–10, <https://doi.org/10.4159/9780674239838>.

⁵² See chapter 11 in Listokin, *Law and Macroeconomics*.

⁵³ Listokin, 198–203.

⁵⁴ See the case within the US context in “Too Sovereign to Be Sued: Immunity of Central Banks in Times of Financial Crisis,” *Harvard Law Review* 124, no. 2 (2010): 550–71.

available abundance stimulus options. As a follow up, third, challenged by zero lower bound, all policy makers should aim for stimulating aggregate demand. Fourth, an institution dedicated for law and macroeconomics is needed. Fifth, as the role of law becomes more and more evident and related to economy and finance, jurisdictions should be confident to rely on and utilize law and macroeconomics perspective either in times or out of economic crises.

IV. BI AND OJK'S MEASURES TO INCORPORATE THE BASEL III FRAMEWORKS INTO THE DOMESTIC FINANCIAL REGULATION SYSTEM

A. The OJK's Initiatives

Following the meeting of Group of Governor and Head of Supervision (GHoS) on December 7, 2017, the BSCBS members in attendance agreed to make a revision to Basel III implementation. The implementation of market risk assessment that previously was planned to be effective in 2019, was extended and was scheduled to come into full operation in 1 January 2022. Then, due to COVID-19 pandemic, OJK in the early 2020 decided to delay the full implementation of Basel III to 1 January 2023.

There are several reasons why OJK is committed to implementing Basel III:

- 1) A commitment as G-20 and BCBS member;
- 2) A continuation of the preceding accords, Basel I and Basel II;
- 3) A reputation factor in which affecting international valuation of Indonesia's banking system;
- 4) Effectiveness and efficiency of risk management in banks; and
- 5) A better and more credible transaction landscape with international counterparts.

The recent rank of the best global corporation of Forbes magazine 2020 put three Indonesian banks on the top of other domestic firms. On one hand, this showed that the financial industry is still promising and has potential to be frontrunners in the competitive global market. On the other hand, considering the ranks the firms gained, it seems that the objectives implied in the above consideration are far from sight. Putting a spotlight on the first, second, third and fifth reasons, global acceptance and reputation are among the essential considerations. Domestic interests can be withdrawn from the fourth point which is evidenced and persistent in every financially advanced country.

Yet, domestic interests pursued by OJK were announced in a press release dated December 13, 2016. The press release was published prior to the GHoS meeting of 27 member countries of the Basel Committee on Banking Supervision in Frankfurt on December 7, 2016. Two points were

critical to the Basel III framework implementation in Indonesia. First, Basel III implementation was extended to 1 January 2022. Second, BCBS through the GHoS conference furthers Indonesia's initiative concerning sovereign debt (the debt of either the central or local governments and debt to the Central Bank). OJK, in line with GHoS, stated that the existing sovereign exposure calculation standard of zero percent RWA (Risk Weighted Asset) would remain in place. The decision, OJK viewed, would have a positive impact on national banks' capacity for circulating credit in the domestic market. Predictably, this would create a sound and steady financial environment for a better and more development in many other economic fields.

OJK, as stated in its official press release, said that national interest remained the first priority, superior to other considerations. By assigning 0 % RWA (Risk-Weighted Assets) for sovereign debt (central or regional government bonds denominated in foreign currencies), OJK tried to manifest the aforementioned hierarchy of priorities whereas Basel III, in conjunction with Indonesia risk rate, supposedly assigns 50 % RWA. In line with this, similar discretion is applied to sovereign debts. Indonesia, as mentioned on many occasions by the head director of OJK, is committed to imposing zero percent risk of its Government Debt Securities (SUN – *Surat Utang Negara*) denominated in foreign currency. Having said that, based on Basel framework, such exposures assigned a weighted-risk concurrent to country's rating, in the case of Indonesia's rate, the risk is weighted 50%. Furthermore, weighted risks for claims to pensioners and civil servants is set lower (50%) than the one in Basel III (75%). What makes this setting is plausible, according to OJK, is because the mentioned claims ensure by government. Hence, the authority perceives that the risks related to the claim is considerably low.

Interestingly, in 2020 the above initiatives invoked a quasi-fiscal financing measure. The measure was implemented in two stages. First, the pandemic had required the government to maintain the state's budget.⁵⁵ Because of the pandemic's impact, the fiscal deficit was authorised to exceed the pre-pandemic limit of 3% of GDP under the Enactment of Government Regulation in Lieu of Law (Perppu) No. 1, 2020, which was later ratified as Law No. 2 2020. This law also stated that Bank Indonesia was entitled to buy SBN directly from the main market for fiscal financing. Second, this unprecedented agreement between BI and the MoF was carried out through three Joint Agreement procedures.

⁵⁵ In the last two years the deficit has been about 3 times than that of last 5 years average, amounting to 6.3 % of GDP in 2020 and 5.5% (estimation) in 2021. For global description of the fiscal deficit due to the pandemic see. Goldberg and Reed, "The Effects of the Coronavirus Pandemic in Emerging Market and Developing Economies," 165.

1) the First Joint Agreement

Bank Indonesia purchases SBN from the primary market as a stand-by buyer at a market yield rate when the market cannot absorb all of the SBN auction goals for Government fiscal finance. This method is applicable for three years 2020, 2021, and 2022. In this regard, as of 15 November 2022, Bank Indonesia had acquired Rp. 266.11 trillion in SBN.

2) the Second Joint Agreement

Bank Indonesia purchases SBN on the primary market directly with a burden-sharing mechanism to meet the increasing needs of the APBN for social protection programmes (Rp. 397.6 trillion with a net burden of 0% for the Government) and national economic recovery (Rp. 117 trillion with a net charge of 1% below the Bank Indonesia Reverse Repo interest rate for three months for the Government). This was only applicable to the APBN financing for 2020.

3) The Third Joint Agreement

Bank Indonesia's direct purchase of SBN in the primary market with a coupon at the Reverse Repo Bank Indonesia interest rate for three months to finance the massive health and humanitarian funding needs in the 2021 APBN (Rp215 trillion) and the 2022 APBN (Rp224 trillion) due to the outbreak of the COVID-19 delta variant.

The above agreements would not have been possible without the adjustment and lobby in the BCBS, the agency under BIS (Bank for International Settlement) that published Basel III, meeting according to Basel III framework the Indonesian government bond supposedly assigned 50% Risk-Weighted Assets (RWA). Thanks to the OJK's initiative during the GHoS (the Group of Governors and Heads of Supervision) meeting in Basel, the bond was since then enjoying 0 % RWA. This way, a zero RWA allowed state-owned banks to comfortably buy the bonds free from 50 % RWA according to Basel III. Whether it was a coincidence or not (the Indonesian government had already planned to fund the budget deficit through government bonds purchase by BI) needs a further analysis.

B. Bank Indonesia's Initiatives

On the other hand, BI took some measures to respond to the COVID-19 pandemic's effects on the micro and macro-economic situations in Indonesia. A couple of actions, formulated by BI, imposed less restrictive requirements with respect and comparison to the Basel III framework (point c). This challenging situation, understandably, was due to stricter and more limited mobility that resulted in banks suffering from liquidity concomitant with lower financing opportunities. The details of this mixed formulation to mitigate the

COVID-19 impact were as follows:

- a. Set a lower rate of the BI 7-Day (Reverse) Repo Rate in February and March by 25bps respectively;
- b. Intensified a triple intervention policy in the spot and DNDF markets and purchasing SBN in the secondary market;
- c. Reduced the foreign currency reserve requirements for conventional commercial banks from 8% to 4%;
- d. Extended the SBN repo tenor and provide daily auctions to loosen rupiah liquidity as well as increase the frequency of FX;
- e. Swapped auctions to daily in order to ensure adequate liquidity;
- f. Expanded the types of underlying transactions for Domestic Non-Deliverable Forwards (DNDF), thus increasing hedging alternatives against rupiah holdings in Indonesia;
- g. Lowered the Rupiah reserve requirements by 50bps for banks that are engaged in export-import financing, as well as the financing of MSMEs and other priority sectors;
- h. Loosened the Macro-prudential Intermediation Ratio (MIR);
- i. Provided hygienic currency fit for circulation, reduce the costs of the National Clearing System (SKNBI), maintain a QRIS Merchant Deposit Rate (MDR) of 0% for micro-merchants, and support non-cash disbursements of various government programs, including the Family Hope Program (PKH/*Program Keluarga Harapan*) and Noncash Food Assistance Program (BPNT), as well as the Pre-Employment Card and College Smart Indonesia Card.

Outlining the above measures, BI and/or OJK's responses were through relaxation programs which combined or put more precisely, distracted by non-monetary measures such as social-net (PKH) and health support program (food assistance program) led by the government. Ideally, this program was by no means on the list.

Being different from Basel I and II, Basel III is specially formulated to Bank BUKU (*Bank Umum Kegiatan Usaha*/ Commercial General-Banks) III and IV.⁵⁶ BUKU III banks are banks whose main capital is between five and 30 trillion rupiah while BUKU IV banks are those that have main capital more than 30 trillion rupiah.⁵⁷

⁵⁶ Leverage Ratio Calculation is a requirement for general conventional banks, including Branch Offices of Foreign Banks (KCBA). For KCBA, the calculation of Tier 1 approach will use operational funds placed in CEMA. In regards to public compulsory-disclosure, the obligation is solely applicable to BUKU 4, BUKU 3 and foreign banks (including KCBA).

⁵⁷ Based on Bank Indonesia Regulation Number 12/26/PBI of 2012 regarding Commercial Activities and Office Networks Based on Bank's Core Capital, banks in Indonesia are classified as "bank buku" 1, 2, 3 and 4 in which their core capital respectively are less than 1 trillion, 1 – 5 trillion, 5 – 30 trillion and more than 30 trillion (in Rupiah)

Since 2012, OJK and Bank Indonesia have published 13 regulations in respect to Basel III standards (see table 1).

Table 1.
Indonesia Financial Authorities Official Documents in Implementing Basel III

No.	Basel III Documents	OJK/BI Documents
1.	Basel III: A Global Regulatory Framework for More Resilient Banks and Banking Systems (2011)	OJK Regulations No.11/POJK.03/2016 on Compulsory Reserves of Minimum Capital for General Banks
2.	Press Release – Basel Committee Issues Final Elements of the Reforms to Raise the Quality of Regulatory Capital (2011)	OJK circular letter No.20/SEOJK.03/2016 on Conversion to ordinary stock or write down features for additional Main Capital Instruments and complementing capital
3.	International Convergence of capital Measurement and Capital Standards: A Revised Framework	OJK Circular Letter No.42/SEOJK.03/2016 on Guidance of Risk-Weight Based Asset for Credit Risk using Standard Approach
4.	-	OJK Circular Letter No.24/SEOJK.03/2016 on Guidance of Risk-Weight Based Asset for Operational Risk using Base Indicators ⁵⁸
5.	-	OJK Circular Letter No.35/SEOJK.03/2016 on the Utilization of Standard Method in Measuring Capital Reserve Requirements in General Banks by considering Market Risks ⁵⁹
6.	The Standardized Approach for Measuring Counterpart Credit Risk Exposures (2014)	OJK Circular Letter No.48/SEOJK.03/2017 on the Guidance of Measurement of Derivative Transactions Net-Claim in Measuring Risk-Weighed Asset for Credit Risk using a Standardized Approach
7.	Revisions to the Securitization Framework (2014 & 2016)	OJK Regulation No.11/POJK.03/2019 on Prudential Principles in Asset Securitization Activities for General Banks
8.	Interest Rate Risk in the Banking Book (2016)	OJK Circular Letter No.12/SEOJK.03/2018 on the Implementation Risk Management and Risk Measurement based using Standardized Approach of Interest Rate Risk in The Banking Book for General Banks
9.	Basel III: The Liquidity Coverage Ratio and Liquidity Risk Monitoring Tools (2013)	OJKR No.42/POJK.03/2015 on Compulsory Liquidity Coverage Ratio (LCR) for General Banks
10.	Monitoring Tools for Intraday Liquidity Management (2013)	Bank Indonesia Circular Letter No.13/36/INTERN/2011 on the Guidance of Risk-Based Banking Supervision for Risk Valuation Stage and Bank's Soundness (RBBR)
11.	Basel III: The Net Stable Funding Ratio	OJKR No.50/POJK.03/2017 on Compulsory Net Stable Funding Ratio for General Banks
12.	A Framework for Dealing with Domestic Systematically Important Banks (2012)	OJKR No.2/POJK.03/2018 on Determining Systematic Bank and Capital Surcharge
13.	Supervisory Framework for Measuring and Controlling Large Exposure (2014)	OJKR No.32/POJK.03/2018 on Credit Maximum-Limit and Large Financing Provision for General Banks

⁵⁸ A guidance for operational risk which was initially promulgated in Basel II.

⁵⁹ A guidance for market risk which was initially promulgated in Basel II.

The above table shows how the role of OJK is prominent in the implementation and supervisory conduct of the Basel III framework, because the separation of OJK from BI, supervisory roles and measures become the OJK's domain. Through Law No.2/2023, OJK gained a greater supervisory role e.g., crypto assets and derivative trading assets. This role had previously been under the auspices of Bappepti (the Commodity Futures Trade Supervisory Agency). This additional role and responsible was a challenge for OJK as the matters are relatively new instruments and a considerable amount of time and human resources are needed to incorporate and harmonize the existing and the brand-new roles.

C. Implementation Compliance

Overall, Indonesia received “compliant” predicate which is the highest one by the assessment team of BCBS.⁶⁰ This predicate was obtained based on the publication of specialized assessment entitled the “Regulatory Consistency Assessment Program (RCAP) - Assessment of Basel large exposures regulations – Indonesia” in March, 2020. By the time this was article written, the Basel Committee has already assessed 28 jurisdictions (see table 2). Three out of five indicators were compliant. The other two indicators, Risk-Based Capital and Global/Domestic-Systematically Important Banks are “largely compliant” and “not-applicable” respectively.

Table 2.
Assessment of Country's Compliance of Basel III Implementation

Country	Basel Committee Country Assessments				
	Standard and Grade				
	Risk-based Capital	Liquidity (LCR)	Net Stable Funding Ratio (NFSR)	Large Exposure Framework	G-SIB/ D-SIB
Argentina	C	C	C	C	NA
Australia	C	C	C	C	NA
Brazil	C	C	C	C	NA
Canada	C	C	C	C	NA
China	C	C	C	C	C
EU	MNC	LC	NA	NA	C
Hong Kong	C	C	C	C	NA
India	C	LC	C	C	NA
Indonesia	LC	C	C	C	NA
Japan	C	C	NA	NA	C
Korea	C	C	NA	NA	NA

⁶⁰ There are three grades assigned i.e. C (Complaint), LC (Largely Compliant) and NC (Not Compliant)

Table 2.
Assessment of Country's Compliance of Basel III Implementation (Continued)

Country	Basel Committee Country Assessments				
	Standard and Grade				
	Risk-based Capital	Liquidity (LCR)	Net Stable Funding Ratio (NFSR)	Large Exposure Framework	G-SIB/ D-SIB
Mexico	C	C	NA	NA	NA
Russia	C	C	NA	NA	NA
Saudi Arabia	C	LC	C	C	NA
Singapore	C	C	C	C	NA
South Africa	C	C	NA	NA	NA
Switzerland	C	C	NA	NA	C
Turkey	C	C	NA	NA	NA
USA	LC	C	NA	NA	C

Compliant : C
 Largely Compliant : LC
 Materially Non-Compliant : MNC
 Non-Compliant : MC
 Not Applicable : NA

Note: Nine EU member states join the Basel Committee i.e. Belgium, France, Germany, Italy, Luxembourg, the Netherlands, Spain, Sweden, and the United Kingdom

The risk-based capital regulation received a designation slightly lower than “compliant” because of differences in Article 39 of Regulation No 32/POJK.03/2018 regarding bank claims to sovereign debt or central bank management including regional government and SOE (State-Owned Enterprise) are not subject to exemption of LEX (large exposure) risks. OJK argued that this provision, a 30% limit of sovereign debt and quasi-sovereign debt in bank capital, was solely set for prudential reasons. On the contrary, according to Basel III paragraph 13, the Basel LEX Framework, these claims are exempted. Yet, the assessment team did not perceive this as a material finding. For the same reason, the team graded this category LC (Largely Compliant) (*Regulatory Consistency Assessment Programme (RCAP) - Indonesia, 2020*).

However, there is one category which is not applicable to any assessment. Since no banks in Indonesia are globally active, OJK has not issued any regulations or guidance for a LEX risk among G-SIB's. Nevertheless, the assessment team identified that there are currently 13 D-SIBs in Indonesia and the OJK has not exercised its national discretion to impose a tighter limit for the exposure of an Indonesian D-SIB to a foreign G-SIB or to another Indonesian D-SIB (*Regulatory Consistency Assessment Programme (RCAP) - Indonesia, 2020*).

In general, with minor discrepancies in sovereign debt management and a mild warning in anticipation of D-SIB, OJK has been fairly thorough in integrating Basel III in the Indonesia financial system. This achievement should not create loose projections for ensuring micro and macroprudential regulation in Indonesia in line with the international gold standard and domestic interests.

V. THE RISING CHALLENGES OF THE BURDEN SHARING ARRANGEMENT

A. Risk-to-Objective Analysis

Eichengreen recognized the relationship between political and economic interests, stating:

The ability to issue debt creates a temptation to put off hard decisions. It allows legislators to finance deficit, instead of facing hard choices about what spending programs to cut or taxes to raise. It allows incumbents to manipulate the budget for political gain, ramping up spending before an election in the hope of attracting swing voters, or boosting programs favoured by their constituents prior to leaving office.⁶¹

Even in times when sovereign debt (SD) is needed, the side effects of political fallout and lack of fiscal discipline are difficult to deny. Eichengreen, even when illustrating some of the positive benefits of SDs has stressed this (see above). Whatever a jurisdiction aiming (objectives), the risks lurking behind the policy may put the novel objective backlogged.

The burden sharing programme (BSP) has put more liability to BI than to MoF. As oppose to previous law (Law No.23/1999) which provisions only one objective – price stability, the current law (Law No.3/2023) gives BI more objectives to achieve namely i) price stability, ii) payment system stability, and iii) financial system support for sustainable growth.⁶² While mandating more than one objective is not a rare practice in modern governance of CB, without clear priorities and lack of independence, having multiple mandates will potentially deviate BI from the traditional role of CBs in maintaining price stability. CBs that follow this trajectory has been warned by financial law

⁶¹ Barry J Eichengreen et al., *In Defense of Public Debt* (Oxford University Press, 2021), 94.

⁶² Classic works on CBI such as that of Cukierman et.al. and the more recent one by Bini-Smaghi and Gross have stressed the importance of single objective than dual or multiple objectives. See: Alex Cukierman, Steven B. Web, and Bilin Neyapti, "Measuring the Independence of Central Banks and Its Effect on Policy Outcomes," *The World Bank Economic Review* 6, no. 3 (September 1, 1992): 353–98, <https://doi.org/10.1093/wber/6.3.353>; Lorenzo Bini-Smaghi and Daniel Gros, "Is the ECB Sufficiently Accountable and Transparent?," *European Network of Economic Policy Research Institutes*, Economics Working Papers 007, 2001, <https://ideas.repec.org//p/epr/enepw/007.html>.

experts such as Goodhart, Lastra and Skinner.⁶³ Goodhart and Lastra argue that the central bank populism (CBP), gaining its traction in the aftermath of global financial crisis, has blurred, and made the CB's objective fuzzier. Yet, they offer several potential solutions such as strengthening the credibility of the Board of Governors to curb unwanted moral hazard and increasing the awareness and checks-and-balances capability of the parliament because they initiate populist law and, at the same time, have responsibility to oversee it. As a consequence, they added, a new accountability regime is needed. On the other hand, Skinner showed that the parliament, in his case the U.S. Federal Reserve Bank or the Fed, is the problem (initiator) and could provide solution if they are transparent and fluent enough in communicating the vision of this change (populistic CB law).

In response to the experts' warnings above, there are several procedures which can be performed mainly by BI. First, in terms of accountability, there must be a clear formulation of performance measures as well as consequence, if needed, when BI misses or partly misses the target. It is not an easy task and BI will not be able to do this without coordinating with other agencies. Once the performance measure is agreed or determined, BI will have more space to innovate without fearing that this will deteriorate its independence (instrumental independence - the autonomy to choose appropriate tools to achieve its institutional goal)⁶⁴ or suffer from political interventions. Second, the parliament must be able to communicate its vision and expectation regarding the legislated law because BI's independence and credibility are key for managing the market expectation of Indonesian monetary policies. In this context, the public has pronounced its concern regarding the BI independence and credibility.⁶⁵ Third, the process of incorporating BSP into

⁶³ Charles Goodhart and Rosa Lastra, "Populism and Central Bank Independence," *Open Economics Review* 29, no. 1 (2017): 49–68, <https://doi.org/10.1007/s11079-017-9447-y>; Christina Parajon Skinner and Rosa M Lastra, "Sustainable Central Banking," *Virginia Journal of International Law* 61 (2023); Christina Parajon Skinner, "Central Bank Activism," *Duke Law Journal* 71, no. 2 (2021): 247–328.

⁶⁴ There are two types of independence in relation to objective achievement i.e. objective and instrumental independence. A distinction proposed by Debelle and Fischer. See: Guy Debelle and Stanley Fischer, "How Independent Should a Central Bank Be?," in *Goals, Guidelines and Constraints Facing Monetary Policymakers*, ed. Jeffrey C Fuhrer, Conference Series No. 38 (Boston: Federal Reserve Bank of Boston, 1994), 197.

⁶⁵ Ade Wiharso, "Mempertimbangkan Dampak Perpanjangan 'Burden Sharing' (Assessing 'Burden-Sharing' Effect)," news, Detiknews, accessed 10 July 2021, <https://news.detik.com/kolom/d-5190935/mempertimbangkan-dampak-perpanjangan-burden-sharing>; "Ekonom Sebut Risiko Bank Indonesia Cetak Uang Terus Karena Burden Sharing Permanen - Bisnis Tempo.Co," accessed July 25, 2023, <https://bisnis.tempo.co/read/1666384/ekonom-sebut-risiko-bank-indonesia-cetak-uang-terus-karena-burden-sharing-permanen>; "Pertimbangkan Ulang 'Burden Sharing' ", Neraca BI Bisa Defisit Rp 21,8 Triliun - Kompas.Id," accessed 25 July 2023, <https://www.kompas.id/baca/ekonomi/2020/09/29/karena-burden-sharing-neraca-keuangan-bi-defisit-rp-218-triliun-pada-2021>.

the legal products in times of crisis that did not do through maximum public participation, discussion and socialization must not be repeated in the future. This has triggered a negative perception in the public.

Multiple objectives that are delegated to BI According to Law No.3/2023, may be counterproductive to the government's vision for building infrastructure programs and high investment. The problems with that visions are endemic, namely: i) the program ineffectiveness because the high inflow of Foreign Direct Investment failed to contribute to considerable growth and positive industrial spill overs; ii) overly leaning to prestige projects and supporting-groups may and the indications have been detected leading to high cost policy in the form of corruption or financial excesses; and iii) unfavourable experiences with weak discipline of fiscal practices, financial oversight and monetary credibility seem to reiterate and may lead to another financial problem or at worst crisis.⁶⁶ Many of the issues are outside BI's domain. However, the closest counterpart for monetary policies is the MoF (fiscal policies). Hence, it is important to maintain, and connect BI's interest when holds coordination with the ministry.

Looking at a central bank's core function – maintaining price stability (stable inflation rates), funding the government deficit, and a quasi-fiscal policy. From August, 2022 to January 2023, BI was progressively consistent increasing BI 7-Day (reserve) Repo Rate. At this period, the inflation rate was around 5 %, with the highest one recorded in September 2022 which was 5,9 %. Theoretically, increase in this rate is a counter for rising inflation. In fact, the monthly inflation rate has been rising since June 2021 (with only one anomaly). Whether or not the BSP has contributed to this rise needs further study but, for sure, BI was struggling to curb the inflation, which is targeted in 3,6 % in the 2023 state budget (APBN). This inflation risks should always keep in check to ensure the overall economic stability and maintain BI's credibility as the monetary policymaker.

More crucially, the Law No3/2023 which, like has been predicted,⁶⁷ permanently allows the deficit-funding through BI's SD purchase actions may present latent risks to BI effectiveness in achieving its core objectives (price stability) not to mention attaining the other two objectives. First, the BSP arrangement which sets BI to return the SD coupons which equals to the Reverse Repo Bank Indonesia interest rate for three months will potentially

⁶⁶ Wilmar Salim and Siwage Dharma Negara, "Infrastructure Development under the Jokowi Administration: Progress, Challenges and Policies," *Journal of Southeast Asian Economies* 35, no. 3 (2018): 386–401; William E. James, "Lessons from Development of the Indonesian Economy," *Education About Asia*, Spring 2000; Salim and Negara, "Infrastructure Development under the Jokowi Administration."

⁶⁷ Hal Hill, "Indonesia and the Covid-19 Crisis: A Light at the End of the Tunnel?," *Economic Dimensions of Covid-19 in Indonesia*, Edited by Blane D. Lewis and Firman Witoelar, 2021, 21.

burden BI's balance sheet. This will potentially burden and weaken the effectiveness of BI's policies. Without prudent governance, this situation may weaken the BI's capability to meet its objectives.

B. The Legal Issues

BI, as a state institution protecting price stability as formulated in Law No. 23/1999, has faced a massive test when they have had to coordinate with the government to contain the "collateral damage" from the pandemic. The test may reveal the level of BI independence and the legal framework by which BI engages in making sure the financial soundness of the national economy and the fiscal stability of the government.

In the midst of the COVID-19 crisis, BI was successful in keeping the Rupiah exchange rate and inflation rate in check. This achievement was attributed to aggressive intervention by BI either through selling foreign exchange reserves in spot, on a forward basis (Domestic Non-Deliverable Forward, DNDF), or simultaneously buying government bonds sold by foreign investors on the secondary market.⁶⁸ However, the success of this measures must be followed with equal measures on the side of the fiscal policy known as fiscal consolidation policy.

The unprecedented measures to mitigate the effects of the outbreak has weakened the government's fiscal structure.⁶⁹ Hence, as the government remains committed to contain the social and financial impact, they invited BI to become actively involved in a "burden-sharing"⁷⁰ scheme to fund the deficit and other pandemic-related programs which require considerable financial resources. The scheme lets BI buy government bonds on the primary market. According to the Basel III framework the Indonesian government bond supposedly assigned 50% RWA. Thanks to the OJK's initiative during the GHoS meeting in Basel (see previous page), the bond was since then enjoying 0 % RWA. This way, a zero RWA let state-owned banks buying the bonds comfortably free from 50 % RWA according to Basel III. Whether it was a coincidence or not needs further analysis.

⁶⁸ Bank Indonesia, "Synergy and Policy Innovation: Key to Resilience and Saving the Economy from Crisis Risk," 7.

⁶⁹ In the last two years the deficit has been about 3 times than that of last 5 years average, amounting to 6.3 % of GDP in 2020 and 5.5% (estimation) in 2021. For global description of the fiscal deficit due to the pandemic see. Goldberg and Reed, "The Effects of the Coronavirus Pandemic in Emerging Market and Developing Economies," 165.

⁷⁰ By issuing government bond amounting up to \$ 4,3 billion, the highest in the country history, the scheme lets BI to purchase the bond in primary market. See Olivia, Gibson, and Nasrudin, "Indonesia in the Time of Covid-19."

The Burden sharing program was an unprecedented innovation in times of a deficit crisis caused by the pandemic. In Indonesia, the fund was planned to finance the government's needs to contain the pandemic specifically for i) general spending in APBN (the state budgets) (stage 1, April 2020), ii) APBN spending for special purposes, including social protection and the national economic recovery program from the impact of the Covid-19 pandemic (stage 2, July 2020); and iii) APBN spending for special purposes, including health and humanitarian budget allocation to overcome the impact of the Covid-19 pandemic.⁷¹ Thanks to Government Regulation in Lieu of Law (Perppu) No. 1 2020 which was then amended into Law No. 2/2020, the program was able to be implemented in three stages from 2020 to 2022. The total amount was up to Rp 974,09 trillion in total.

The risk awareness associated with such an initiative is not uncommon. Two prominent international financial institutions, the IMF and BIS, have warned of and given several limitations to this measure. On top of that, we can also learn about these risks from the existing practises of CBs in major industrial countries, including the Fed, the Bank of England, and the ECB (European Central Bank). The main limitations are: i) the SD's purchase is not made in the primary market; ii) there must be a solid or high-quality asset as a guarantee; and iii) the funding limit is legalised in the CB law.

Despite the legal status, the aforementioned statutes deviated from what was promulgated by the Law No.23/1999 and Basel III framework of sovereign debts risk-weighted assessment. The former prohibited the funding of government budget/deficit through sovereign debts purchase and the later compulsorily required commercial banks to assign certain amount of capital whenever holding government bonds based on credit rating agency's rank or internal-self assessment.

The government's legal responses are in line with what Listokin illustrate as expansionary legal measures. In terms of the rule of law during crisis, he has listed several requirements and conditions. In a dire condition, the relationship between economy and law have been realized intertwined. Put differently, jurisdictions tended to perform expansionary legal measures to contain the damage of crisis to economy by legislating an array of law and/or regulation that would stimulate economic recovery. Listokin pioneered it by proposing the stimulation of macroeconomic recovery (aggregate demand) through legal instruments and lawyers.⁷² Which then subsequently develop in the field of

⁷¹ Bank Indonesia, “Synergy and Policy Innovation: Key to Resilience and Saving the Economy from Crisis Risk,” 8.

⁷² Listokin, *Law and Macroeconomics*.

public procurement by Klingler.⁷³ From these observations and analyses, legal instruments aimed for greater aggregate demand which, in turn, accelerate the general economic recovery. This monetarist approach keeps government intervention minimum and, at the same time, protects the central bank's independence.

However, there are few conditions to be met. First, a solid coordination and understanding between the executive/government, the central bank and the legislature body wherein legal instruments were approved and legislated. In other words, from the CB's perspective, there must be excellent communication and professional coordination in order to cruise through the intricacy of various interests of both political and economic field. The logic consequence of this condition is that the Board of Governors (BoG) of BI stands in a strategic position to ensure monetary priority and technocracy among related government agencies and political institutions. They should accept the political process as it is but BI's credibility and independence must be the uncompromising principles. BI has been active enough to communicate its policies through the cutting-edge technology of social media, for instance the release of the BoG monthly meeting. This must be cultivated to gain legitimacy and the public's trust. That said, BI will have more support group to defend itself against potential intervention.

Second, the expansionary legal measures may hide unanticipated legal arrangement that need. For example, the function of the Lender of Last Resort (be the ultimate lender for financial institution in times of crisis), based on the Law No.3/2023 is delegated to a special committee chaired by the Minister of Finance and the right for determining an emergency is hold by the President.⁷⁴ In this situation, amendment is one of the solutions. If shifting the right to the BI governor is not possible in an immediate timeframe, then assigning a veto player is more reasonable in a typically fluctuating political landscape like Indonesia. Adopting veto players arrangement can be done by provisioning the BI governor to submit the emergency to the President, and then the President is legally entitled to approve or reject it.⁷⁵ Another solution is for BI has to design a system to mitigate an indication of crisis as early as possible and whenever possible, the measure to rescue financial institutions and/or domestic financial stability should be directed through the market

⁷³ Désirée Klingler, "Government Purchasing during COVID-19 and Recessions: How Expansionary Legal Policies Can Stimulate the Economy," *Public Contract Law Journal* 50, no. 1 (2020): 3–33.

⁷⁴ See, Article 4 and 34A "Law No.3/2023 on Financial Sector Development and Strengthening,"

⁷⁵ For a classic and comprehensive account of veto-player arrangements in political institutions, see George Tsebelis, *Veto Players: How Political Institutions Work* (Princeton University Press, 2002), <https://press.princeton.edu/books/paperback/9780691099897/veto-players>.

mechanism as efficient as possible (avoid using the public fund or by ‘printing money’).

VI. CONCLUDING REMARKS

Flexibility and compliance are two aspects that maintain the softness traits of Basel III employed in domestic financial and legal regulation in Indonesia. The authorities tried to enshrine the government’s resilient and prudent financial state through flexibility. Beyond this achievement, broader impacts of flexible discretion are expected shortly. Both OJK and BI have promulgated thirteen regulations to accomplish this. BCBS has awarded the Basel III implementation in Indonesia “largely compliance.” This indicated that both authorities have been able to mitigate the implementation between strict compliance and unlimited flexibility.

Regulations published concerning Basel III implementation have been intended to maintain domestic economic stability. On the other hand, domestic and international political interests seemed minor compared to economic ones. In hindsight, the initiative to maintain 0% RWA can be seen financially or politically, as this makes BSP un-offending Basel III to fund the fiscal deficit in 2021–2022. However, more stringent but aggressive legal approaches and policies can be made to reap the maximum opportunities behind the “soft” character of Basel III.

Instead of taking expansionary legal measures to stimulate the state’s income and limit the state’s expenses, BI and the government worked together to contain the damage of the pandemic through the quasi-fiscal program (burden-sharing program). It was indeed necessary to help the deteriorating fiscal structure, but the risks seemed to be overlooked. The legislation of Law No. 3/2023 did not make the BI’s objective less risky. However, more could have been done to prevent the fiscal deficit, especially by the government, through fiscal consolidation (limiting or decreasing the state’s expenses).

Regarding the scope of analysis, this paper does not conduct in-field research to gain first-hand data and practitioners’ views. Undoubtedly, this angle would be promising and fruitful in understanding the incorporation of soft law in terms of decision-makers’ perception of soft law, including its efficacy, environmental pressures, financial institution pressures, domestic political pressures, and effects.

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