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Christopher A. Whytock
University of California, Irvine School of Law, cwhytock@law.uci.edu

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Christopher Whytock
cwhytock@law.uci.edu

University of California, Irvine ~ School of Law

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Christopher A. Whytock*

By allocating governance authority among nations, conflict of laws—also known as private international law—helps bring order to transnational activity in a globalized world that lacks centralized legal institutions. In this way, conflict of laws is a distinct form of global governance. Yet conflict-of-laws rules are predominantly national rules; these rules remain cross-nationally diverse; and there is little international agreement on the rules to apply to solve conflict-of-laws problems. Thus, conflict of laws contributes to transnational legal order, but conflict of laws is itself transnationally disordered. Nevertheless, in at least two regions (Europe and Latin America) and two specialized areas of law (family law and commercial law), conflict of laws is increasingly ordered at the transnational level. These developments raise interesting questions about how conflict of laws contributes to transnational legal ordering and about how conflict of laws itself becomes transnationally ordered.

* Professor of Law and Political Science, University of California, Irvine School of Law; Associate Reporter, Restatement (Third) of Conflict of Laws. This essay was prepared for the Symposium on Transnational Legal Orders for Private Law and Business Regulation, University of California, Irvine School of Law, May 13-14, 2015. For helpful comments, I thank Hannah Buxbaum, Terence Halliday, Ralf Michaels, Greg Shaffer, Robert Wai, Peer Zumbansen, and other symposium participants, as well as participants at the roundtable on Transnational Legal Orders at the 2015 Law and Society Association Annual Meeting. For excellent research assistance, I thank Terence Desouza.

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INTRODUCTION

In our globalized world, people, goods, services, money, ideas, and many other things readily cross borders. Yet the transnational legal system, if such a system can be said to exist, is highly decentralized. Legal authority is still organized primarily by national territory, and law differs considerably across nations, reflecting nations' diverse policies and values about how to govern human activity. This raises a fundamental governance problem: When activity has connections to more than one nation—that is, when activity is transnational—more than one nation may plausibly have the authority to govern that activity. So, which nation's laws should apply? Which nation's courts should resolve a dispute arising out of that activity? And if one nation's court decides such a dispute, what effect—if any—should the decision have in other nations? Simply put, the problem is how to answer this question: "Who governs?"[1]

Generally speaking, there are three responses to this problem. International law tries to transcend national legal systems by creating a single body of international legal rules to govern transnational activity and a system of international courts to adjudicate transnational disputes. Harmonization seeks convergence and ultimately uniformity of national laws, thereby reducing the salience of the "who governs?" question, but leaving application and enforcement of uniform laws to national legal institutions. This article examines a third response: conflict of laws (also known as private international law). Conflict of laws embraces the role of national legal institutions in governing transnational activity (unlike international law's impulse), and it accepts cross-national legal diversity (unlike harmonization's impulse). Instead, conflict of laws responds by providing rules to help nations allocate governance authority among themselves.[2]

By allocating governance authority among nations, conflict of laws helps bring order to transnational activity in a globalized world that lacks centralized legal institutions. As I have argued in a series of earlier articles, this is one way in which conflict of laws makes important contributions to global governance.[3] Yet conflict-

1. Christopher A. Whytock, *Domestic Courts and Global Governance*, 84 TUL. L. REV. 67, 75-76 (2009) [hereinafter *Domestic Courts*]. This question was first prominently asked in the context of domestic politics by Robert Dahl. ROBERT A. DAHL, WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY (1961). It has also been used by scholars of global governance. *See, e.g.*, Mark A. Pollack & Gregory C. Shaffer, *Who Governs?, in* TRANSATLANTIC GOVERNANCE IN THE GLOBAL ECONOMY 287 (Mark A. Pollack & Gregory C. Shaffer eds., 2001).

2. Christopher Whytock, *Faith and Scepticism in Private International Law: Trust, Governance, Politics, and Foreign Judgments*, ERASMUS L. REV. 113, 115 (2014) [hereinafter *Faith and Scepticism*].

3. *See* Whytock, *Domestic Courts*, *supra* note 1, at 76-83 (arguing that courts perform global governance functions by making conflict-of-laws decisions); Christopher A. Whytock, *Myth of Mess? International Choice of Law in Action*, 84 N.Y.U. L. REV. 719, 735-45, 778-81 (2009) [hereinafter *Myth of*

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of-laws rules are predominantly national rules. Like other fields of national law, these rules are cross-nationally diverse. And there is little international agreement on the rules to apply to solve conflict-of-laws problems. In short, *conflict of laws contributes to transnational legal order, yet conflict of laws is itself transnationally disordered.*

In this Essay, I use the transnational legal order (TLO) framework to explore this paradox and develop four claims.[4] First, there presently is no global conflict-of-laws TLO of general legal scope. Instead, there are many different national approaches to conflict-of-laws. Second, however, there are two regional conflict-of-laws TLOs with limited geographical scope: a highly institutionalized European conflict-of-laws TLO and a less institutionalized Latin American conflict-of-laws TLO. Third, there are also two emerging specialized global conflict-of-laws TLOs with limited legal scope, one of which is significantly institutionalized: the global TLO for family law matters. In addition, there is an incipient global conflict-of-laws TLO for civil and commercial matters. Fourth, it appears that beyond these regional and specialized TLOs, most conflict-of-laws norms are not part of a TLO—yet even those non-TLO conflict-of-laws norms contribute independently to transnational legal ordering. The essay concludes by raising several questions that might usefully motivate further TLO research on conflict of laws.

I. THE LACK OF A GLOBAL CONFLICT-OF-LAWS TLO OF GENERAL LEGAL SCOPE

Conflict of laws is a body of law that governs multijurisdictional legal problems. It is typically understood as having three branches: jurisdiction, choice of law, and recognition and enforcement of foreign judgments. Jurisdictional rules determine the authority of courts to adjudicate disputes arising out of transnational activity. Choice-of-law rules determine which nation's laws apply to transnational activity. And recognition-and-enforcement rules govern whether a nation will recognize and enforce a decision of another nation's courts.[5]

In the United States, conflict-of-laws rules govern jurisdiction, choice of law, and recognition and enforcement of judgments both nationally (among U.S. states) and internationally.[6] Outside the United States, the term "private international law" is often used to refer to conflict of laws.[7] However, the two terms are not

Mess] (analyzing the relationship between global governance and the choice-of-law branch of conflict of law) and 778-81 ("[Choice of law] has the potential to make important contributions to global governance"); Whytock, *Faith and Scepticism*, *supra* note 2, at 115, 120-23 ("[Conflict of laws] is a particular approach to global governance" and analyzing the governance functions of the foreign judgments branch of conflict of laws). For the most comprehensive treatment of the global governance implications of conflict of laws to date, *see* PRIVATE INTERNATIONAL LAW AND GLOBAL GOVERNANCE (Horatia Muir Watt & Diego P. Fernández Arroyo eds., 2014).

4. *See* TRANSNATIONAL LEGAL ORDERS (Terence C. Halliday & Gregory Shaffer eds., 2015).

5. *See* PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, CONFLICT OF LAWS 1-4 (2010).

6. *See* RESTATEMENT (SECOND) CONFLICT OF LAWS § 10.

7. *See* PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, CONFLICT OF LAWS 2 (2010).

synonymous. In much of Europe, for example, private international law is said to include not only conflict of laws, but also rules governing nationality and its consequences.[8] Beyond that, private international law is also sometimes said to encompass international efforts to unify private and commercial law through treaties or uniform laws and model legislation, and occasionally to encompass rules governing international business, international trade, international finance, and other interactions among private parties.[9] In this Essay, I use the term "conflict of laws" because it is well understood, even to those who also use the term "private international law," as including the rules governing jurisdiction, choice of law, and recognition and enforcement of judgments.

TLO scholars Terence Halliday and Gregory Shaffer note that the TLO concept includes conflict of laws.[10] They define a TLO as "a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions."[11] According to this definition, a TLO (1) seeks to produce order, (2) orders transnational activity, and (3) has legal form and is transnationally produced.[12] At a global level of analysis, conflict of laws appears to satisfy the first two requirements, but not the third.

A. What Is Being Ordered?

First, "[a] TLO seeks to produce *order* in a domain of social activity or an issue area that relevant actors have construed as a 'problem' of some sort or another."[13] Conflict of laws' problem is the allocation of governance authority over transnational activity. Transnational activity is activity with multinational connections. These connections may be legal, for example, when an activity involves persons of more than one nationality. Or these connections may be territorial, as when an activity occurs or has effects in more than one nation's territory.

Because transnational activity has connections to more than one nation, more than one nation may plausibly have authority to govern that activity. But which of those nations should exercise that authority?[14] In other words, how should the

8. *See, e.g.*, PIERRE MAYER & VINCENT HEUZÉ, DROIT INTERNATIONAL PRIVÉ 17-18 (11th ed. 2014) (including within the definition of the field not only conflict of laws, the effect of foreign judgments, and the jurisdiction of courts, but also the legal status of foreigners and the determination of nationality).

9. *See, e.g.*, BARRY E. CARTER & ALLEN S. WEINER, INTERNATIONAL LAW 2 (6th ed. 2011).

10. *See* HALLIDAY & SHAFFER, *supra* note 4, at 19-20 ("The TLO concept . . . encompasses . . . international private law," defined as the body of law that "addresses conflicts between national jurisdictions asserting authority over the transnational activities of private actors.").

11. HALLIDAY & SHAFFER, *supra* note 4, at 5.

12. HALLIDAY & SHAFFER, *supra* note 4, at 476.

13. HALLIDAY & SHAFFER, *supra* note 4, at 20.

14. In addition to the international dimension of this governance problem, which is the focus of this Essay, there also are two other dimensions: a national-international dimension (should national or international law and institutions govern?) and a public-private dimension (should public—whether

authority to govern transnational activity be allocated among nations? This problem has three dimensions. Which nation's law should apply? Which nation's courts should adjudicate disputes arising out of the activity? And if one nation's courts decide such a dispute, should other nations' courts recognize and enforce that decision?[15]

Without answers to these questions, various problems can arise for parties and nations alike. If no nation asserts authority to govern particular transnational activity, that activity may not be governed by any nations' legal institutions. If two or more nations assert authority to govern that activity, the parties involved may be required to comply with the laws of two different legal systems simultaneously, which will not always be possible (for example, if one nation's law requires an action that another nation's law prohibits). Parties planning transnational activity will be uncertain about the rules that will govern their activity. Different nations' different laws reflect different policy preferences, and in some cases two or more such nations may have an interest in having their preferred policies apply. Conflict of laws seeks to mitigate these problems by providing rules for the orderly allocation of governance authority over transnational activity.

B. Transnational

Second, "[a] TLO is *transnational* insofar as it orders social relationships that transcend the nation-state in one way or another."[16] Conflict of laws satisfies this criterion for being a TLO. It directly seeks to order the international allocation of governance authority over transnational activity. Insofar as it succeeds in allocating that authority, conflict of laws influences how that activity is governed, thus affecting economic welfare, transnational rule of law, and transnational bargaining.[17] This is one of the ways that conflict of laws plays an important role in global governance.[18]

C. Legal

A final defining feature of a TLO is its legal character. Specifically, "[a] TLO is *legal* insofar as it [1] has legal form, [2] is produced by or in connection with a transnational body or network, and [3] is directed toward or indirectly engages national legal bodies."[19] Thus, the extent to which ordering is legal depends on three factors. First, "[t]he norms are produced in recognizable legal forms."[20] Conflict of laws satisfies this criterion for a TLO. The primary legal forms for conflict of laws

national or international—or private norms and institutions govern?). Whytock, *Domestic Courts*, *supra* note 1, at 76.

15. Whytock, *Domestic Courts*, *supra* note 1, at 76.

16. HALLIDAY & SHAFFER, *supra* note 4, at 20.

17. Whytock, *Myth of Mess*, *supra* note 3, at 736.

18. *See* PRIVATE INTERNATIONAL LAW AND GLOBAL GOVERNANCE, *supra* note 3; Whytock, *Myth of Mess*, *supra* note 3, at 722.

19. HALLIDAY & SHAFFER, *supra* note 4, at 20.

20. HALLIDAY & SHAFFER, *supra* note 4, at 15.

are codifications; common law; and hybrid forms such as the American Law Institute's First, Second, and forthcoming Third Restatements of Conflict of Laws, which attempt to codify U.S. common law conflict-of-laws rules.[21] To a lesser extent, conflict-of-laws rules take the form of international and regional conventions and regulations.[22]

Second, the norms are "directed toward or indirectly engage[] national legal bodies";[23] that is, "[t]he norms, directly or indirectly, formally or informally, engage legal institutions within multiple nation-states, whether in the adoption, recognition, or enforcement of the norms."[24] Conflict of laws only partially satisfies this criterion. Its norms directly address national legal bodies—namely, courts—providing them with rules and methods for resolving conflict-of-laws problems in particular cases. And, where there are relevant international or regional conflict-of-laws norms, these norms are directed to the courts of multiple nations. However, most conflict-of-laws norms are national norms, with each nation's norms being directed not to "legal institutions within multiple nation-states" but instead only to its own national legal institutions (for example, California conflict-of-laws norms do not purport to govern the conflict-of-laws decisions of Japanese courts, only those of California courts).[25]

Conflict of laws also only partially meets the third criterion for legality in the TLO framework. This criterion is that "[t]he norms are produced by, or in conjunction with, a legal organization or network that transcends or spans the nation-state."[26] But conflict-of-laws norms have been produced primarily at the national level—including the aforementioned codifications, common law rules, and hybrid forms.[27] Obviously, this does not mean that there is no transnational dimension to conflict-of-laws norm production. For example, the transnational level of norm production played a central role in the regional and specialized conflict-of-laws TLOs discussed below. Moreover, there is some degree of transnational network activity in the field of conflict of laws more generally, both informal through academic exchange and comparative research and, at least at the regional level, through more formal academic associations such as the European

21. *See* SYMEON C. SYMEONIDES, CODIFYING CHOICE OF LAW AROUND THE WORLD: AN INTERNATIONAL COMPARATIVE ANALYSIS (2014) (surveying choice-of-law codifications); SYMEON C. SYMEONIDES, AMERICAN PRIVATE INTERNATIONAL LAW 18 (2008) (noting that "the great bulk of American conflicts law is found in the case reporters, not the statute books").

22. *See* PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, CONFLICT OF LAWS 1-4 (5th ed. 2010) (noting relatively few relevant international agreements).

23. HALLIDAY & SHAFFER, *supra* note 4, at 20.

24. HALLIDAY & SHAFFER, *supra* note 4, at 13.

25. Nevertheless, there is sometimes the possibility of renvoi, which occurs in some conflict-of-laws systems when the forum court's choice-of-law rules require it to apply a foreign nation's "whole law" including its choice-of-law principles. *See* WILLIAM M. RICHMAN, WILLIAM L. REYNOLDS & CHRISTOPHER A. WHYTOCK, UNDERSTANDING CONFLICT OF LAWS § 59 (4th ed. 2013).

26. HALLIDAY & SHAFFER, *supra* note 4, at 12.

27. *See* PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, CONFLICT OF LAWS 2 (5th ed. 2010).

Group for Private International Law.[28] Further research would be required to assess the role of international organizations and transnational networks in the development of national conflict-of-laws norms. However, it would seem that this role has generally been fairly limited.[29]

Moreover, even if one were to conclude that conflict-of-laws norms are generally directed at legal institutions in multiple nations and to some extent produced transnationally, there is currently little settlement of those norms at the transnational level. In many nations, there is considerable settlement at the national level, but in ways that exhibit considerable cross-national normative variation, thus indicating high levels of discordance with those transnational norms that may be said to exist.

Yet national conflict-of-laws norms—as diverse as they may be—may share a common impulse of comity. Although the meaning of comity itself varies cross-nationally and across contexts, it suggests at a minimum an opposition to a categorically parochial approach, whereby a court would always assert jurisdiction, always apply its own nation's law, and never recognize or enforce a judgment of another nation's court, and a recognition that deference to another nation's authority is at least sometimes appropriate—by applying that nation's law, respecting the jurisdiction of its courts, or recognizing or enforcing the judgments of its courts. In addition, public international law principles of jurisdiction—although contested—contribute to the allocation of governance authority by placing limits on the jurisdiction of states to prescribe, enforce and adjudicate. Insofar as these understandings of comity and jurisdiction are shared, they may facilitate the eventual emergence of a global conflict-of-laws TLO.

So far, however, no general, global conflict-of-laws TLO appears to exist. The definition of TLO insists that an order be transnational in a triple sense: it must order transnational social relationships,[30] its norms must be directed at legal institutions within multiple nations,[31] and its norms must be transnationally produced.[32] Conflict of laws is transnational in the first sense, but generally not in the second and third senses. At a global level, then, conflict of laws remains transnationally disordered, even as it contributes in important ways to transnational order.

28. EUROPEAN GROUP FOR PRIVATE INTERNATIONAL LAW, http://www.gedipegpil.eu/present_eng.html (last visited Sept. 6, 2015). For example, the author of this Essay is doing basic comparative research as part of his work on the Restatement (Third) of Conflict of Laws.

29. *See* CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 9 (2d ed. 2015).

30. *See* HALLIDAY & SHAFFER, *supra* note 4, at 20 ("A TLO is *transnational* insofar as it orders social relationships that transcend the nation-state in one way or another.").

31. *See* HALLIDAY & SHAFFER, *supra* note 4, at 13 ("[t]he norms, directly or indirectly, formally or informally, engage legal institutions within multiple nation-states, whether in the adoption, recognition, or enforcement of the norms").

32. *See* HALLIDAY & SHAFFER, *supra* note 4, at 12 ("[t]he norms are produced by, or in conjunction with, a legal organization or network that transcends or spans the nation-state").

II. REGIONAL CONFLICT-OF-LAWS TLOS WITH BROAD LEGAL SCOPE

Although there does not currently appear to be a general, global conflict-of-law TLO, there nevertheless are at least two *regional* conflict-of-laws TLOs with broad legal scope: a European conflict-of-laws TLO and a Latin American conflict-of-laws TLO.

A. The European Conflict-of-Laws TLO

The European conflict-of-laws TLO is rooted in a series of European Union (EU) regulations. These regulations are summarized in Table 1. The basic geographic scope of the European conflict-of-laws TLO is the European Union. Moreover, in relation to jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, the TLO extends to three members of the European Free Trade Association, Iceland, Norway, and Switzerland.[33]

Table 1

The European Union Conflict-of-Laws TLO[34]

Instrument	Legal Scope				Geographic Scope
	Substantive Issues	Conflicts Issues			
		Jurisdiction	Recognition and Enforcement	Choice of Law	
1. Insolvency Regulation, No. 1346/2000	Insolvency	X	X	X	EU-DK
2. Brussels I Regulation, No. 44/2001, superseded by Brussels I Regulation (Recast), No. 1215/2012	Civil and Commercial Matters; Some Exceptions	X	X		EU-DK+Lugano
3. European Enforcement Order Regulation, No. 805/2004	Civil and Commercial Matters; Some Exceptions		X		EU-DK

33. This extension is established by the Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters. *See* MICHAEL BOGDAN, CONCISE INTRODUCTION TO EU PRIVATE INTERNATIONAL LAW 32 (2d ed. 2012) ("The Lugano Convention applies . . . in relation between Iceland, Norway and Switzerland and between any of them and the EU Member States.").

34. *A European Framework for Private International Law: Current Gaps and Future Perspectives* (Nov. 2012), http://www.europarl.europa.eu/document/activities/cont/201212/20121219ATT58300/20121219ATT58300EN.pdf. For the European Account Preservation Order Regulation, *see* http://eur-ex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014R0655. For the Regulation on mutual recognition of protection measures in civil matters, No. 606/2013, *see* http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013R0606.

Instrument	Legal Scope				Geographic Scope
	Substantive Issues	Conflicts Issues			
		Jurisdiction	Recognition and Enforcement	Choice of Law	
4. European Payment Order Regulation, No. 1896/2006	Civil and Commercial Matters; Some Exceptions		X		EU-DK
5. European Small Claims Procedure Regulation, No 861/2007	Civil and Commercial Matters; Small Claims (< €2,000); Some Exceptions		X		EU-DK
6. European Account Preservation Order Regulation, No. 655/2014	Civil and Commercial Matters; Pecuniary Claims; Some Exceptions	X	X	X	EU-DK&UK
7. Rome I Regulation, No. 593/2008	Civil and Commercial Matters; Contractual Obligations; Some Exceptions			X	EU-DK
8. Rome II Regulation, No. 864/2007	Civil and Commercial Matters; Non-Contractual Obligations; Some Exceptions			X	EU-DK
9. Brussels II-bis Regulation, No. 2201/2003	Civil matters relating to: (a) divorce, legal separation or marriage annulment; (b) the attribution, exercise, delegation, restriction or termination of parental responsibility. Some exceptions.	X	X		EU-DK
10. Maintenance Regulation, No. 4/2009	Maintenance obligations arising from a family relationship, parentage, marriage or affinity.	X	X	X (incorporates 2007 Hague Protocol)	EU-DK(-UK)

Instrument	Legal Scope				Geographic Scope
	Substantive Issues	Conflicts Issues			
		Jurisdiction	Recognition and Enforcement	Choice of Law	
11.Rome III Regulation, No. 1259/2010	Situations involving a conflict of laws, to divorce and legal separation. Some exceptions.			X	15 EU Member States
12.Succession Regulation, No. 650/2012	Succession to the estates of deceased persons. Some exceptions.	X	X	X	EU-DK&IE&UK
13.Regulation on mutual recognition of protection measures in civil matters, No. 606/2013	Protection measures in civil matters. Some exceptions.		X		EU-DK

As Table 1 indicates, the legal scope of the European conflict-of-laws TLO is quite broad. In terms of substantive legal issues, it focuses primarily on civil and commercial matters and various family matters. In terms of conflict-of-laws issues, it extends to all three branches: jurisdiction, recognition and enforcement, and choice of law.

The European conflict-of-laws TLO appears to be highly institutionalized. According to TLO theory, the institutionalization of a TLO depends on two factors: normative settlement and TLO alignment.[35] Each EU regulation represents a high degree of normative settlement at the transnational level, insofar as each is a product of the European Union lawmaking system. Formally, at least, there should be a high degree of settlement at the national level, and a high degree of concordance between the transnational and national level. This is because as a matter of EU law, a regulation is a binding legislative act that has direct application and direct effect in all member nations (unless otherwise provided, as is the case for Denmark in many cases).[36] Because the national law of member nations must yield to EU regulations, there is also likely to be a high degree of alignment, where there is a single TLO aligned with the issue being addressed.[37] The formal principles indicating settlement at the national level and concordance between the transnational and national level do not, of course, mean that settlement and concordance is complete in practice. Therefore, empirical investigation would be necessary to confirm the extent of

35. HALLIDAY & SHAFFER, *supra* note 4, at 51.

36. MICHAEL BOGDAN, CONCISE INTRODUCTION TO EU PRIVATE INTERNATIONAL LAW 14 (2d ed. 2012).

37. HALLIDAY & SHAFFER, *supra* note 4, at 53.

institutionalization. For example, to determine the extent of actual settlement at the national and local levels, and the actual extent of concordance among the different levels, cross-national and intra-national research on conflict-of-laws decision-making would be required.

B. The Latin American Conflict-of-Laws TLO

The Latin American conflict-of-laws TLO is the result of a series of private international law conferences held by the Organization of American States (OAS) beginning in 1975.[38] The conferences produced a number of conflict-of-laws conventions, which are summarized in Table 2. The geographical scope of the Latin American conflict-of-laws TLO might be understood as extending to all thirty-five of the OAS member nations.[39]

As Table 2 indicates, the legal scope of the Latin American conflict-of-laws TLO is quite broad. Like the European TLO, the Latin American TLO's legal scope extends substantively to civil and commercial matters and various family matters, and to all three branches of conflict of laws: jurisdiction, recognition and enforcement, and choice of law.

Table 2

The Latin American Conflict-of-Laws TLO[40]

Instrument	Legal Scope				Status
	Substantive Issues	Conflicts Issues			
		Jurisdiction	Recognition and Enforcement	Choice of Law	
1. Inter-American convention on general rules of private international law (1979)	General		X	X	18 signed, 10 ratified
2. Inter-American convention on conflicts of laws concerning commercial companies (1979)	Commercial companies constituted in any of the States Parties	X		X	18 signed, 8 ratified

38. *See The History of the CIDIP Process,* ORGANIZATION OF AMERICAN STATES (2014), http://www.oas.org/dil/PrivateIntLaw-HistDevPriLaw-Eng.htm.

39. The OAS was established in 1948 and has thirty-five member nations. The founding twenty-one OAS members were Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, United States of America, Uruguay, and Venezuela. Since then, fourteen additional nations have joined the OAS: Barbados, Trinidad and Tobago (1967); Jamaica (1969); Grenada (1975); Suriname (1977); Dominica (Commonwealth of), Saint Lucia (1979); Antigua and Barbuda, Saint Vincent and the Grenadines (1981); The Bahamas (Commonwealth of) (1982); St. Kitts & Nevis (1984); Canada (1990); Belize and Guyana (1991). See *Member States*, ORGANIZATION OF AMERICAN STATES (2015), http://www.oas.org/en/about/member_states.asp.

40. *Private International Law*, ORGANIZATION OF AMERICAN STATES (2014), http://www.oas.org/dil/privateintlaw_studytopics.html. In all instances, "ratification" means either ratification, accession, or acceptance.

Instrument	Legal Scope				Status
	Substantive Issues	Conflicts Issues			
		Jurisdiction	Recognition and Enforcement	Choice of Law	
3. Inter-American convention on conflict of laws concerning the adoption of minors (1984)	Family Law: adoption of minors in the form of full adoption, adoptive legitimation and other similar institutions that confer on the adoptee a legally established filiation, when the domicile of the adopter (or of the adopters) is in one State Party and the habitual residence of the adoptee is in another State Party.	X	X	X	12 signed, 9 ratified
4. Inter-American convention on conflict of laws concerning bills of exchange, promissory notes and invoices (1975)	Bills of exchange, promissory notes and invoices	X		X	18 signed, 14 ratified
5. Inter-American convention on Conflict of Laws concerning checks (1975)	Checks			X	16 signed, 9 ratified
6. Inter-American convention on conflicts of laws concerning checks (1979)	Checks			X	16 signed, 8 ratified
7. Inter-American convention on extraterritorial validity of judgments and arbitral awards (1979)	Judgments and arbitral awards rendered in civil, commercial or labor proceedings in one of the States Parties (subject to reservations)		X		18 signed, 10 ratified

Instrument	Legal Scope				Status
	Substantive Issues	Conflicts Issues			
		Jurisdiction	Recognition and Enforcement	Choice of Law	
8. Inter-American convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments (1984)	Jurisdiction for purposes of Inter-American convention on extraterritorial validity of judgments and arbitral awards (1979), with enumerated exceptions.	X	X		13 signed, 2 ratified
9. Inter-American convention on the international return of children (1989)	Family Law: return of children habitually resident in one State Party who have been wrongfully removed from any State to a State Party or who, having been lawfully removed, have been wrongfully retained. This Convention further seeks to secure enforcement of visitation and custody rights of parties entitled to them.	X	X	X	13 signed, 14 ratified
10. Inter-American convention on support obligations (1989)	Family Law: child support obligations owed because of the child's minority and to spousal support obligations arising from the matrimonial relationship between spouses or former spouses	X	X	X	13 signed, 13 ratified
11. Inter-American convention on personality and capacity of juridical persons in private international law (1984)	Juridical persons organized in any of the States Parties		X	X	11 signed, 4 ratified

Instrument	Legal Scope				Status
	Substantive Issues	Conflicts Issues			
		Jurisdiction	Recognition and Enforcement	Choice of Law	
12. Inter-American convention on the legal regime of powers of attorney to be used abroad (1975)	Powers of attorney.			X	18 signed, 15 ratified
13. Inter-American convention on the law applicable to international contracts (1994)	International contracts (i.e. the parties thereto have their habitual residence or establishments in different States Parties or the contract has objective ties with more than one State Party), with enumerated exceptions.			X	5 signed, 2 ratified
14. Inter-American convention on Contracts for Carriage of Goods by Road (1989)	Contracts for the carriage of goods by road (i.e. any contract whereby the carrier undertakes, in exchange for the payment of a carriage charge or price, to transport goods overland from one place to another in vehicles that use roads as transportation infrastructure), with enumerated exceptions.	X			9 signed, 0 ratified; has not entered into force
15. Model Inter-American Law on Secured Transactions (2002)	Security interests in movable property securing the performance of any obligations		X	X	N/A

However, the Latin American conflict-of-laws TLO is not as highly institutionalized as the European conflict-of-laws TLO. The conventions produced by the OAS special conferences suggest a high degree of settlement at the transnational level. However, as Table 2 shows, the number of nations signing many

of the conventions is low, and the number of ratifications is lower still. This suggests a relatively low level of settlement at the national level. The lower number of signatures and ratifications also suggests a relatively low level of concordance between the transnational and national levels. It appears, then, that the Latin American conflict-of-laws TLO has a low degree of institutionalization compared to the European conflict-of-laws TLO. However, signatures and ratifications clearly are only very rough measures of settlement and concordance. Cross-national and intra-national empirical research on OAS member nations would be necessary to more reliably assess the institutionalization of the Latin American conflict-of-laws TLO.

III. GLOBAL CONFLICT-OF-LAWS TLOS WITH LIMITED LEGAL SCOPE

In addition to the two regional conflict-of-laws TLOs, there is at least one global conflict-of-laws TLO with narrow legal scope—a global family law TLO—and another that is incipient—a global conflict-of-laws TLO for civil and commercial matters. Both TLOs have been produced at the transnational level by the Hague Conference on Private International Law. The Hague Conference is an international organization with seventy-eight members that seeks the progressive unification of conflict-of-laws rules and private international law rules more generally through the production of international conventions and other legal instruments.[41]

A. The Global Conflict-of-Laws TLO for Family Law Matters

The global conflict-of-laws TLO for family law matters is one TLO that is largely the result of the work of the Hague Conference.[42] The international conventions that make up this TLO are summarized in Table 3.

Table 3

The Global Conflict-of-Laws TLO in Family Law Matters[43]

Instrument	Legal Scope				Contracting Parties
	Substantive Issues	Conflicts Issues			
		Jurisdiction	Recognition and Enforcement	Choice of Law	
1. Convention of 24 October 1956 on the law applicable to maintenance obligations towards children	Child support.			X	14

41. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, https://www.hcch.net/en/about (last visited Sept. 29, 2016).

42. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, https://www.hcch.net/en/home (last visited Sept. 29, 2016).

43. International Protection on Children, Family, and Property Relations, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (2015), https://www.hcch.net/en/instruments/conventions.

Instrument	Legal Scope				Contracting Parties
	Substantive Issues	Conflicts Issues			
		Jurisdiction	Recognition and Enforcement	Choice of Law	
2. Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children	Child support.	X	X		19
3. Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants	Protection of infants.	X	X	X	13
4. Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations	Divorce, separation	X	X		19
5. Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations	Maintenance obligations			X	15
6. Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations	Maintenance obligations in respect of adults	X	X		24
7. Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes	Marital property			X	3
8. Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages	Marriage		X	X	3
9. Convention of 25 October 1980 on the Civil Aspects of International Child Abduction	Child abduction	X	X	X	92
10. Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption	Adoption		X		95

Instrument	Legal Scope				Contracting Parties
	Substantive Issues	Conflicts Issues			
		Jurisdiction	Recognition and Enforcement	Choice of Law	
11. Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children	Protection of children	X	X	X	41
12. Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance	Maintenance obligations		X		32
13. Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations	Maintenance obligations			X	28

The geographical scope of the conflict-of-laws TLO for family matters is difficult to pin down. On the one hand, its scope might be understood as extending only to The Hague Conference's seventy-eight formal members. The membership includes nations from Africa, Asia, Australia, Europe, North America, and South America, which gives it a somewhat global scope—but while most European, North American, and South American nations are members, relatively few African and Asian nations are members, which suggests an actual scope that might not match the Hague Conference's aspirations.[44] On the other hand, the legal instruments produced by the Hague Conference are, in principle, designed with a view to global adoption.[45] Moreover, non-member nations often ratify or accede to the Hague Conference's international conventions, leading to 145 so-called "connected states" that are signatories or contracting states to at least one Hague Convention or in the process of becoming a member of the Hague Conference.[46]

Regarding legal scope, as Table 3 indicates, the substantive legal scope of the global TLO for family law matters extends to a wide range of family law matters including marriage and divorce, maintenance obligations (to both children and

44. *Members of the Hague Conference*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (2015), https://www.hcch.net/en/states/hcch-members.

45. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, https://www.hcch.net/en/about (last visited Sept. 29, 2016).

46. *Global Coverage of the Hague Conference*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (2015), http://www.hcch.net/upload/hcch_connected.pdf.

spouses), child abduction and the protection of children, and adoption. Table 3 also indicates that the conflict-of-laws scope is likewise broad, extending—depending on the substantive area—to jurisdiction, recognition, and choice of law.

The global conflict-of-laws TLO for family law matters enjoys a significant degree of institutionalization—probably more than the Latin American conflict-of-laws TLO but less than the European conflict-of-laws TLO. The numerous conventions produced by the Hague Conference on family-related conflict-of-laws issues suggests a high degree of settlement at the transnational level. Moreover, there is significant settlement at the national level, although national settlement varies depending on the specific issue area. For example, more than ninety nations have ratified the child abduction and adoption conventions,[47] whereas only three have ratified the convention on law applicable to matrimonial property regimes.[48] As with the other TLOs examined in this essay, it would be necessary to undertake empirical research within each nation to determine the extent of settlement at the local level, as well as to confirm the extent of concordance between the transnational and national levels (mere ratification does not necessarily reflect perfect concordance, as national implementation and national practices may nevertheless differ from the terms of an international convention), as well as between the international and national levels on the one hand, and the local level on the other hand.

B. The Global Conflict-of-Laws TLO for Civil and Commercial Matters

There is also an incipient global conflict-of-laws TLO for civil and commercial matters. Like the global conflict-of-laws TLO for family law matters, this TLO is a product of the Hague Conference. Thus, while its geographical scope aspires to be global, the same limitations discussed regarding the geographical scope for the family matters TLO also apply to the civil and commercial matters TLO. The international conventions that make up the conflict-of-laws TLO for civil and commercial matters are summarized in Table 4.

47. *Status Table on the Convention on the International Aspects of Child Abduction*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (OCT. 2014), http://www.hcch.net/index_en.php ?act=conventions.status&cid=24.

48. *Status Table on the Convention of Law Applicable to Matrimonial Property Regimes*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (2015), http://www.hcch.net/index_en.php ?act=conventions.status&cid=87.

Table 4

The Emerging Conflict-of-Laws TLO Civil and Commercial Matters[49]

Instrument	Legal Scope				Contracting States
	Substantive Issues	Conflicts Issues			
		Jurisdiction	Recognition and Enforcement	Choice of Law	
1. Convention of 15 June 1955 on the law applicable to international sales of goods	International sale of goods.			X	8
2. Convention of 1 June 1956 concerning the recognition of the legal personality of foreign companies, associations and institutions [not yet in force]	Business associations		X		3
3. Convention of 15 April 1958 on the law governing transfer of title in international sales of goods [not yet in force]	Transfer of title in international sales of goods			X	1
4. Convention of 15 April 1958 on the jurisdiction of the selected forum in the case of international sales of goods [not yet in force]	International sale of goods.	X	X		0
5. Convention of 25 November 1965 on the Choice of Court [not yet in force]	International civil and commercial matters (with exceptions)	X	X		0

49. *International Legal Co-Operation and Litigation*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (2015), https://www.hcch.net/en/instruments/conventions.

Instrument	Legal Scope				Contracting States
	Substantive Issues	Conflicts Issues			
		Jurisdiction	Recognition and Enforcement	Choice of Law	
6. Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters	International civil and commercial matters (with exceptions)	X	X		5
7. Convention of 4 May 1971 on the Law Applicable to Traffic Accidents	Traffic accidents.			X	21
8. Convention of 14 March 1978 on the Law Applicable to Agency	Agency			X	4
9. Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods [not yet in force]	International sale of goods.			X	2
10. Convention of 2 October 1973 on the Law Applicable to Products Liability	Product liability			X	11
11. Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition	Trusts		X	X	11
12. Convention of 30 June 2005 on Choice of Court Agreements	International civil and commercial matters (with exceptions)	X	X		30[50]

50. This number includes Mexico, Singapore, the European Union, and each member state of the European Union other than Denmark (each of which is bound by the Convention as a result of the European Union's approval). See Status Table on Convention on Choice of Court Agreements, Hague Conference on Private International Law (2015), https://www.hcch.net/en/instruments/conventions.

Instrument	Legal Scope				Contracting States
	Substantive Issues	Conflicts Issues			
		Jurisdiction	Recognition and Enforcement	Choice of Law	
13. Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary [not yet in force]	Securities held with an intermediary			X	2

Regarding legal scope, this TLO extends substantively to civil and commercial matters, except family matters (and, depending on the specific convention, except other issue areas as well).[51] Regarding conflict-of-laws scope, as Table 4 indicates, the TLO extends to all three branches of conflict-of-laws.

The global conflict-of-laws TLO for civil and commercial matters enjoys only a very limited degree of institutionalization. The numerous conventions produced by the Hague Conference on conflict-of-laws issues in civil and commercial matters suggests a high degree of settlement at the transnational level. However, there is very little apparent settlement at the national level. Very few international conventions produced by the Hague Conference on conflict-of-laws in civil and commercial matters have been ratified by more than ten nations: the Convention of 4 May 1971 on the Law Applicable to Traffic Accidents (twenty-one), the Convention of 2 October 1973 on the Law Applicable to Products Liability (eleven), and the Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition (twelve). However, just as ratification of an international convention does not necessarily mean national settlement and concordance between the national and transnational levels, non-ratification does not necessarily mean a lack of national settlement or a lack of concordance between the transnational level on the one hand, and the national and local levels on the other hand. Therefore, empirical research within each nation would be necessary to rigorously assess the

51. For example, the exclusions from the scope of one of the Hague Conference's most recent instruments, the Convention of 30 June 2005 on Choice of Court Agreements, provides as follows: "Article 2. Exclusions from scope. (1) This Convention shall not apply to exclusive choice of court agreements -a) to which a natural person acting primarily for personal, family or household purposes (a consumer) is a party; b) relating to contracts of employment, including collective agreements. (2) This Convention shall not apply to the following matters - a) the status and legal capacity of natural persons; b) maintenance obligations; c) other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships; d) wills and succession; e) insolvency, composition and analogous matters; f) the carriage of passengers and goods; g) marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage; h) anti-trust (competition) matters; i) liability for nuclear damage; . . . [etc.]." *See* Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294, available at http://www.hcch.net/upload/conventions/txt37en.pdf.

overall institutionalization of the global conflict-of-laws TLO in civil and commercial matters. Still, it appears that this TLO is far less institutionalized than either the European conflict-of-laws TLO or the global conflict-of-laws TLO for family law matters.

IV. CONFLICT OF LAWS AS A FOUNDATION FOR TLOS

The analysis so far suggests the following tentative conclusions. First, there currently is no global conflict-of-laws TLO of general legal scope. Second, however, there are two regional TLOs with limited geographical scope but broad legal scope: a highly institutionalized European conflict-of-laws TLO and a minimally institutionalized Latin American conflict-of-laws TLO. Third, there are at least two specialized global conflict-of-laws TLOs with broad geographical scope but limited legal scope: a significantly institutionalized global conflict-of-laws TLO for family law matters and an incipient global conflict-of-laws TLO for civil and commercial matters. Aside from these TLOs of limited scopes and varying levels of institutionalization, most conflict-of-laws norms are national norms that are not part of a TLO. In this sense, conflict of laws is, for the most part, transnationally disordered.

But even if conflict of laws is itself disordered at the transnational level, it plays a foundational role in transnational legal ordering. It does so in two ways. First, conflict of laws is a basic normative approach to global governance, as discussed in the introduction.[52] International law tries to transcend national legal systems by creating a single body of international legal rules to govern transnational activity and a system of international courts to adjudicate transnational disputes. Harmonization seeks convergence and ultimately uniformity of national laws, thereby reducing the salience of the "who governs" question, but leaving application and enforcement of those laws to national legal institutions. In contrast, conflict of laws accepts the role of national legal institutions in governing transnational activity (unlike international law's impulse), and it accepts cross-national legal diversity (unlike harmonization's impulse). Instead, conflict of laws responds by providing rules to help nations allocate governance authority among themselves. Conflict-of-laws norms perform this transnational legal ordering function even if they remain settled, in their diverse ways, mostly at the national (and local) levels alone and in the absence of significant transnational settlement.

Second, TLOs that seek to order substantive law will, until they are fully institutionalized—in particular, until there is national and local settlement as well as transnational settlement, and concordance among the different levels—depend on conflict-of-laws norms, regardless of whether those norms are part of a TLO. Two issue areas that have been studied by TLO scholars illustrate this point: corporate

52. *See* PRIVATE INTERNATIONAL LAW AND GLOBAL GOVERNANCE, *supra* note 3; Whytock, *Myth of Mess*, *supra* note 3, at 722; Whytock, *Domestic Courts*, *supra* note 1, at 76.

bankruptcy[53] and secured transactions.[54] In both issue areas, there are TLOs that have reached a point of significant institutionalization. Yet in both issue areas, there is still considerable cross-national variation in substantive bankruptcy and secured transactions norms, as well as considerable cross-national variation in national conflict-of-laws norms applicable to these issue areas. Thus, notwithstanding the existence of these substantive TLOs, there are persistent questions about *which* set of norms should govern *which* transnational bankruptcy or secured transactions problems (choice of law), *which* courts (or other dispute resolution systems) should adjudicate those problems (jurisdiction), and *when* courts in one nation should recognize and enforce another nation's resolution of those problems (recognition and enforcement of judgments).

As the institutionalization of these TLOs increase, the salience of the choice-of-law problem will decrease (since, with greater settlement of the TLO at the national level, there would be less cross-national variation in substantive bankruptcy and secured transactions norms). Even then, however, conflict-of-laws norms would be necessary to address related jurisdictional and recognition and enforcement problems. Eventually, the institutionalization of these specialized TLOs may extend beyond substantive principles of bankruptcy and secured transactions to fully include all three branches of conflict of laws—or perhaps one day the incipient global TLO for civil and commercial matters may become sufficiently institutionalized to provide the necessary conflict-of-laws norms for bankruptcy and secured transactions. Until then, national conflict-of-laws norms that are not themselves part of a TLO will continue to play an important role in the transnational legal ordering of bankruptcy and secured transactions.

The essential point is that not all conflict-of-laws norms are part of a TLO, but even those non-TLO conflict-of-laws norms can contribute to transnational legal ordering. They can help allocate governance authority among states and they can provide support for TLOs as they progress toward higher degrees of institutionalization.

CONCLUSION

Conflict of laws—even if transnationally disordered—makes important contributions to global governance.[55] In fact, the techniques of conflict of laws—

53. Susan Block-Lieb & Terence C. Halliday, *Settling and Concordance: Two Cases in Global Commercial Law, in* TRANSNATIONAL LEGAL ORDERS 75 (Terence C. Halliday & Gregory Shaffer eds., 2015).

54. Roderick A. Macdonald, *When Lenders Have Too Much Cash and Borrowers Have Too Little Law: The Emergence of Secured Transactions Transnational Legal Orders, in* TRANSNATIONAL LEGAL ORDERS 114 (Terence C. Halliday & Gregory Shaffer eds., 2015).

55. *See* Whytock, *Domestic Courts*, *supra* note 1, at 76-83 (arguing that courts perform global governance functions by making conflict-of-laws decisions); Whytock, *Myth of Mess*, *supra* note 3, at 735-45, 778-81 (analyzing the relationship between global governance and the choice-of-law branch of conflict of law) and 778-81 (arguing that choice of law "has the potential to make important contributions to global governance"); Whytock, *Faith and Scepticism*, *supra* note 2, at 115, 120-23 (arguing

such as splitting jurisdiction and choice of law, characterization, and dépeçage[56]—constitute a distinctive form of global governance,[57] one that that might usefully be understood as an alternative to TLOs as a form of legal ordering. One can conceptually distinguish conflict of laws and TLOs while remaining agnostic as to which form is more pervasive, practically effective, or normatively desirable. Maintaining the distinction opens up opportunities for fruitful inquiry into how conflict of laws and TLOs interact, how conflict of laws can support TLOs, and how and under what circumstances conflict-of-laws TLOs emerge in different legal and geographic areas and with varying degrees of settlement and concordance. Opening up these avenues of research is one of the valuable contributions that TLO scholarship can make to the study of conflict of laws.

that conflict of laws "is a particular approach to global governance" and analyzing the governance functions of the foreign judgments branch of conflict of laws).

56. Dépeçage is the application of the law of different states to different issues in the same case. ROBERT L. FELIX & RALPH U. WHITTEN, AMERICAN CONFLICTS LAW § 69, at 249 (6th ed. 2011).

57. Karen Knop, Ralf Michaels & Annelise Riles, *From Multiculturalism to Technique: Feminism, Culture, and the Conflict of Laws Style*, 64 STAN. L. REV. 589, 632-641 (2012). *See also* Horatia Muir Watt, *The Relevance of Private International Law for the Global Governance Debate, in* PRIVATE INTERNATIONAL LAW AND GLOBAL GOVERNANCE, *supra* note 3 (arguing that "the tools, methods, and underlying axiology of the field could be reinvented to contribute to regulate the transnational exercise of private power by a variety of non-state actors whose cross-border economic activities fall within its traditional remit").