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*With, Within, and Beyond the State:
The Promise and Limits of Transnational Legal Ordering*

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**With, Within, and Beyond the State:
The Promise and Limits of Transnational Legal Ordering**

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The construction of *legal* orders that transcend and penetrate states has become a favored way for policy-makers, citizens, experts, activists, governments, and international organizations to solve problems besetting the contemporary world. The scope of potential orders can only be imagined in proportion to the magnitude of issues, whether climate change or human trafficking, financial regulation or the ubiquity of torture, financing of terrorism or governance of the internet, protection of women in civil conflicts or transport of goods to market by sea, to name but a few of the policy challenges facing states and requiring solutions beyond states.

Such transnational legal ordering is ubiquitous across domains of law. As Menkel-Meadow (2011) writes, pick up any local newspaper and one sees scores of examples of transnational legal issues involving parties from different states and different applicable legal norms, ranging from public and private international law, private standards and contracts, and foreign and national law. The areas span “such staples as contracts, torts, employment law, intellectual property and technology law, environmental law, banking, commercial, corporate, or even constitutional law” (Menkel-Meadow 2011). Empirical studies demonstrate the expanse of transnational legal ordering (Braithwaite & Drahos 2000), which can give rise to *transnational legal orders* (TLOs). By a TLO, we refer to a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions (Halliday & Shaffer 2015, p. 5).

Many theorists conceptualize “transnational law” as “non-state law,” or governance by non-state actors, and theorize the autonomy of transnational orders from state law (Teubner 2013; 1997). They align with a convention in international relations scholarship that has defined transnational relations and transnational governance in terms of networks of non-state actors (Keohane & Nye 1972; Risse-Kappen 1995). In this vein, many transnational commercial law scholars view the rise of a privatized, autonomous, “new lex

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mercatoria” as “a synonym for transnational (commercial) law” (Calliess 2010, 5).² Dalhuisen (2015, 23), for example, writes of the “transnationalization of commercial and financial law as a “legal order operating besides states.”³ From a broader governance perspective, Backer (2011, 761) writes of transnational law as “the governance systems of non-state actors.”⁴ Kjaer (2013, 783), from a systems theory perspective, writes of transnational governance as a normative order having “a ‘non-state’ structure with a spatial reach beyond state borders.”⁵ Teubner (2011, 621) goes further and theorizes the rise of “transnational economic constitutionalism” of “nonstate societal orders [that] develop autonomous constitutions.”⁶

In our view, the conceptualization of “transnational” legal ordering solely or primarily as non-state lawmaking is misleading from an empirical perspective. It is mistaken to the extent it suggests that autonomous, non-state legal ordering is becoming predominant. Such scholarship can also be normatively problematic, to the extent that it advocates the development of autonomous, non-state legal orders, since the state public sphere remains central for advancing social ends. Zumbansen (2013, 125) earlier hedges that “the conceptual embrace of a purportedly autonomous, transnational order may too quickly cut the ties between the unavoidable recurring conflicts over power, bargaining asymmetry and third party interests,” and long-standing reflections on the relationship between the state and society.”⁷ Going further, Michaels (2010, 38) writes that “lex mercatoria as non-state law is a myth.”⁸ This chapter defends the inclusion of the state in conceptualizing transnational legal ordering from the perspective of our work on transnational legal orders.

²Gralf-Peter Calliess, “Law, Transnational,” *Comparative Research in Law and Political Economy Research Paper Series* 6, no. 8 (2010): 5. See also Klaus-Peter Berger, *The Creeping Codification of the New Lex Mercatoria* (2nd ed.), Alphen aan den Rijn, Netherlands: Kluwer, 2010.

³J.H. Dalhuisen, “Globalization and the Transnationalization of Commercial and Financial Law,” *Rutgers University Law Review* 67, no. 1 (2015): 23. See also Klaus-Peter Berger, *The Creeping Codification of the New Lex Mercatoria* (2nd ed.), Alphen aan den Rijn, Netherlands: Kluwer, 2010.

⁴Larry Cata Backer, “Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board, and the Global Governance Order,” *Indiana Journal of Global Legal Studies* 18, no. 2 (2011): 761.

⁵Poul F. Kjaer, “Transnational Normative Orders: The Constitutionalism of Intra- and Trans- Normative Law,” *Indiana Journal of Global Legal Studies* 20, no. 2 (2013): 783.. See review of Kjaer’s book.... in Shaffer.... https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2746235

⁶Gunther Teubner, “Self-Constitutionalizing TNCs – On the Linkage of Private and Public Corporate Codes of Conduct,” *Indiana Journal of Global Legal Studies* 18, no. 2 (2011): 621. See Teubner, “Transnational Economic Constitutionalism in the Varieties of Capitalism,” *Italian Law Journal* 1, no. 2 (2015): 219-248; and Teubner, “Societal Constitutionalism and the Politics of the Common,” *Finnish Yearbook of International Law* 21 (2010): 111-124.

⁷Peer Zumbansen, “Transnational Private Regulatory Governance: Ambiguities of Public Authority and Private Power,” *Law and Contemporary Problems* 76, no. 2 (2013): 125.

⁸Ralf Michaels, “The Mirage of Non-State Governance,” *Utah Law Review* 2010, no. 1 (2010): 38. See also Ralf Michaels, *Transnational Law and Comparative Law*, in *Oxford Handbook of Transnational Law*, ed., Peer Zumbansen, Oxford University Press, forthcoming 2017).

Our theory of *transnational legal orders* addresses transnational legal orders constructed with, within, and beyond the state. Such ordering involves the transnational interaction of lawmaking and practice across different levels of social organization in which the state is directly or indirectly a part (Shaffer 2013; Halliday & Shaffer 2015). It is not a question of either the state or not the state, but a question of both the state and processes beyond and within the state. The transnational processes, moreover, are not unidirectional, such as top down from the transnational/international to the state. They are rather recursive and diachronic, involving top-down, bottom-up, horizontal, and transversal processes through which legal norms are constructed, flow, settle, and unsettle. Through these processes actors may deploy legal norms at one level of social organization in one domain to contest and shape legal norms in a different domain at a different level of social organization.

For us, the term “transnational” thus does not suggest the disappearance of the state, the withdrawal of the state as a major actor, or processes autonomous of state law, as contended by others. Rather, the term “transnational” has three core attributes. First, it highlights that states (through state officials) are just one among many *actors* engaged in transnational legal ordering. Second, it points to the ways transnational legal ordering transcends and often *transforms* states through their participation in transnational legal processes. Third, it underscores that one needs to assess the *interaction* of state and non-state actors at different levels of social organization, including international organizations and transnational networks, national institutions, and local practice, to understand transnational legal ordering. This interaction determines the extent to which legal norms settle across levels of social organization and give rise to transnational legal orders (Halliday & Shaffer 2015a).

1. With and Beyond the State: The State’s Ongoing Role

Our theory of transnational legal orders does not focus only on the state. It stresses the role of private actors, including professionals and business and civil society representatives, and it views the state as disaggregated, in which officials, professionals, businesses, activists operate in different functionally-differentiated domains that actors define in response to social perceptions of problems.⁹ The state is not simply being bypassed or marginalized, but remains central to transnational processes, directly and indirectly. It does so in two predominant ways. First, states and state officials are central to transnational norm-making through international organizations, through transgovernmental networks of officials, and through creating models that are exported and imported transnationally. Second, the norms that are developed through transnational processes, in order to be effective in shaping social behavior, ultimately must become

⁹ This is not a purely functionalist argument since the domains are socially constructed. The domains reflect social perceptions of problems, and are thus social constructs. Actors exercise agency in such constructions, which entail different mechanisms of power.

embedded locally. The processes of settlement of legal norms thus often involves the state as an intermediary, where norms become directly part of state law or are otherwise indirectly supported or accommodated by state legal institutions. We give three examples of the role of the state in these processes: international arbitration, business law, and public international law.

a. The “State.” Before we proceed further, we define what we mean by the state for analytic purposes. By the *state*, we refer to state institutions and state officials who work within them (the material dimension) as well as the symbolic representation of these institutions in the imaginations of social actors (the mythical/ideological dimension).¹⁰ These institutions and officials are themselves legal constructs of state law so that the definition of the state is circular. But they are also global constructs (in their mythical/ideological dimension) in light of the expansion and acceptance of certain ideas about institutional structures and social identities. The modern state is part of a long tradition that emerged and has changed and transformed over time, and continues to transform. Although the Westphalian territorial state is often dated back to the Treaty of Westphalia of 1648, the state tradition predated it as part of a longer historical process and tradition (Glenn 2013).¹¹ Modern states themselves of course vary in their authority, territorial control, popular acceptance, and structures, and they are continually being transformed through their own agency in their engagement with transnational legal ordering and transnational legal orders. Ultimately, since the legitimacy and effectiveness of state law and institutions depend on social acceptance, the ideological/mythical dimension is critical for state institutional and legal authority.

b. International Arbitration as a Transnational Legal Order. Transnational law scholars that come out of private law, such as contract law, often start by showcasing international arbitration and the merchant law norms (or *lex mercatoria*) that it may apply, as prime examples of law-making without the state.¹² Teubner (1992, 1997), for example, from the vantage of systems theory, writes of the autonomy of private legal ordering in light of the complexity of modern society and the decline of state capacities. He posits the transnational legal order of arbitration as a stateless “auto-poetic,” self-reflexive, normatively-closed institution. The “primary source of law” before arbitral panels, Teubner stresses, is private contracts, which, in turn, refer disputes arising in connection with them to arbitration, which arbitral tribunals, in turn, validate when issuing their awards (Teubner 1997, 14). And so the private lawmaking circle self-referentially turns.

¹⁰ The mythical/ideological dimension is particularly present in the use of the term nation-state, connoting the identity of a state with a people.

¹¹ For good overviews of theorizing of the state, in addition to Glenn (2013), see Loughlin (2010, chapter 7); Mitchell (1991); Novak (2015).

¹² See discussion in Shaffer 2016 (Part I).

Similarly, from the vantage of law and economics (Cooter 1996, 1643) theorizes the rise of a new law merchant involving “specialized business communities,” in which law “arises outside of the state’s apparatus” as a response to the demands of a complex, rapidly changing economy. Hadfield (2001) goes further, contending that, to avoid the complexity and transaction costs of the public law system (including its choice of law rules), decentralized privatized regimes for commercial law can compete against each other (including regarding their lawmaking, adjudication, and enforcement systems), such that businesses choose among them like products. The result is the development of autonomous, non-state legal orders (Hadfield & Weingast 2013).

Yet such depictions of international arbitration ignore the crucial role of the states in these processes. After all, states were integral to creating, negotiating, signing and acceding to the New York Convention on the Recognition and Enforcement of Arbitral Awards in 1958 that provides the underpinning of the arbitral system. The number of state members rose from twenty-five at the end of 1958 to 153 countries today.¹³ It is states that participate in United Nations Conference on International Trade Law (UNCITRAL) to create UNCITRAL’s Model Law on International Commercial Arbitration, which provides for the enforcement of arbitral agreements and arbitral awards. It is states that increasingly have amended their national laws to adopt and adapt the UNCITRAL model code. The number of states that have done so rose from one in 1986 to thirty-five in 2000 to over seventy by 2016 (and comprising over one hundred jurisdictions when including sub-national jurisdictions).¹⁴ And it is state courts that ultimately enforce arbitral awards if they are challenged. Empirical data shows that enforcement by state courts remains significant, and that state courts decline to enforce awards that they view to be contrary to state public policy. Whytock’s empirical study of US enforcement (based on public court decisions) showed that, between 1970-2008, the US federal district courts did not fully enforce arbitration awards around 23% of the time.¹⁵

The trend within states has been to defer to arbitration agreements and awards, but even so, states can withdraw from the New York Convention or modify their laws and practices at any time. The backlash against investor-state arbitration provides a striking example. Since 2009, Bolivia, Ecuador and Venezuela have withdrawn from the Washington Convention on investor-state arbitration,¹⁶ and states, including in particular the United States, have modified bilateral investment treaties to shift their rules in the

¹³ Contini (1959); and “Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958),” United Nations Commission on International Trade Law, accessed August 25, 2016, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

¹⁴ “Status,” United Nations Commission on International Law, accessed August 30, 2016, <http://www.uncitral.org/uncitral/index.html>. Within the United States, California, Connecticut, Florida, Georgia, Illinois, Louisiana, Oregon, and Texas have adopted the UNCITRAL model code. Ibid.

¹⁵ Whytock (2008, 74). [Christopher A. Whytock, “The Arbitration-Litigation Relationship in Transnational Dispute Resolution: Empirical Insights from the U.S. Federal Courts,” *World Arbitration & Mediation Review* 2, no. 5 (2008): 74.]

¹⁶ The convention, signed in 1965, created the International Centre for the Settlement of Investment Disputes within the World Bank

direction of favoring greater state regulatory autonomy and policy space. These state responses to arbitral awards highlight the ongoing role of the state in supporting, revoking, and amending the arbitral model.

Private parties of course are also central to understanding the emergence and operation of the transnational arbitral system, but in this they are not so different in shaping public law generally (Shaffer 2003). It was the International Chamber of Commerce that created the first draft of the New York Convention, and private professionals were and remain central in the drafting and revision of the UNCITRAL model code. In individual arbitrations, private parties are free to choose their substantive and procedural rules, subject to review on public policy grounds. Yet, in practice, private parties generally specify a particular state's law as the governing law in the vast majority of their contracts, and even when they do not, arbitrators generally look to national law for guidance.¹⁷ As Whytock summarizes from his empirical work, "states play a leading role in providing the foundations for the transnational commercial arbitration system. For their part, private parties play a leading role in determining the rules governing particular arbitral proceedings. In both areas of rule-making, there is substantial private-public interaction."¹⁸

Even those partisans and participants in the international arbitral regime who write in terms of a transnational "arbitral legal order," the state remains critical. One of the leading members of the arbitral community, Emmanuel Gaillard, for example, in his book *Legal Theory of International Arbitration*, writes of an "arbitral legal order" that does not depend on the law of the state of the seat of arbitration or on the law of the state where an award is enforced, and in this way can be viewed as autonomous.¹⁹ His theory, nonetheless, is based on state practice in which "states broadly agree on the conditions that an arbitration must meet in order for it to be considered a binding method of dispute resolution the result of which, the award, deserves their sanction in the form of legal enforcement."²⁰ This system, he contends, is thus not "a-national" but rather "transnational" in that it represents a "convergence" of state laws that authorize the arbitral method of dispute resolution.²¹

Gaillard notes a formal parallel with the public international law concept of "general principles of law" in providing the source of law for the arbitral legal order. The derivation of "general principles" requires a comparative method for identifying them, in a legal positivist sense, through looking to widely accepted, common principles among national legal systems.²² In arbitration, Gaillard advocates the use of a comparable

¹⁷ Christopher Whytock, "Private-Public Interaction in Global Governance: The Case of Transnational Commercial Arbitration," *Business and Politics*, volume 12, no. 3 (2010): 14-15, citing Blackaby and Partasides 2009 (noting parties' selection of state law approximately 80% of the time).

¹⁸ Whytock, "Private-Public Interaction in Global Governance: The Case of Transnational Commercial Arbitration," 16.

¹⁹ Emmanuel Gaillard, *Legal Theory of International Arbitration* (Boston: Martinus Nijhoff Publishers, 2010), 35.

²⁰ *Ibid.*, 46.

²¹ *Ibid.*

²² *Ibid.*, 48, 55.

comparative method to derive common legal principles for the commercial world. For Gaillard, the resulting arbitral “legal order [emanates] from the States, in the same way that, in a positivist conception of international law, the international legal order stems from the will of the States, without this preventing it from having an autonomous existence. In the field of international business relations, it is the convergence of national legal orders that, through their widespread acceptance of arbitration, legitimizes its existence.”²³

Gaillard’s concept from the perspective of analytic legal theory parallels our own from the perspective of socio-legal theory regarding the emergence of a transnational legal order. From the perspective of TLO theory, the arbitral legal order emerges from the interaction of international hard law (such as the New York Convention), international soft law (such as UNCITRAL model rules), national law, and national and transnational arbitral practice. The principles of arbitration are constructed through the agency of a professional community that helps induce states to recognize the legitimacy and semi-autonomy of the arbitral legal order, one that is developed dynamically over time (Dezalay & Garth 1996).²⁴ In the end, arbitral awards still require national recognition and enforcement and thus they must enroll and obtain the acquiescence of the state.

As part of broader processes of transnational legal ordering, state institutions and state law are, in turn, not immune from these transnational processes, and may themselves be transformed. Many state laws and institutions, for example, have responded by further acquiescing to transnational arbitral processes and their outcomes. The very interpretation and understanding of state law by state officials and private actors has, at times, been shaped by arbitral practice.²⁵ For example, the concept of “public policy” pursuant to which state courts may refuse to recognize or enforce an arbitral award has been shaped in many state jurisdictions by principles of transnational public policy developed by arbitrators.²⁶ The national public policy exception to the enforcement of an award, as a result, has become more limited in its reach and constraints.

c. Construction and Reconstruction of Commercial Transnational Legal Orders. Just as many transnational law scholars pay too little attention to national law, so most domestic law scholars pay too little attention to the transnational nature of domestic law. Business law, for example, is traditionally taught in law schools as purely domestic law, be it corporate insolvency law, sales law, secured transactions law, corporate law, and so

²³ Ibid., 59.

²⁴ Yves Dezalay and Bryan G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order*, (Chicago: University of Chicago Press, 1996), 6-7, 115-128.

²⁵ Alec Stone Sweet and Florian Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (chapter 4) (Oxford University Press 2017)..

²⁶ Id., at... (giving numerous examples, including in courts in France, Switzerland, Luxembourg, and Lithuania).

forth. But upon investigation, one quickly sees that much of this law is transnationalized, and some of it can be viewed as sites for the rise and fall of transnational legal orders.²⁷

In 1978 it was possible for the U.S. to reform its path-breaking corporate insolvency law in a U.S. Bankruptcy Code without any reference to a wider world, just as the 1986 English Insolvency Act remained substantially domestic in its reformist focus (Carruthers and Halliday 1998). In the wake of the national debt crises and Asian Financial Crises of the 1990s, however, an emergent ecology of actors—states, professions, professionals, international financial institutions—produced global norms through UNCITRAL’s Legislative Guide on Insolvency, and the World Bank and IMF’s standards for member states, that drew all states into a drive for legal change towards emerging TLOs for corporate liquidation or restructuring for the entire world (Halliday and Carruthers 2009).

For secured transactions law, there was a counsel of caution at UNCITRAL in the 1980s that no transnational soft or hard law was possible in laws so deeply embedded in different legal families and national practices. By the 1990s, caution had been converted into boldness by norm entrepreneurs intent on producing transnational and global legal norms that would stimulate international public and private investment in developing and transitional economies, ease trading barriers across Europe or Africa or the world, and thereby stimulate economic growth. Regional development banks from Europe (European Bank of Reconstruction and Development) to Asia (Asian Development Bank) drafted principles and standards that would be endorsed by the G-20, and drawn into intense lawmaking that produced UNCITRAL’s Legislative Guide on Secured Transactions in 2007 (Cohen 2016; Macdonald 2015; Block-Lieb and Halliday In Press), alongside UNIDROIT’s very successful codes on aircraft and mobile equipment leasing,²⁸ and the European Commission’s initiative on unifying secured transaction law in the European Union. Delegations of states explicitly were drawn into the UNCITRAL negotiations (Halliday et al., 2009) and all the norm-making proceeded on pragmatic assumptions that transnational norms would be meaningless without statutory adoptions by states and local implementation by financial institutions, businesses and professionals (Block-Lieb and Halliday In Press) .

For carriage of goods by sea, legal regulation of relations between carriers and shippers has a long history (Braithwaite and Drahos 2000, Chap. 17). Since the late 19th century, however, the movement of goods from production to market by sea has progressively become subject to international law on carriage of goods. A succession of successful multi-lateral treaties (e.g., Hague Rules, Hague-Visby Rules) eventually broke down and unsuccessful ones (Hamburg Rules, Multi-Modal Convention) failed to gain traction. By the latter decades of the 20th century it became clear to business and

²⁷ Michaels goes further and conceptually contends that “even the State is a transnational legal order.” Ralf Michaels, *The State as a Transnational Legal Order*, 1 *Irvine J. Intl’l L.*.... (2016).

²⁸ See UNIDROIT’s Convention on International Interests in Mobile Equipment, Nov. 16, 2001, S. Treaty Doc. No. 108-10, available at <http://www.unidroit.org/instruments/security-interests/cape-town-convention>.

professionals alike that the vast volume of world trade by sea could become fragmented and divergent, regionalized, or even subject to the dominance of a single global trading power. Since states as well as industry have strong interests in stimulating their markets, states joined together with industry actors and professionals to forge a new, potentially global TLO for the carriage of goods by sea—UNCITRAL’s Rotterdam Rules, launched in 2009. Again, although the problem is transnational and global, there is a substantial consensus that the legal solution must be transnational *and* national. States, most notably the U.S., drove hard for acceptable transnational laws; accession by states is critical to the emergence of a new legal order; and the active participation by state and non-state, public and private actors is essential for the rise of a new TLO that is at once beyond the state and of the state.

These three instances underline the more general proposition that states remain central in the deliberations over laws that govern otherwise private business transactions; in the affirmation of those laws through statutory, regulatory or judicial adoption of those laws; and in assurances that norms indeed are to be brought home and brought into practice and not simply statute-books.

Empirical research on every phase of TLO dynamics in business and commercial law likewise demonstrates that national professions are integral to lawmaking and practice. Professionals participate as state and non-state delegates on the transnational plane before United Nations (UN) bodies and expert groups. The acceptance of transnationally promulgated norms, and translations into local practice by professions and professionals within states, are necessary conditions for TLO construction and reconstruction. Indeed, recognizing their critical role, international organizations that initiate transnational normmaking with ambitions for the institutionalization of new or reformed TLOs seek to draw the ultimate professional implementers of new law into the lawmaking itself. Thereby they anticipate recurrent dangers in recursive legal change, such as actor mismatch or harmful diagnostic struggles. National legal professions, which are part of national bars and educated predominantly in national institutions, are essential actors for problem-solving through law, both beyond and within the state.

d. Public International Law and Transnational Legal Orders. For those transnational law scholars that view transnational law in non-state terms, public international law is a distinct, state-centric order not encompassed within the concept of transnational law. Indeed, public international law is traditionally viewed as a separate realm of law governing inter-state relations, in distinction to national law governing citizens within states (Glenn 2003; Malanczuk 1997). But this formalist vision of public international law fails to capture the role public international law plays in transnational legal ordering and the construction of transnational legal orders. Public international law today addresses most areas of social relations and its norms often permeate domestic law

and local practice. The state's role in public international law is thus more profound than simply through state consent to govern inter-state relations through law.

Socio-legally, public international law involves the state in processes of transnational legal ordering in at least three ways. First, public international law norms develop through state participation in international organizations and networks, whether those norms assume a hard and soft law form. In many cases, states, and in particular powerful states, successfully upload their state law norms into public international law, which is then diffused through international organizations. Second, the effectiveness of these international law norms typically depends on their implementation across states through state formal enactment or state recognition or acceptance, especially in the areas of regulatory, business, and human rights law. Third, such effectiveness depends on the settlement of the meaning of these norms through practice, which state officials and institutions can facilitate or obstruct.

We turn to traditional public international law to highlight the ongoing role of the state since public international law remains central to transnational legal orders. Public international law today exists across most areas governing social life. Much transnational legal theory refers back to Philip Jessup's seminal lectures in 1956 when Jessup defines "transnational law" as "all law which regulates actions or events that transcend national frontiers," and which includes, in addition to public and private international law, "other rules which do not wholly fit into such standard categories" (Jessup 1956, 2). The focus of many transnational law theorists is that these "other rules" have become privatized and grown predominant (Shaffer 2016).²⁹

What is often lost in analysis is that, compared to when Jessup wrote in 1956, public international law and international organizations have dramatically grown in importance (Shaffer & Coye 2016). In 1956, the Yearbook of International Organizations reported that there were 136 intergovernmental organization and 980 international non-governmental organizations.³⁰ By 2015, their numbers had skyrocketed to at least 7,757 intergovernmental organizations and 60,272 international non-governmental organizations.³¹ Moreover, while early intergovernmental organizations were heavily restrained in their area of functioning and power, today they engage in law-making over almost every imaginable topic, ranging from such areas as security, economics, health, the environment, human rights, labor, trade, investment, and consumer safety (Alvarez 2005).

²⁹ Gregory Shaffer, "Theorizing Transnational Legal Ordering," *Annual Review of Law and Social Science* (forthcoming).

³⁰ "UIA Yearbook of International Organizations 1956-1957," *Union of International Associations*, accessed July 25, 2016, http://www.uia.org/allpubs?combine=&field_pub_year_value=&items_per_page=20&page=8&order=field_uia_publication_nr_&sort=asc.

³¹ "UIA Yearbook of International Organizations 2015-2016," *Union of International Associations*, accessed July 25, 2016, http://www.uia.org/allpubs?combine=&field_pub_year_value=&items_per_page=20&page=8&order=field_uia_publication_nr_&sort=asc (reports data collected in 2014).

As for international treaties, in 1959, only a few years after Jessup delivered his lectures, there were 7,779 treaties on deposit with the U.N. Secretary General, and 105 of them were multilateral treaties.³² As of 2014, around 56,500 treaties were registered with the United Nations,³³ and over 560 of them were multilateral treaties.³⁴ By 2014, the numbers of international instruments covering human rights, for example, had expanded dramatically. In 1956, according to Elliot, there were around 200 international instruments focusing on human rights, but by 2003, Elliot identifies almost 800 such instruments.³⁵ For environmental law, the modern period of major international environmental agreements began in 1972 with the Stockholm Conference on the Human Environment after Jessup wrote.³⁶ The International Environmental Agreements (IEA) Database Project, as of July 2013, reports over 1,190 multilateral environmental agreements, 1,550 bilateral environmental agreements, and 250 other agreements on deposit with the UN.³⁷ The IEA Database project records fifteen multilateral environmental agreements since 2010 alone.³⁸ For investment law, the first bilateral investment treaty (BIT) was signed between the Federal Republic of Germany and Pakistan only a few years after Jessup's lecture.³⁹ Today, the international investment regime consists of more than 3,304 agreements (2,946 bilateral investment treaties and 358 treaties with investment provision).⁴⁰

This list of treaties does not include soft law, such as model codes, legislative guides, legal principles, and informal governance mechanisms, such as peer review and the use of indicators to measure compliance and effectiveness. The WTO, for example, has

³² Adolf Sprudz, "Status of Multilateral Treaties—Researcher's Mystery, Mess or Muddle?," *American Journal of International Law* 66, no. 2 (1962): 365 (noting that these are just treaties on deposit at the U.N.).

³³ Christian J. Tams et al. eds., introduction to *Research Handbook on the Law of Treaties* (Northampton: Edward Elgar Publishing, Inc.): X (2014).

³⁴ United Nations, *Treaty Event 2014: Towards Universal Participation and Implementation Treaty*, accessed September 4, 2016, <https://treaties.un.org/doc/source/events/2014/Publication/publication-English.pdf>.

³⁵ Michael A. Elliott, "The Institutional Expansion of Human Rights, 1863–2003: A Comprehensive Dataset of International Instruments," *Journal of Peace Research*, 48, no. 4 (2011): 539.

³⁶ Daniel Bodansky, Jutta Brunnée, and Ellen Hey, "International Environmental Law: Mapping the Field," in *The Oxford Handbook of International Environmental Law* (Oxford: Oxford University Press, 2007), 3.

³⁷ "Data from Ronald B. Mitchell. 2002–2016," *International Environmental Agreements (IEA) Database Projects*, accessed August 31, 2016, <http://iea.uoregon.edu/page.php?file=home.htm&query=static> (Note that they start recording MEAs from 1950).

³⁸ "Data from Ronald B. Mitchell. 2002–2016,"

<http://iea.uoregon.edu/page.php?file=home.htm&query=static>. The WTO estimates that there are 250 major multilateral environmental agreements currently in force, which is a long way from a phenomenon that started only after Jessup's lectures. "Relationship between WTO and MEA Rules," World Trade Organization, accessed August 30, 2016, https://www.wto.org/english/tratop_e/envir_e/envir_neg_meas_e.htm.

³⁹ United Nations, "Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking," (conference, United Nations Conference on Trade and Development, New York and Geneva, 2007): 1.

⁴⁰ See United Nations Conference on Trade and Development, *The World Investment Report 2016: Investor Nationality* (Geneva: United Nations Press, 2016), 101.

over a dozen committees that meet, in total, thousands of times per year (Hoekman 2011).⁴¹ Officials come to these meetings to challenge others regarding their regulatory practices and to defend their own. They serve as interlocutors that link the domestic to a transnational monitoring and accountability process. The OECD is particularly known for its use of soft law and informal governance mechanisms in which norms are developed and conveyed through regular interactions of policymakers (Salzman 2012).⁴² The OECD has no formal dispute settlement system, yet signatories act ‘as if’ certain obligations are binding, such as, for example, under the Arrangement on Officially Supported Export Credits (Shaffer, Wolfe & Le 2015).⁴³ These mechanisms of law-making and legal oversight may not constitute binding law, but they are designed to inform and shape state and local practice, including through the adoption of legal norms as part of national legal systems and practices.

The human rights regime similarly relies significantly on pressure through oversight committees at the multilateral level, which does not constitute formally binding dispute settlement, but is designed to implicate and shape state behavior.⁴⁴ At times this pressure induces policy change.⁴⁵ For example, Japan changed its policies regarding the Ainu indigenous community after it was challenged before the international human rights monitoring system pursuant to a number of human rights treaties and declarations (Tsutsui 2015). The Ainu have had claims brought before the UN Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Committee on Economic, Social and Cultural Rights, the Committee on All Forms of Discrimination Against Women, and the Committee on the Rights of the Child in order to put pressure on Japan.⁴⁶

A rapidly increasing technology of governance relies on *indicators* (Davis et al. 2012). These indicators vary from rigorous criteria deployed by international financial institutions (such as World Bank and IMF Reports on the Observance of Standards and Codes in twelve areas of financial regulation) (Halliday 2011) to criteria developed by non-profit organizations to rate countries and corporations on human rights, rule of law,

⁴¹ Bernard Hoekman, “Proposals for WTO Reform: A Synthesis and Assessment,” *Minnesota Journal of International Law* 20 (2011): 324.

⁴² James Salzman, “The Organization for Economic Cooperation and Development’s Role in International Law,” *George Washington International Law Review* 43, no. 2 (2011): 104-105.

⁴³ Gregory Shaffer, Robert Wolfe, and Vincent Le, “Can Informal Law Discipline Subsidies?,” *Journal of International Economic Law* 18 (2015): 711, 725-729.

⁴⁴ Philip Alston and Ryan Goodman, “The United Nations Human Rights,” *International Human Rights: The Successor to International Human Rights in Context* (Oxford: Oxford University Press, 2013), 685-761.

⁴⁵ See Wade M. Cole, “A Civil Religion for World Society: The Direct and Diffuse Effects of Human Rights Treaties, 1981-2007,” *Sociological Forum* 27, no. 4 (2012): 938-939; Sam R. Bell, K. Chad Clay, and Amanda Murie, “Neighborhood Watch: Spatial Effects of Human Rights INGOs,” *Journal of Politics* 74, no. 2 (2012): 344-345; Hunjoon Kim and Kathryn Sikkink, “Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries,” *International Studies Quarterly* 54, no. 4 (2010): 941; Ana Carolina Garriga, “Human Rights Regimes, Reputation, and Foreign Investment,” *International Human Quarterly* 60, no. 1 (2016): 160-161.

⁴⁶ See Kiyoteru Tsutsui, “Transformation of Movement Actorhood and Local-Global Feedback Loop: Global Human Rights and Minority Social Movements in Japan,” *American Journal of Sociology* (forthcoming).

freedom, and justice. Countries are rated and those ratings are published to measure scales of conformity with the supposed norm. The World Bank, for example, uses doing business indicators to assess national law and practice as a stimulus to change state regulatory practice. Through indicators, broad international/transnational legal norms that are relatively soft because they are open to interpretation can be made much more precise in their requirements, and in this sense “hardened” (Merry 2015).⁴⁷

The state ultimately remains central for the adoption and tailoring of international hard and soft law. When international institutions pass declarations or states ratify treaties on human rights, these treaties and declarations often become adopted in state laws and constitutions.⁴⁸ Elkins, Ginsburg and Simmons find that after the passage of the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights, there was a steady increase in the number of rights included in national constitutions compared to before the passage of these instruments.⁴⁹ Using data from the Comparative Constitutions Project, they show a significant uptick of rights found in national constitution after the passage of the UDHR.⁵⁰ The inclusion of a right in the UDHR affected its inclusion in a national constitution by as much as fifty percent.⁵¹ They similarly found that after a country ratified the ICCPR, its constitution was almost ten percentage points more likely to include the rights covered in the ICCPR.⁵² Just as human rights treaty ratification may have a significant effect on the increase in rights in a country’s constitution, Simmons’ work shows how, for countries transitioning toward democratic regimes, the ratification had a significant effect on the country’s protection of those rights.⁵³

In sum, transnational legal orders involving public international law transcend the state, but they also work with and through the state. A transnational legal order does not exist simply because consensus was reached at the international level on a public international law norm. Rather, large areas of public international law depend on the enrollment of national law and law’s normative settlement through habitual practice within states.

⁴⁷ Sally Engle Merry, “Firming Up Soft Law: The Impact of Indicators on Transnational Human Rights Legal Orders,” in *Transnational Legal Orders*, eds. Terence C. Halliday and Gregory Shaffer (New York: Cambridge University Press, 2015), 374-376.

⁴⁸ Zachery Elkins, Tom Ginsburg, and Beth Simmons, “Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice,” *Harvard International Law Journal* 54, no. 1 (2013): 63.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*, 76-77 (e.g., while “nine constitutions written in 1947 contain an average of 17.6 rights... the six written in 1949 contain an average of 31 rights.”). This is based on ninety percent of constitutions adopted after World War II. *Ibid.*, 69.

⁵¹ *Ibid.*, 80.

⁵² *Ibid.*, 87 (“controlling for the era and a country’s prior constitutional tradition vis-a`-vis the ICCPR.”).

⁵³ *Ibid.*, 90. See also generally Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (New York: Cambridge University Press, 2009).

2. TLOs and State Transformations

States are not only actors in creating transnational legal norms, implementing them, and shaping local practice. They also are sites for transformation in which states' participation in transnational processes transforms them. As we have written elsewhere, transnationally induced changes in law affect the boundary between the market and the state, the allocation of institutional power within states, the role of professionals, and accountability mechanisms and normative frames (Halliday 2012, Shaffer 2013; Shaffer 2015).⁵⁴ States themselves have become transnationalized and cosmopolitan (Glenn 2013).

In a series of studies, Shaffer has shown, for example, the impact of the WTO within Brazil, India, and China, enhancing the role of judicial review and legal professionals, from customs law to intellectual property law to import relief law.⁵⁵ As WTO negotiations stagnate, new rule-making has turned to bilateral and plurilateral trade agreements, many of whose provisions reach deep within states' regulatory governance, including intellectual property law, standard setting, competition law, environmental law, and labor law.⁵⁶

Take a case study of the impact of NAFTA on Mexico. As Hugo Perezcano writes, "for Mexico, NAFTA was a catalyst more than anything else... policy makers saw it as an opportunity to deepen and consolidate, and a means to cement the economic reform that they had already embarked on. For Mexico—more so than for the United States—it was clear that within an international agreement such as NAFTA, there was no guarantee of a long-lasting economic reform."⁵⁷ Perezcano points to how Mexico not only

"enacted new laws on foreign trade, customs, competition policy, industrial property, trade in seeds and protection of plant varieties, to name a few. It created modern regulatory bodies and granted them autonomy, such as the Federal Competition Commission, the Commission on Energy Regulation, the Federal Commission for Improving Regulation (in charge of publicizing draft governmental regulation related to economic activities, receiving public comments, streamlining regulation and reducing associated costs), the Mexican Industrial Property Institute, the National Copyright Institute and several others. It also continued privatizing state-owned enterprises."⁵⁸

⁵⁴ Terence C. Halliday, "Architects of the State: International Organizations and the Reconstruction of States in East Asia," in *Transnational Legal Ordering and State Change*, ed. Gregory Shaffer (New York: Cambridge University Press, 2013): 89-120; Gregory Shaffer, "How the WTO Shapes Regulatory Governance," *Regulation & Governance* 9, no. 1 (2015): 1-15.

⁵⁵ For example, policies to provide import relief protection must meet WTO-sanctioned forms subject to strict legal criteria and judicial review, giving rise to a specialized legal bar. See Shaffer, "How the WTO Shapes Regulatory Governance," 7-10.

⁵⁶ See generally, Andrea Dür, Leonardo Baccini, and Manfred Elsig, "The Design of International Agreements: Introducing a New Dataset," *Review of International Organizations* 9, no. 3 (2014).

⁵⁷ Hugo Perezcano, "Peeling NAFTA Layers: Twenty Years Later," *CIGI Papers*, no. 68 (May 2015): 5. https://www.cigionline.org/sites/default/files/cigi_paper_68_0.pdf

⁵⁸ *Ibid.*, 5.

These new bodies provided new opportunities for professionals, including legal professionals who work in these areas. Through its engagement in NAFTA negotiations and implementation, Mexico participated in its own self-transformation. Perezcano notes: “Even without NAFTA, Mexico’s policy makers would surely have carried on with their economic reform. However, it is unlikely that it would have been as profound, and very uncertain how long the changes would have lasted.”⁵⁹

3. States and the Contingencies of TLO Institutionalization

Institutionalized TLOs, we have shown, reflect more than a transnational consensus on legal norms. A fully institutionalized TLO involves a settling of legal norms at the transnational, national, and local levels; discernible concordance across the norms at each level of norm production and adoption; and an alignment of those norms with an underlying problem or issue-area such that social actors accept them as the proper guides for behavior in given situations (Halliday and Shaffer 2015a). Institutionalization of a TLO therefore is a dynamic and fraught process, both in its construction and its persistence. The properties of states are amongst the most critical contingent conditions of TLO institutionalization. These properties can be observed in at least four respects.

(1) First, the influence of transnational legal norms on national and subnational actors depends significantly on the institutional structure of states. Those structures vary significantly across time and place by the degree of concentration or fragmentation of central state institutions, including the extent of devolution of state powers to sub-national units within federal polities down to local governments. It can therefore be expected that variation in the institutional distribution of formal state power will produce systematic differences in the extent to which states can present unified positions in transnational lawmaking, and the probability that states can adopt and implement concordant transnational norms national and locally.

These variations also influence recursive dynamics of TLOs. For example, in a highly centralized state where there is little independence of legislatures and courts, there may be fewer rounds of recursive interactions on the road to settling. If legislatures and courts are thoroughly subordinate to executive power there may be less contestation among state institutions over norm-making, interpretation, and implementation, which might lower the probability of subsequent rounds of lawmaking on the way to settlement. In states where lawmaking and implementation is scattered across institutions, repeated within-state recursive rounds of lawmaking should be expected as a matter of course on the way to settling. Yet, research by Liu and Halliday (2009) on the 1996 and 2012 revisions of China’s criminal procedure law shows that even in authoritarian one-party states with a supposed concentration of power in China’s Communist Party, interpretive contests among

⁵⁹ Ibid.

implementing government agencies can force recursive rounds of reform, not least in response to critique from actors beyond the state and within China's legal system.

(2) Second, the formal and substantive attributes of transnational legal norms themselves may be shaped by properties of states to which those norms are directed. Block-Lieb and Halliday (forthcoming) show that different legal technologies developed by international organizations (e.g., conventions, model laws, practice guides) may be tailored specifically to different institutional "audiences" within the state. A model law is directed to legislatures. Bright lines rules are crafted to minimize judicial discretion and maximize executive predictability. Rules may be designed specifically for adoption by private parties. Hence, the role of elements of the state and non-state institutions influence the formal properties of transnational law as transnational lawmakers anticipate where in and beyond the state the adoption or adaptation of those legal norms will be sited.

(3) Third, TLOs frequently fail to be institutionalized because states become sites of resistance to transnational legal norms (Halliday and Shaffer 2015b, Section IX). Because states may jealously protect what they regard as transnational infringements on their sovereignty, or because they do not agree with either the form or content of legal norms developed beyond their state or by other states, they can deploy sophisticated modes and dynamics of resistance to fend off transnational legal norms. The influential work of Scott (1985) can be adapted to legal orders where research on commercial TLOs in-the-making demonstrates the skill and adeptness of putatively weak states in fending off tremendous pressure from the IMF or World Bank or G-7 to adopt legal norms with which they disagree (Halliday and Carruthers 2007). TLO theory insists upon empirical research to elaborate contingent theory of ways and means by which states exercise creative political imagination to mobilize their superior local knowledge in order to nullify or modify transnational legal norms. Moreover, close attention to resistance reinforces the insistence of TLO theory on the dynamism inherent in recursive processes of legal change and underlines the obstacles to institutionalization of TLOs.

(4) Fourth, states as collections of institutional structures inside a sovereign territory leave more or less space within that territory for markets and civil society as orders in their own right. Hence the explanation of institutionalization of TLOs will also require investigation of markets and civil society in at least two respects.

First, as sites of action, law may be directed to the market or civil society either indirectly, through state lawmaking, or indirectly, by by-passing the state. It is a strategy commonly adopted by transnational or international organizations, by international non-governmental organizations, or by other states to bypass a state apparatus that is resistant to transnational legal norms. These transnational actors seek to engage directly with civil society, markets, judges, and/or lawyers. Since the late 1990s, struggles have intensified

between states intent on restricting international flows of norms into domestic civil society or legal institutions and international bodies and their local domestic allies who develop inter-dependencies to bypass the state. From Mubarak's Egypt in the 1990s (Moustafa 2007) to Putin's Russia and Xi Jinping's China, authoritarian rulers seek to restrict the scope of non-state spheres such as civil society and to quarantine those spheres from alien influences and resources, particularly in relation to human and constitutional rights.

Second, states may shape domestic institutions to suppress competitors and empower partners. Whether in the market, religion, or social movements within civil society, insofar as legal norms and practices threaten to subvert state officials' aims, then the state may suppress activists, restrict firms or voluntary associations, and minimize their access to media. Conversely, where market, religious, or social movement actors are potential partners to advance officials' aims, then the state may deliberately stimulate their activism as allies in a drive to institutionalize domestic norms at variance with transnational legal norms.

In all these respects, the state reveals itself to be a formidable institution capable of leveraging or frustrating the construction of TLOs. Contemporary experience offers empirical evidence that states are integral to the contingencies of TLO emergence and effectiveness, even if some observers might wish the state away, as if it can be easily contracted around or simply by-passed by lateral non-state initiatives.

4. So What? The Normative Dimension

Addressing the role of the state is not just an empirical issue. It involves normatively freighted questions. Those advancing the premise of legal ordering without the state range in their ideological positions. Libertarians distrust state centralism and promote private, non-state forms of legal ordering.⁶⁰ Economic globalization represents, for them, an opportunity to advance neoliberal proposals that marginalize the state and state regulation. In contrast, Marxist theorists view the state as an instrument of domination in support of the governing class.⁶¹ In parallel, legal pluralists stress the importance of non-centralized forms of legal ordering, such as to protect local cultures and cultural minorities, including indigenous groups.⁶² Legal pluralists are concerned with the risks of oppression through centralized legal orders.

Actors advance concepts not only to reflect the world, but often with the aim of shaping it. Even if they do not consciously have such aim, they participate in social processes that can embed certain conceptions in social practices. Many theorists of the "transnational" as private legal orders outside the state consciously seek to bypass and marginalize the state. This enterprise is clearest among advocates of an a-national *lex*

⁶⁰ See e.g. Friedrich Hayek, *The Road to Serfdom*, London: Routledge, 1944.

⁶¹ See Norberto Bobbio, "Is There a Marxist Theory of the State?" *Telos* 1978, no. 35 (1978): 5-16.

⁶² See e.g. Sally Engle Merry, "Legal Pluralism," *Law & Society Review* 22, no. 5 (1988): 869-896.

mercatoria, whether from a traditional law-and-economics perspective, or as advanced by participants in transnational arbitral networks. The law-and-economics scholar Gillian Hadfield (2001; 2009), for example, advocates transnational legal orders autonomous of the state because they avoid the complexity and transaction costs of the public law system and enhance efficiency. Traditionally in law-and-economics scholarship, law has been viewed as a price signal that creates incentives for rational actors to alter their behavior. For Hadfield, however, law is also a commodity that can be commercialized so that private actors may choose optimally among legal norms and dispute settlement mechanisms. From this vantage, law is both a commodity and a price. Perhaps the best analogue of such a legal order is the monetary legal order offered through non-state payment systems such as Bitcoin.

Similarly, but on the ideological left, systems theorists such as Gunther Teubner (2004) offer the vision of non-state legal orders that regulate the global economy. For them, only such non-state legal ordering can effectively respond to the globalization of markets, social complexity, and the decline of the welfare state. Teubner (2013) contends that these non-state legal orders have their own analogues to constitutions. He maintains that each differentiated social system — such as the economy, science, technology, the media, and the health system — performs constitutional functions of securing its own autonomy and self-limiting its reach. He maintains that these functionally differentiated, societal constitutions are critical as stabilization mechanisms today in light of the “totalizing tendencies” of systems, such as the economy under neoliberal norms.

Although our approach to transnational legal orders has been predominantly empirical and theoretical, it also has important normative implications. For us, individuals are social creatures living in communities. They build institutions both to live with each other and to foster communication and cooperation, as well as to repress each other and to facilitate domination. These institutions are not limited to state institutions, but state institutions remain central for creating order and stability and advancing normative and instrumental aims.

In a world of global markets and the rise of private forms of power, public institutions are critical. Although a transnational public sphere accompanied by transnational institutions is developing and may be increasingly important (Fraser & Nash 2014), state institutions remain central for fostering social order and legitimizing and enforcing social norms. To marginalize the state, state law, and state institutions, in our view, is not only a conceptual mistake empirically, it also is normatively problematic. States of course vary in their legitimacy, authority, and efficacy. From a normative perspective, the state will and should always remain subject to critique, but it is likely to remain important because of the ongoing relative legitimacy, efficacy, and authority of the public sphere at the national level compared to, and in relationship with, alternative means of advancing social ends.

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