

## DIVERSITY AND PERMEABILITY IN TRANSNATIONAL GOVERNANCE

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A major theme of discussion about plural governance in a decentralized world has been the changing role of the nation-state system as the defining characteristic of a traditional global order. Some pretty extravagant claims have been made that, in light of the inexorable forces of globalization, traditional nation-states are becoming increasingly irrelevant as international legal actors. Some have gone so far as to suggest that we are witnessing, in some neo-Marxist idiom, the withering-away of the modern nation-state.

This Essay challenges this set of suppositions, as it seeks to properly understand globalizing developments and their impact on the transnational legal order. I propose to undertake this examination through two primary lenses. The first is to fully survey the diverse set of actors in transnational governance. It is true that new, non-state actors have emerged on the international legal scene over the past few decades. These actors have given rise to competing models of transnational governance at sharp variance with the traditional, Westphalian nation-state system. But despite the emergence of disciplined market-state institutions or liberal cosmopolitan transnational networks, the continued influence of nation-states on the levers of international lawmaking and transnational governance seems to be undoubted.

The second focus of analysis, and the subject of the latter part of this Essay, will be the permeability of governance mechanisms in the global legal order. Many aspects of the porosity of contemporary transnational governance are attributable to the manifest influences of globalizing trends. But what is really significant is the way in which the global legal order has responded to these developments. Among these are the re-emergence of private-ordering mechanisms and customs among international economic actors (a “new” *lex mercatoria*), as well as the extraterritorial application of domestic laws and the availability of legal recourse from national to international regulatory and dispute-settlement mechanisms. Perhaps most significant of all is the structuring of a new global regulatory order and the relevant considerations

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that are being marshaled in the fashioning of novel solutions to problems of transnational governance.

The overall picture that is to be conveyed by this Essay is that the processes of globalization interact and influence trends in transnational governance in surprising, and sometimes counterintuitive, ways. Far from seeing the growing irrelevance of nation-state institutions and authority, we may well be witnessing some redefinition of concepts of national sovereignty without necessarily observing an actual loss of power or competence by countries. The key is selecting the correct optic to view these significant changes in the global legal order.

## I. DIVERSITY OF ACTORS IN TRANSNATIONAL GOVERNANCE

One of the most striking challenges for the new world order is that it has apparently brought about the end of the monolithic state system of sovereignty, which has been in place since the seventeenth century. I say “apparently” because this remains one of the most contested elements of contemporary globalization. As will become readily apparent from my analysis, I think that the purported demise of the nation-state system is rather premature; state institutions and systems of sovereignty are alive and well. But there are certainly major competitors to the state-wielded levers of power in international governance, and these non-state actors (particularly transnational corporations (sometimes “TNCs”) and nongovernmental organizations) will be considered in this Essay.

### A. *Dissolving the Westphalian State System?*

It has been argued by a number of recent scholars that the modern nation-state has become outmoded by the economic, cultural and social aspects of globalization, which are largely beyond the means of states to control. The emergence of a “borderless world” can certainly give credit to the notion that the concept of bounded territory, which is necessary for state sovereignty, is no longer a meaningful way to describe political and social change. Under this theory, the nation-state has lost its dominant role in international governance (in both the political and economic senses of that concept) and is being supplanted by transnational networks of authority and non-state actors. Taken to its extreme, this theory of globalization—called “hyperglobalization” by

some—will inevitably involve the decreasing relevance and ultimate withering away of the nation-state.<sup>1</sup>

Before assessing the merits of these hyperglobalizing contentions, it is worth considering the contours of the international system that is purportedly being replaced by globalization. The contemporary community of nations was premised on the principle of territorial sovereignty and the exercise of modern state institutions to wield military, economic, fiscal, and police powers over a defined population. Each nation-state was likened to a hermetically-sealed unit, autonomous and independent, owing no allegiance to any higher authority of rules or norms except that which had been consented to by that entity.<sup>2</sup> In the Westphalian system—established under the 1648 Treaty of Westphalia which ended the bloody religious wars of sixteenth-century Europe and ushered-in a period of consolidation of State power over populations based on principles of nationality—states, and only states, controlled the levers of power in international relations.<sup>3</sup>

Of course, this monolithic vision of international relations—in which states were the only subjects of international law and the only actors of note on the international scene—was starting to degrade by the cataclysmic events of the early twentieth century, most notably World Wars I and II. It would be extravagant to suggest, as some hyperglobalizers have, that just because the nation-state's monopoly on power and influence has been broken, that this is somehow attributable to the inevitable and inexorable characteristics of the globalizing movement.

Rather, this change in power dynamics should be properly viewed as the culmination of a century-long progression of developments, as both the subjects of international law (the authoritative lawmaking actors and parties affected by international rules) and objects of international law (the legitimate topics of international legal regulation) have grown and diversified. Since

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<sup>1</sup> See PHILIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY* (2002); LOWELL BRYAN & DIANA FARRELL, *MARKET UNBOUND: UNLEASHING GLOBAL CAPITALISM* (1996); KENICHI OHMAE, *THE END OF THE NATION-STATE* (1995); JEREMY A. RABKIN, *WHY SOVEREIGNTY MATTERS* 34 (1998); SASKIA SASSEN, *LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION* (1996); Oscar Schachter, *The Decline of the Nation-State and its Implications for International Law*, 36 COLUM. J. TRANSNAT'L L. 7 (1997).

<sup>2</sup> See, e.g., *Customs Regime Between Germany and Austria, 1931 P.C.I.J. (ser. A/B) No. 41*, at 12 (Mar. 19) (discussing the prospect of “the continued existence of Austria within her present frontiers as a separate State with sole right of decision in all matters economic, political, financial or other”).

<sup>3</sup> DAVID HELD ET AL., *GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS, AND CULTURE* 37–38 (1999); ROBERT J. HOLTON, *GLOBALIZATION AND THE NATION STATE* 80–85 (1998).

more and more issues have become of international concern and placed under the auspices of international treaties, rules, and practices, it is obvious that state sovereignty—an ultimate freedom of action without limit—has been constrained over the past century, as states have become increasingly bound to international norms. While the processes of globalization have provided a functional impetus for international cooperation, the key dynamic for this development has remained state consent. Developments in the international law of human rights, the emergence of international environmental norms, and the growth of international trade disciplines are all indicative of measured State responses to globalizing moves.<sup>4</sup>

So, if we suppose that the Westphalian model of state sovereignty is dead (or dying), what is to take its place? The two leading metaphors in globalization discourse are the notions of the “market-state” and of “cosmopolitanism.” Each reflects different trends, and each has different implications for the future of international law.

The idea of the market-state, as distinct from the old nation-state, derives its appeal from the manifest economic costs and benefits of globalization, including trade liberalization, the free movement of goods, services, and capital across borders, and the panoply of trade and regulatory disciplines that have emerged in the past generation. (Of course, there is nothing new about the market-state; traditional nation-states have reflected these trends and values, as was apparent with mercantilism in seventeenth-century France and eighteenth-century England.) The traditional nation-state, the theory goes, is unsuited to respond to these changes, and so must reinvent itself (and its state institutions) to survive.<sup>5</sup> The market-state will tend to act as any rational economic actor might, by engaging in consolidation of internal markets (witness the European Union), fierce competition for foreign markets, and forced wealth transfers to promote economies of scale and efficiencies. Under this model, all aspects of international cooperation are subordinated to economic and market considerations. If the underlying economic rationale is the promotion of the greatest good for the greatest numbers, then market-states

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<sup>4</sup> For helpful analyses of such globalization-spurred State actions, see VINCENT CABLE, *GLOBALIZATION AND GLOBAL GOVERNANCE* (1999); RAIMO VÄYRYNEN, *GLOBALIZATION AND GLOBAL GOVERNANCE* (1999); Kanishka Jayasuriya, *Globalization, Law and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance*, 6 *IND. J. GLOBAL LEGAL STUD.* 425, 444 (1999); and Edith Brown Weiss, *The Rise or Fall of International Law?*, 69 *FORDHAM L. REV.* 345, 356 (2000).

<sup>5</sup> See BOBBITT, *supra* note 1 (discussing limitations of the modern nation-state); DON SLATER & FRAN TONKISS, *MARKET SOCIETY: MARKETS AND MODERN SOCIAL THEORY* 92–116 (2001) (same).

should promote the best quality of life for all people around the world. On the other hand, as with any state system that is Hobbesian in its outlook, international life, in a world of market-states, could very rapidly become nasty, brutish, and short.

The alternate model of the contemporary state system is the principle of cosmopolitanism. First enunciated by Immanuel Kant, cosmopolitanism emphasizes the fundamental moral status of individuals and the goal of achieving global justice not only within political communities, but also between them. Cosmopolitanism seeks a middle ground between the bounded territoriality of state sovereignty (the old Westphalian system) and the unbounded and borderless world of the hyperglobalists. In a cosmopolitan world, individuals might have affections and attachments to a variety of polities and a flexible definition of citizenship and nationality.<sup>6</sup> A cosmopolitan model for a State system would certainly harbor many challenges for international law, which, despite its progressivism and reforms, depends (for its practical enforcement) on individuals and juristic entities (such as corporations) being linked to one State for purposes of jurisdiction and control. While the emergence of dual nationality and TNCs (which present multiple sources of authority) in the past century has eroded this principle somewhat, it still remains powerful. Cosmopolitanism's emphasis on individual autonomy, choice, and dignity makes it an appealing model, but those very values are rather in conflict with other values of the international system: safety, security, predictability, and order. The allure of cosmopolitanism, as with that of the market-state, has to be tempered by realistic assessments of the dangers that they present to contemporary world order.

Some aspects of State sovereignty and autonomy are clearly dissolving in the face of globalizing forces.<sup>7</sup> The new world order features clear restraints on recourse to the use of force in relations between nations, the emergence of

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<sup>6</sup> See APRIL CARTER, *THE POLITICAL THEORY OF GLOBAL CITIZENSHIP* 79–85 (2001); DAVID HELD, *COSMOPOLITAN DEMOCRACY: AN AGENDA FOR A NEW WORLD ORDER* 96–120 (1995); DAVID MILLER, *ON NATIONALITY* (1995); AIHWA ONG, *FLEXIBLE CITIZENSHIP: THE CULTURAL LOGICS OF TRANSNATIONALITY* 6 (1999); Kwame Anthony Appiah, *Cosmopolitan Patriots*, in *COSMOPOLITICS: THINKING AND FEELING BEYOND THE NATION* 91 (Pheng Cheah & Bruce Robbins eds., 1998); Charles Beitz, *Cosmopolitan Liberalism and the State System*, in *POLITICAL RESTRUCTURING IN EUROPE* (Chris Brown ed., 1994); Martha C. Nussbaum, *Patriotism and Cosmopolitanism*, in *FOR LOVE OF COUNTRY: DEBATING THE LIMITS OF PATRIOTISM* 9 (Joshua Cohen ed., 1996).

<sup>7</sup> See JENS BARTELSON, *A GENEALOGY OF SOVEREIGNTY* (1995); SUSAN STRANGE, *THE RETREAT OF THE STATE: THE DIFFUSION OF POWER IN THE WORLD ECONOMY* (1996).

democracy as an international norm and a defining element for the legitimacy of governments, the use of regional frameworks as a means to advance economic and regulatory objectives, and new multilateral mechanisms for the compulsory resolution of disputes between States. Likewise, there has been a refashioning of the relationship between individuals and their States of nationality, a process that has been ongoing in the past half-century in which individuals have been accorded the status (at least for some purposes) of being an authentic “subject” of international law. International law has been applied to the economic relationships between individuals and States other than their own country of nationality (based on principles of State responsibility), just as the old *lex mercatoria* has been revived to provide a private international law overlay to many cross-border and transnational business relationships and transactions.<sup>8</sup>

It is also important to recognize that, in the past generation, there have been strong forces at work, resulting in the disaggregation of State institutions. Putting aside polities that are already politically characterized as decentralized or federal jurisdictions (such as the United States, Canada, Australia, or Germany), there have been other phenomena at work. Regulatory agencies within States, previously subject to command and control by the top political echelons of the country, are becoming increasingly independent, as evidenced by the substantial autonomy granted to central banking institutions, securities and business regulators, and some environmental protection entities. Additionally, judicial independence is being taken seriously in many polities, with the result that domestic courts and tribunals are not necessarily following the policy leads of executive authorities and legislative bodies. Lastly, political subdivisions of existing States (even non-federal ones) have asserted substantial new authority in the foreign relations realm. They have claimed for themselves the right to conclude agreements with similarly situated jurisdictions across international boundaries (in order to effectuate a common

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<sup>8</sup> See CHARLES R. BEITZ, POLITICAL THEORY AND INTERNATIONAL RELATIONS 65–123 (1979) (discussing and providing examples of how international law has been applied to the economic relationships between individuals and States); Charles R. Beitz, *External Sovereignty and International Law*, 18 FORDHAM INT’L L.J. 1685 (1995) (same); Ronald A. Brand, *Sovereignty: The State, the Individual, and the International Legal System in the Twenty First Century*, 25 HASTINGS INT’L & COMP. L. REV. 279 (2002) (same); Jayasuriya, *supra* note 4, at 427–37 (same).

goal, whether economic, environmental, or social), or even to pursue their own foreign policy objectives.<sup>9</sup>

Another set of tensions besetting the traditional nation-state is that the primary means by which countries have coordinated and harmonized their functional activities and policy objectives in the past century—through public international organizations and the negotiation of comprehensive treaty instruments—have become seriously dysfunctional. Quite apart from the institutional problems of organizations like the United Nations and some of its subsidiary agencies (bloated budgets, overpaid and complacent staff, unnecessary turf battles between entities, and operational incompetence) is the perception that the traditional machinery of international lawmaking is wearing-out. The quality of discourse in international institutions, never very high (especially with the heated rhetoric of the Cold War), seems to have further degraded. Treaties take years to negotiate, and then countries fail to ratify them. Even when treaties are concluded and ratified, they are rarely fully implemented and only spottily enforced. The highly touted systems of international dispute resolution (including the International Court of Justice, human rights and war-crimes tribunals, and specialized arbitration mechanisms) often do not produce definitive, or even sensible, decisions, leading the parties to seek other means to settle their disputes.

Taken together, all of these developments have indicated that the modern, Westphalian nation-state system is under challenge but certainly has not collapsed or been rendered irrelevant by globalizing trends. The balance of this section will look at the two competing sources of non-State power in today's world order—transnational corporations and nongovernmental organizations (NGOs) networks—and assess their impact on the structures and institutions of international law.

### *B. Transnational Corporations as Shadow Market Governments*

Transnational corporations are the nongovernmental manifestation of the market-state.<sup>10</sup> Of course, global economic combines are hardly a unique feature of the current phase of globalization. Transnational business entities have existed during every phase of globalization in human history, whether the

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<sup>9</sup> See Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT'L L. 485, 497 (2005) (discussing the new authority asserted by existing States in the foreign relations arena); Jayasuriya, *supra* note 4, at 437–46 (same).

<sup>10</sup> See generally Patrick Ainley, *The New 'Market-State' and Education*, 19 J. EDUC. POL'Y 497 (2004).

network of factors and financiers during the Renaissance and Age of Exploration, or the East India Companies (both British and Dutch) during the 1700s and 1800s.

Obviously, though, transnational corporations have grown tremendously in number and influence over the past century, partly because every domain of commerce (including all trade in goods and services) has become globalized.<sup>11</sup> Areas of the service economy, in particular, which a few years ago were highly localized (such as insurance, banking, and even the practice of law), have increasingly become multinational enterprises, through such mechanisms as cross-border marketing, franchising, and branding, as well as outright mergers and acquisitions. The annual earnings of many transnational conglomerates (especially those in the energy, manufacturing, retailing, and information technology sectors) exceed the gross domestic product (GDP) of many nations in not just the developing world, but also the industrialized North. For example, the annual sales of General Motors in 2000 exceeded the GDP of Denmark, while those of Wal-Mart exceeded those of Poland. The two-hundred largest TNCs account for nearly half of the globe's industrial output. If one aggregates nation-states with TNCs, fifty-one of the world's one-hundred largest economic units are corporations, while only forty-nine are States.<sup>12</sup>

Needless to say, transnational corporations are organized in highly efficient ways, or otherwise they would not have the success that they have registered. Often acting through national subsidiaries, answerable to a centralized management structure, these entities are able to engage in many of the activities and functions we associate with the traditional nation-state: market-making and regulation, intelligence gathering, social welfare programs (for their employees and other stakeholders), and even self-defense in the form of corporate security units.<sup>13</sup> Major TNCs are also the leading agents of foreign direct investment in the developing world as they seek new markets, and even

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<sup>11</sup> Brigitte Stern, *How to Regulate Globalization*, in *THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW* 247 (Michael Byers ed., 2000).

<sup>12</sup> See UNITED NATIONS, *HUMAN DEVELOPMENT REPORT 2004: CULTURAL LIBERTY IN TODAY'S DIVERSE WORLD* (Oxford Univ. Press, 2005); WORLD BANK, *WORLD DEVELOPMENT REPORT 2004: MAKING SERVICES WORK FOR POOR PEOPLE* (Oxford Univ. Press, 2005); Stern, *supra* note 11, at 248 (discussing globalization statistics concerning trade, transnational firms, and financial markets).

<sup>13</sup> See ROBERT GILPIN, *GLOBAL POLITICAL ECONOMY: UNDERSTANDING THE INTERNATIONAL ECONOMIC ORDER* (2001) (analyzing the globalization of the world economy and discussing its impact on the international political economy).

more importantly, cheaper (and less-regulated) labor pools from which they can staff their operations.<sup>14</sup>

An even more ominous development has been the extent to which nation-states have been “outsourcing” or privatizing traditional governmental activities by delegating them to TNCs. This has the effect of not only impoverishing State control and authority over what may be essential functions, but also conferring on TNCs some of the basic attributes of State authority. These delegations have extended so far as to include the provision of basic public services (including social welfare and public health), control of regulatory mechanisms in the business sector, and most problematic of all, the maintenance of public safety, policing, and even national security.<sup>15</sup>

Transnational corporations, with their newfound power and influence, are certainly starting to weave distinctive threads into the fabric of international law. For starters, TNCs have proven themselves to be formidable actors in traditional international lawmaking settings, such as treaty negotiations and international institutions. Often acting through trade associations, a kind of NGO, TNCs can direct the substantive outcome of decisionmaking by States. Whether it is establishing the terms and conditions of liability for their activities (as have occurred in a variety of international environmental fora), or prescribing the rights of workers (as happens in International Labor Organization meetings), TNCs can demand serious concessions from nation-state regulators and insist that their interests be respected.

But even more startlingly, TNCs are increasingly making binding international norms completely outside the usual mechanisms for international lawmaking (which were hitherto dominated by States). There has long been a

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<sup>14</sup> For discussions of the changing role of transnational corporations in the developing world, see GLOBAL CAPITALISM (Will Hutton & Anthony Giddens eds., 2000); HOLTON, *supra* note 3, at 54–67; ANKIE HOOGVELT, GLOBALIZATION AND THE POSTCOLONIAL WORLD: THE NEW POLITICAL ECONOMY OF DEVELOPMENT (2d ed. 2001); and EDWARD LUTTWAK, TURBO-CAPITALISM: WINNERS AND LOSERS IN THE GLOBAL ECONOMY (1999).

<sup>15</sup> See Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM. & MARY L. REV. 135, 138 (2005) (discussing the prevalence of government outsourcing of foreign affairs functions); Laura A. Dickinson, *Public Law Values in a Privatized World*, 31 YALE J. INT'L L. 383, 389–401 (2006) (discussing how government outsourcing of foreign affairs functions may be a threat to public values); Saskia Sassen, *The State and Globalization: Denationalized Participation*, 25 MICH. J. INT'L L. 1141, 1150–58 (2004) (discussing the “partial denationalizing of what had been constructed historically as national”); P.W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT'L L. 521, 522–25 (2004) (discussing the growing global industry of private firms that sell military services).

*lex mercatoria*, in which private merchants make binding customary law for themselves that is enforceable in national courts or international tribunals. This process (which will be discussed in more detail in the next section) has, if anything, accelerated in the past decades, with many areas of global regulation being delegated to private organizations for the proposal of draft conventions or regulatory instruments. Some examples of this dynamic are the Comité Maritime International (CMI) in Brussels, which develops international maritime law rules, and the International Chamber of Commerce (ICC) in Paris, which creates norms of conduct governing such disparate issues as inter-bank transfers, documentary credits, and negotiable instruments. Additionally, groups of international commercial actors often agree to voluntary codes of conduct concerning matters of international public concern, such as compliance with anti-corruption rules, the treatment of child laborers, or environmental protection. Oftentimes, these codes of conduct are concluded in order for industries to certify that they are engaged in best practices (and thus win market-share or public approval), or in some circumstances, to head-off formal domestic or international regulation of their activities.<sup>16</sup>

The conduct of TNCs has become increasingly scrutinized for potential human rights violations. If TNCs are to be regarded as having rights and privileges under international law, the supposition goes, so too must they have duties and obligations, and in instances where those are violated, they must be held accountable and responsible. Until very recently, TNCs felt themselves under no duty (fiduciary or otherwise) to protect the interests of overseas employees and customers, of people living in proximity to their operations, or indeed, anyone other than their shareholders and immediate stakeholders. But with the advent of human rights cases being brought against U.S. companies for their operations overseas under the U.S. Alien Tort Claims Act,<sup>17</sup> many TNCs are starting to realize that they could be liable for the misdeeds of their overseas subsidiaries, particularly in situations where they are actively cooperating or colluding with governments in repressing local populations

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<sup>16</sup> Cf. Jenness Duke, *Enforcement of Human Rights on Multi-National Corporations: Global Climate, Strategies and Trends for Compliance*, 28 DENV. J. INT'L L. & POL'Y 339, 343, 346–51 (2000) (discussing how corporate self-governance can affect human rights); Jordan J. Paust, *Human Rights Responsibilities of Private Corporations*, 35 VAND. J. TRANSNAT'L L. 801 (2002) (discussing the effects that multinational corporations can have on human rights and how they can be held accountable).

<sup>17</sup> 28 U.S.C. § 1350 (2006); see also *Doe I v. Unocal Corp.*, 395 F.3d 932, 942–43 (9th Cir. 2002), *reh'g en banc granted*, 395 F.3d 978 (9th Cir. 2003) (adjudicating claim by Myanmar villagers alleging human rights against oil companies under the Alien Tort Claims Act); *Beanal v. Freeport-McMoran*, 197 F.3d 161, 168–69 (5th Cir. 1999) (adjudicating claim by Indonesian citizen against domestic corporation under the Torture Victim Protection Act).

(especially indigenous groups) who are resisting environmentally damaging development or infrastructure projects. TNCs have responded to this risk by agreeing to voluntary codes of conduct regarding their overseas operations, to oversight by certification organizations or other NGOs, and (in rare cases) to compliance efforts conducted by their home-state<sup>18</sup> governments (including anti-corruption and bribery legislation).

### C. *NGO Networks and Cosmopolite International Society*

To the same extent that TNCs reflect many aspects of the changing nature of sovereignty with the new market-state, NGOs and transnational networks of individuals, advocates, and experts (what are known as “global civil society”) reflect many of the values and predilections of cosmopolite international society. Transnational civil society manifests globalizing tendencies not only from grassroots origins, but also from elite and privileged groups within various societies. In this sense, cosmopolitanism is largely indifferent to the motives and aspirations of various segments of global civil society, provided that they seek to achieve international political, economic, social, and cultural objectives through cross-border organizing, lobbying, advocacy, and (if need be) protest.

Transnational civil society is actuated through membership in NGOs and through even more inchoate network mechanisms. Of these two phenomena, NGOs are the more formal and institutional type of actor. NGO influence in international affairs began in the eighteenth century with the rise of the anti-slavery social movement, both in Europe and North America, and with the creation of the International Committee of the Red Cross (ICRC) in Switzerland, which was charged with the superintendence of new international humanitarian law norms for the protection of civilians and combatants in wartime. After periods of hostile reactions by States—particularly during the Cold War—NGOs began to increase their influence in the 1970s and 1980s. This was particularly manifested in increased participation as observers and experts at international organization meetings such as the United Nations, human rights bodies, and international environmental fora.<sup>19</sup>

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<sup>18</sup> See Barbara A. Frey, *The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights*, 6 MINN. J. GLOBAL TRADE 153, 164–80 (1997) (discussing regulation of TNCs to promote international human rights).

<sup>19</sup> See Karsten Nowrot, *Legal Consequences of Globalization: The State of Non-Governmental Organizations Under International Law*, 6 IND. J. GLOBAL LEGAL STUD. 579, 581–89 (1999) (discussing the evolution of NGOs as influential international actors).

This type of participation in international governance has increased in the past decades, but NGOs have also expanded their functions and duties. Some engage in factfinding and oversight in various countries (whether to monitor human rights situations or the fairness of elections). Other NGOs have supplanted traditional aid and development organizations, providing more efficient delivery of goods and services to needy populations. Yet other NGOs have taken a stronger advocacy role, seeking to participate in international tribunals by submitting *amicus curiae* (“friend of the court”) briefs or providing expert testimony. International NGOs have thus assumed the role of many domestic member organizations, with all of the lobbying and interest-group muscle that those institutions have acquired.<sup>20</sup>

Perhaps even more powerful and influential than NGOs, but rather more invisible, have been informal transnational networks that have arisen in the past decades. Known in sociological lingo as “epistemic communities,” these are groups of like-minded individuals and subject-matter experts that collaborate in guiding the course of international affairs. Interestingly enough, some of these transnational networks have situated themselves in governmental circles, such that bureaucrats working in the same regulatory area from different countries (whether banking, securities enforcement, or environmental protection) might find that they attend many of the same collaborative meetings, exchange data and best practices, and gradually harmonize their regulatory actions over time. The same phenomenon has been observed with judges of various countries (especially supreme court or constitutional court justices) meeting regularly in informal consultations or academic settings. While the agenda of such sessions may have banal topics (such as promoting judicial independence), the real work of collaboration is done behind the scenes, with the inevitable result that judges and officials from various nations are inculcated with cosmopolite values.<sup>21</sup>

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<sup>20</sup> See Berman, *supra* note 9, at 546–49 (discussing NGO success in changing governmental policy and corporate behavior); Julie Mertus, *From Legal Transplants to Transformative Justice: Human Rights and the Promise of Transnational Civil Society*, 14 AM. U. INT’L L. REV. 1335, 1342 (1999) (discussing “transnational civil societies”); Nowrot, *supra* note 19, at 586–601 (analyzing the reasons for the growing participation in international relations by NGOs).

<sup>21</sup> See ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004); Berman, *supra* note 9, at 500–07 (discussing various types of transnational networks, including regulatory, judicial, and terrorist networks); Scott C. Fulton & Lawrence I. Sperlberg, *The Network of Environmental Enforcement and Compliance Cooperation in North America and the Western Hemisphere*, 30 INT’L LAW. 111, 116–22 (1996) (discussing the creation of a North American network to enforce environmental law); Jayasuriya, *supra* note 4, at 446–53 (discussing network governance); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT’L L. 1, 16 (2002) (discussing

Apart from governmental officials or regulators, transnational networks might include private individuals from various sectors of global civil society. Scientists, doctors, and public health officials from various countries have been collaborating on surveillance and treatment of highly infectious diseases. Artists, writers, software designers, and filmmakers from all nations can generally agree that they desire higher degrees of international protection for their intellectual property. Academic and professional practitioners of international law from all jurisdictions—what is known as the “invisible college of international law”—work toward the expansion of the rule of law in international affairs and the broadening of their academic and practice opportunities. The cosmopolitan effect of these transnational informal networks is the subtle change that it works on the attitudes of the participants. People entwined in these networks tend to feel that they have more in common with their international colleagues than they might have with the fellow citizens of their own country. Of course, that confusion of loyalties and allegiances can be problematic for the functioning of the traditional nation-state.<sup>22</sup>

#### *D. Neo-Medievalism and the Future of the Nation-State*

The diversity of international legal actors and major players in processes of globalization has led some scholars to speculate that we have entered a new era of global governance. Given the evocative name of “neo-medievalism,” this new phase in the way that governmental and non-governmental entities interact may not be very new at all. As in the Middle Ages, before the advent of the modern, Westphalian nation-state in Europe, an individual or community might have a multitude of sovereign or corporate loyalties, that run in different directions. A local warlord might have held feudal obligations to a superior noble and to the Church, while he, himself, may have been owed obligations by nearby vassals and townships. Merchant guilds and university colleges may have reported to higher secular or religious authority, even as they exercised substantial power of their own.

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types of networks); David Zaring, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*, 33 TEX. INT'L L.J. 281, 282 (1998) (noting that “cooperation is blossoming among the world’s regulators”).

<sup>22</sup> See Oscar Schachter, *The Invisible College of International Law*, 72 NW. L. REV. 217, 217 (1977) (discussing international communication and collaboration of the professional community); Peter J. Spiro, *Globalization, International Law and the Academy*, 32 N.Y.U. J. INT'L L. & POL'Y 567, 570–72 (2000) (discussing how the shift away from identification with a state to identification with global communities has led to international organizations).

Neo-medievalism is the notion that there can be, in fact, multiple authorities exercised over the same individuals, communities, transactions, relationships, events, or bodies of law. As in the Middle Ages, multiple authorities create multiple loyalties, thus destroying a monolithic system of governance (as in the Westphalian nation-state model) in which all authority in a domestic polity derives from the sovereign (whether a monarch or a republican government of representative institutions) and is exercised against all subjects in a vertical fashion. Contemporary global politics has been likened to medieval models insofar as we have, at present, a variety of species of entities that can exercise authority over matters of international concern: States, treaty-based public international organizations (such as the United Nations and its specialized agencies), subnational entities (autonomous municipalities or provinces), regional bodies (such as the North American Free Trade Agreement, the European Union, or European Court of Human Rights), supranational organs (such as the World Trade Organization), TNCs, nongovernmental organizations and networks, and other non-state players. Together, these entities, polities, and actors create a mosaic of governance and international lawmaking, application, and enforcement.<sup>23</sup>

Putting aside the question of whether these “new” features on the landscape of globalization and international-law creation are really novel at all, it bears consideration of whether they fundamentally change the dynamics of global governance and subvert the authority of traditional nation-states. The key question would seem to be whether any of these competing institutions and structures for global governance can actually compel behavior by nation-states that those countries would not otherwise be prepared to accept or countenance. Recently, some scholars have been highly skeptical of that proposition, and perhaps rightly so.<sup>24</sup> Nevertheless, the most compelling set of actors in this neo-medieval calculus will be subnational units, regional organizations, and supranational entities. Subnational polities (whether states in a federal government or autonomous regions in other countries) can already possess substantial domestic authority and legitimacy, so it is merely a question of whether these entities can successfully assert control over matters of international concern. The traditional nation-state system has discouraged this type of power devolution, preferring to have each country “speak with one

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<sup>23</sup> See ANTHONY CLARK AREND, LEGAL RULES AND INTERNATIONAL SOCIETY 171–85 (1999); Jörg Friedrichs, *The Meaning of New Medievalism*, 7 EUR. J. INT’L REL. 475 (2001).

<sup>24</sup> See JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005).

voice,”<sup>25</sup> but that hesitance may be changing as polyphonic theories of federalism and State authority emerge in the foreign affairs realm.<sup>26</sup> And, as noted above, as high court judges of different legal jurisdictions meet and confer with each other, they may become more comfortable with giving their sanction to this new development.<sup>27</sup>

Regional and supranational institutions may offer an even more urgent and compelling vector for neo-medievalist models of global governance. Of course, it is important to note at the outset that these institutions are all the creatures of state consent. The North American Free Trade Agreement (NAFTA), European Community (and then Union), the European and American Human Rights Commissions and Courts, and the Association of Southeast Asian Nations (ASEAN) were all established by treaties and given the full imprimatur of State consent and sanction. Nevertheless, these regional bodies have tended to aggregate their power and authority, in some instances far beyond the original intentions of the treaty-drafters. The European Union is currently in a process of reinvention, seeking (by national referenda or legislative approval) to “constitutionalize” an economic and social “single market” entity into a fully realized European super-government. The European Convention on Human Rights, as interpreted by the European Court of Human Rights, has de facto become the fundamental civil rights law for all of Europe, supplanting the formal and informal constitutional regimes of almost all European nations (including even the United Kingdom, which had long been resistant to such a change).<sup>28</sup>

Perhaps most controversial of all has been the role of supra-national institutions. Entities like the World Trade Organization (WTO) began their institutional lives as traditional, treaty-based and state-consented bodies. But what distinguishes the WTO and a handful of other universal organizations is the extent to which they have diverged from their original state-centered modes of operation and have, instead, sought legitimacy from, and accountability to, a wide variety of international stakeholders, while also pursuing goals and embracing values that might be divergent from the interests of many (if not most) states. Another distinguishing factor for these supranational entities is

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<sup>25</sup> See *Japan Line, Ltd. v. County of L.A.*, 441 U.S. 434, 449 (1979).

<sup>26</sup> See Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CAL. L. REV. 1409 (1999); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243 (2005).

<sup>27</sup> See Sassen, *supra* note 15, at 1144–47.

<sup>28</sup> See Stern, *supra* note 11, at 264.

the degree to which they can compel states to obey their decisions, without recourse to domestic enforcement mechanisms. Indeed, organizations like the WTO have both a strong public and private international law character, and it is their ability to remit their mandate as against private parties (most notably TNCs) that makes them quite influential. Only those public international organizations that have been strongly “entrepreneurial” in the construction of their constituent charters, that have been prepared to press the limits of state authority and state interest, and embrace either (or both) the realities of market-state or cosmopolitan global politics are likely to succeed as supranational entities. But if they make this institutional transition, they will become a force to be reckoned with in challenging at least some aspects of nation-state prerogatives in international lawmaking.<sup>29</sup>

Despite the reality of a diversity of international actors today, it is important to realize that the prospect of neo-medieval global governance is something freighted with meaning and fraught with danger. Despite its traditional and hide-bound ways, the nation-state system—with States as the leading player in global governance—at least has the virtue of predictability and stability. A neo-medieval world order, which (at its core) is characterized by multiple lines of authority and allegiance, runs a number of risks. One is the simple calculus of interest-group politics. Public-choice theorists have long realized that if there are multiple organs of authority and divergent paths to achieve some policy goal, rational actors will tend to push the easiest political levers to get what they want. This can raise profound problems of legitimacy, transparency, and accountability in the international system.

But even more pertinent is the concern that, to the extent to which global governance is influenced by actors seeking their own particularistic self-interests (the prerogatives of an international institution, shareholder value for a TNC, or the (sometimes eccentric) goals of an NGO), the global good can be ignored. This is certainly not meant to suggest that nation-states are the ultimate repository of rationality or the greatest good for the greatest numbers. Nevertheless, nation-states premised on democratic values can, at least in most circumstances, be depended upon to properly and faithfully represent the interests of their national constituents. As a matter of scale and authority, states offer the best chance to capture and apply the aggregate interests of large populations on the planet.

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<sup>29</sup> See *id.* at 265.

So, despite the readily discerned defects of the contemporary international legal order, it would be extravagant and even silly to declare the end of the nation-state as an effective and legitimate instrument of global governance. Whether there has been an actual decline in state power is hard to tell at this juncture. In reality, it may just be that we are changing our notions of state sovereignty to accommodate the new realities of non-state actors and diverse sources of international lawmaking authority and enforcement.

## II. PERMEABILITY OF GOVERNANCE MECHANISMS IN THE GLOBAL LEGAL ORDER

The multiplicity and diversity of international actors has been accompanied, in the past generation, by the ever-increasing porosity of national boundaries. Although we have certainly not reached the stage of “borderless” international society, quite clearly one of the hallmark features of contemporary globalization has been the increased mobility of persons, goods, and capital across the planet. Before opining on the international legal significance of these globalizing phenomena—and there have been many notable impacts on international law doctrines, processes, and institutions—it is worth summarizing the main permeable features of today’s global culture.

The unimpeded movement of capital between countries, whether as part of foreign direct investment, the acquisition of currency reserves, or other business activity, has been seen as both an attribute of increased mobility across borders as well as increasingly strong trade and regulatory disciplines respected by all nations. The global free-movement of capital is, in large measure, attributed to the inchoate and immaterial character of money and investment. Electronic funds transfers (EFTs) make moving money around the world quite frictionless, even with national regulation and oversight of the transactions. The easy flow of money makes almost all global financial markets dependent on one another, and that very situation of interdependence is what requires legal, regulatory, and policy responses to what may be regarded as market imperfections, dysfunctions, or outright pathologies.

The other major aspect of the porosity of national boundaries, with its concomitant effects on global governance and international legal structures, is patterns of human migration. Unlike capital flows, which have (in many respects) been deregulated as a conscious policy of countries to abide by a neo-liberal, “Washington-consensus” approach to development, immigration and movements of people across boundaries have been subject to substantial

nation-state scrutiny and regulation. This has especially been so in the context of post-9/11 national security considerations and the ongoing debates in many post-industrial nations (like the United States, Great Britain, France, and Germany) about immigration reform and the role of guest workers and migrant labor in their national economies. It is by no means clear whether the world is experiencing today the extent of cross-border human migration that occurred from 1650–1914 (with the African slave trade and mass emigrations from Europe to North America). While migration for economic reasons (seeking a better life) remains the chief motive, some emigration flows have been attributed to armed conflicts, civil strife, or natural disasters. It has been suggested, though, that the majority of contemporary migration flows have been *intra*-state, with vast movements of people from farms and the rural countryside to settle in teeming and already overcrowded cities (as has been occurring in China, India, Brazil, and South Africa).<sup>30</sup>

Nevertheless, contemporary cross-border migrations have had an impact not only on international legal doctrines, such as the treatment of refugees and national security screening,<sup>31</sup> but also on core concepts of citizenship and national allegiances. With more and more countries accepting a “mosaic” concept for the social acceptance of new immigrant communities, instead of insisting on a rigorous “melting pot” approach to assimilation, migration patterns have become a central issue of the new cosmopolitanism. Citizenship, once the central tenet of the relationship between an individual and a nation-state, has undergone a radical transformation. Dual nationality is increasingly common, especially as many states (such as Italy, Ireland, and Israel) continue to promote a “law of return” for former emigrants, and the desirability of having collective citizenship in new market-state entities (such as the European Union, and, to a lesser degree, NAFTA) grows in intensity.<sup>32</sup>

Migration affects basic structures of the traditional nation-state, such as social welfare systems, which are the main source of tension as to the status of immigrants in many European, North American, and northern Pacific polities. Guest-worker movements also have an impact on trade and balance-of-payment regimes, especially as these immigrants make substantial remittances back to their families in their home countries, often accounting for a large part of the source country’s foreign exchange.

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<sup>30</sup> See Saskia Sassen, *Regulating Immigration in the Global Age: A New Policy Landscape*, 570 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 65, 66–69 (2000).

<sup>31</sup> See *id.* at 70–71.

<sup>32</sup> See RAINER BAUBÖCK, *BLURRED BOUNDARIES: MIGRATION, ETHNICITY, CITIZENSHIP* 228–34 (1998).

### A. *The Revival of the Lex Mercatoria*

Taken together, the permeability of national frontiers to movements of both capital and migrants accounts for many recent international legal developments. Several of these changes emphasize the interpenetration of various domestic legal systems, even as they operate on the international plane to affect transnational relationships, transactions, and events. The first of these changes worth noting has been the revival of an unwritten (or, at least, an uncodified) customary law governing international commercial relationships and a coordinate expansion of trade rules and principles of private international law to support the structure of a merchant-driven international economy.

The original conception of global law included an aspect of the “law of nations” derived from the practices and usages of international traders: the *lex mercatoria*. Originally, this was a self-contained customary law system, in which usages were established and confirmed by merchants and market participants. Over time, and beginning in the fifteenth and sixteenth centuries, the emerging Westphalian nation-state sought to “tame” and “order” this exogenous legal system. The law merchant was adjudicated before national tribunals, first before panels of disinterested traders (in England, on the Continent, and even in the Far East), and then before lay juries in those jurisdictions. In a further transition, beginning in the mid-nineteenth century, mercantile and commercial law became the subject of national codification and systematization efforts. Finally, beginning at the commencement of the twentieth century, these diverse national commercial codes came to be harmonized by uniform law treaty instruments, essentially converting (over the course of five centuries) a purely customary law regime, based on the practices of merchants, into an international law regime (with both public and private law aspects).<sup>33</sup>

The “new” *lex mercatoria* has attributes of each of the earlier phases of its development: adjudication by domestic tribunals, national codification, and international harmonization by treaty-making. But particularly notable is the law merchant’s return to its community-based and customary origins. Increasingly, international commercial lawmaking is being restored to trade associations, NGOs, or transnational network-based institutions, such as the International Chamber of Commerce (ICC) or Comité Maritime International (CMI). Even more significant are developments in the adjudication of actual

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<sup>33</sup> See RONALD A. BRAND, FUNDAMENTALS OF INTERNATIONAL BUSINESS TRANSACTIONS 8–17 (2000).

commercial disputes. The vast majority of these claims are being settled through international commercial arbitration mechanisms, many of which are sponsored by law-making institutions, such as the ICC. So, in many different commercial and transnational business contexts, we are witnessing the return of merchant (or at least private and specialized) judges and juries.<sup>34</sup>

Despite these developments, the *lex mercatoria* does remain subordinate to nation-state institutions in one obvious respect: it is subject to be overridden by national enactments and (in rare instances) by domestic tribunal decisions. National legislatures and courts may prefer to substitute their policy judgments of a common good in international commercial relations for the particularistic and self-interested objectives of the market participants themselves. But, in reality, national legislatures have largely ceded international commercial lawmaking authority to treaty processes (which are slow and sclerotic), and so, by default, the new customary law of international business transactions is holding sway. Likewise, national tribunals virtually never disturb the results of pure international commercial arbitration awards (those featuring one commercial party claiming against another, as opposed to a non-merchant consumer), absent extraordinary reasons.<sup>35</sup>

Under the new *lex mercatoria*, public and private international law merges into an indistinguishable and seamless complex of commercial norms, practices, rules, and laws. The global trading architecture—as supported by supranational entities such as the WTO (see the last section) and a bevy of specialized lawmaking or codifying entities like the U.N. Conference on International Trade Law (UNCITRAL), the Hague Conference on Private International Law, or UNIDROIT—supports this new move toward merchant autonomy and independence from State actors and regulators. As already discussed, this may well be a manifestation of the emergence of market-state impulses in international affairs. But, just as plausible, it may reflect a

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<sup>34</sup> See Paul Lagarde, *Approche Critique de la Lex Mercatoria* [Critical Approach of Lex Mercatoria], in *LE DROIT DES RELATIONS ÉCONOMIQUES INTERNATIONALES OFFERTES À BERTHOLD GOLDMAN* [THE LAW OF INTERNATIONAL ECONOMIC RELATIONS, STUDIES OFFERED TO BERTHOLD GOLDMAN] 125–50 (1982).

<sup>35</sup> See PHILIPPE KAHN, *Droit International Économique, Droit du Développement, Lex Mercatoria: Concept Unique ou Pluralisme des Ordres Juridiques*, in *LE DROIT DES RELATIONS ÉCONOMIQUES INTERNATIONALES* 97, 99 (Berthold Goldman ed., 1982); see also New York Convention on the Enforcement of International Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3; Harold J. Berman, *The Law of International Commercial Transactions (Lex Mercatoria)*, 2 *EMORY J. INT'L DISP. RES.* 235, 237 (1988); Ole Lando, *The Lex Mercatoria in International Commercial Arbitration*, 34 *INT'L & COMP. L.Q.* 747 (1985); Nathan Oman, *Corporations and Autonomy Theories of Contract: A Critique of the New Lex Mercatoria*, 83 *DENV. U. L. REV.* 101 (2005).

realization that private market forces are more likely than traditional State authorities to adopt rational and reasonable rules for the conduct of international business transactions.<sup>36</sup>

### *B. Extraterritorial Applications of Domestic Law*

Another feature of porous national frontiers and of permeable legal regimes is the growing controversy surrounding the extraterritorial application of one nation's domestic law as a means of resolving legal issues or disputes arising in another jurisdiction. The normal presumption is that one nation's law applies only to acts or events occurring within its territory or against its own nationals.<sup>37</sup> But some countries—most notably the United States—have pushed the boundaries of extraterritorial application of domestic law, nearly to the breaking point.

The first instances of the extraterritorial use of U.S. law were in the field of antitrust regulation and enforcement, where there was a substantial economic policy justification to do so. The U.S. was among the first countries to legislate strict rules to control monopolistic behavior by business combinations. One would think that, in order to make antitrust enforcement effective, such legislation would have to be applied equally to both U.S. and foreign businesses. Otherwise, U.S. businesses would be operating at a substantial disadvantage, while foreign competitors could seek to subvert the U.S. market by making anti-competitive agreements. But under what theory could the U.S. prosecute or enjoin the monopolistic activities of foreign businesses?

The answer was provided by a panel of the U.S. Court of Appeals for the Second Circuit in *United States v. Aluminum Co. of America (Alcoa)*.<sup>38</sup> The complaint charged that in 1931 Aluminum Ltd., a Canadian entity, had formed a cartel (rather brazenly called “the Alliance”) with German, Swiss, and British companies, in order to corner and control world markets in aluminum. Each member of the Alliance was given a production and sales quota, and at least initially, the U.S. market was not included in the quota. In 1936, the Alliance changed its scheme somewhat and imports into the U.S. were tacitly included

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<sup>36</sup> See Jonathan Fried, *Globalization and International Law—Some Thoughts for States and Citizens*, 23 QUEEN'S L.J. 259 (1997); Robert Wai, *Transnational Liff-off and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization*, 40 COLUM. J. TRANSNAT'L L. 209 (2002).

<sup>37</sup> See *Smith v. United States*, 507 U.S. 197 (1993); *Lauritzen v. Larsen*, 345 U.S. 571 (1953); *Foley Bros. v. Filardo*, 336 U.S. 281 (1949).

<sup>38</sup> 148 F.2d 416 (2d Cir. 1945).

in the combination. The United States later charged that the Alliance constituted a violation of section 1 of the Sherman Act, in that “every contract, combination[,]. . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”<sup>39</sup> The court ruled that the Sherman Act had to be construed consistent with “the limitations customarily observed by nations upon the exercise of their powers.” Nevertheless, the court held that the Sherman Act would only penalize anti-competitive conduct that had actual effects in the United States. In finding that the 1936 version of the Alliance was intended to operate as a cartel in the United States, the court placed the burden on the defendants to prove that it had no actual impact.

Thus was born the effects doctrine in the extraterritorial application of U.S. antitrust laws. The *Alcoa* precedent has since been recognized by the U.S. Supreme Court<sup>40</sup> and used in a variety of particular antitrust contexts. Needless to say, our major trading partners—Canada, Europe, and Japan—have vigorously opposed what they regarded as an untoward and illegal extension of the United States’ prescriptive jurisdiction over competition matters. In the late 1980s, however, the Europeans at least shifted their thinking and began to give qualified support for the use of the effects doctrine.<sup>41</sup> This time it was in vindication of the European Union’s own competition policies and directives. The effects doctrine is thus becoming a more widely recognized aspect of the jurisdictional basis of territoriality.

Extraterritorial conflicts can also arise when a country purports to regulate the conduct and activities of its own citizens abroad. Corporations tend to be the parties that are most often affected by states’ assertions of jurisdiction based on nationality. The most contentious issue in this regard has been the reach of United States’ law to the subsidiaries of U.S. companies located overseas. This has arisen particularly in the context of enforcement of U.S. economic sanctions against foreign nations. For example, when Iranian revolutionaries stormed the U.S. embassy in Tehran in 1979 and took U.S. diplomats hostage, the United States by executive order froze Iranian assets located in U.S. banks. As an additional measure, the order extended to the foreign branches of U.S. banks. Some nations objected to this extraterritorial

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<sup>39</sup> 15 U.S.C. § 1 (2006).

<sup>40</sup> See *Cont’l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962).

<sup>41</sup> See Case 89/85, *A. Ahlstrom Osakeyhtio v. Commission*, 1988 E.C.R. 5193, 4 C.M.L.R. 901 (1988) (EC) (r.e. the Wood Pulp Cartel); *The Community v. Atochem SA*, 1989 O.J. (L 74) 21 (1989), 4 C.M.L.R. 382 (1990) (EC) (r.e. The LdPE Cartel).

enforcement of U.S. law within their respective territories, but under these unique circumstances they did not attempt to foil U.S. sanctions.

Just a few years later, in 1982, the United States sought to block the construction of a Soviet natural-gas pipeline into Western Europe. To this end, the U.S. ordered that U.S. subsidiaries not provide supplies or equipment for the project. European nations howled with protest, and some (including Britain) passed special legislation purporting to block the application of the U.S. sanctions law in their territory and to punish any U.S.-owned or U.S.-controlled business that complied with the sanctions. Most recently, in 1996, the United States legislated the Cuban Liberty and Democratic Solidarity Act, and, in that same year, the Iran-Libya Sanctions Act, both of which purported to sanction the conduct of overseas entities that “trafficked” in Cuban property expropriated from U.S. interests or did business with Libya or Iran.<sup>42</sup> These enactments were also met with opposition by many countries.<sup>43</sup>

We have in these scenarios a classic “whip saw.” A subsidiary of a U.S. corporation is forced to decide whether to comply with United States’ law (asserted under the nationality principle of prescriptive jurisdiction) or to obey the contrary law of the State where it is based (legislated under a territoriality principle). The subsidiary is quite literally impaled on the horns of a dilemma, made all the more difficult if one (or more) of the competing States imposes criminal sanctions for violation of its law. This is not an extravagant scenario: an officer of a U.S. bank with a branch in Switzerland was recently forced to disobey an American subpoena to produce bank records or risk being imprisoned for violation of Swiss bank secrecy laws!

The U.S. Congress tries to be careful in not imposing regulatory requirements on U.S. businesses operating overseas, especially when such requirements would make them less competitive. The U.S. Supreme Court will interpret an ambiguous act of Congress as *not* applying extraterritorially in these situations.<sup>44</sup> Aside from inchoate principles of comity, there are no international law principles that would be used to resolve this conflict between nationality and territoriality bases of jurisdiction. A handful of United States cases recognize a doctrine of “foreign sovereign compulsion,” in which a U.S.

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<sup>42</sup> See 22 U.S.C. §§ 6021–6091 (2006); Iran-Libya Sanctions Act of 1996, Pub. L. No. 104-073, 110 Stat. 1541 (1996).

<sup>43</sup> See Alexander Layton & Angharad M. Parry, *Extraterritorial Jurisdiction—European Responses*, 26 HOUSTON J. INT’L L. 309 (2004); Stern, *supra* note 11, at 255–61.

<sup>44</sup> See *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991).

national will be relieved of the obligation to respect U.S. law when to do so would place it in irreconcilable conflict with a foreign nation's law. While some U.S. court decisions have granted this defense upon showing of a good-faith effort to comply with the U.S. law requirements, other judgments have rejected the argument.

It has been suggested that aggressive uses of extraterritorial applications of domestic law are a permissible means to enforce beneficial regulatory measures, especially in the absence of effective international law rules, processes, and institutions. In short, certain leading nations or combinations—such as the United States or the European Union—can press changes in the global legal order by simply enacting their own regulatory solutions and giving them extraterritorial effect.<sup>45</sup> This will result in complex webs of domestic law being incorporated and applied into international practice, not only in the international economic field (such as trade or sanctions), but also for global health and environmental issues.

There are two obvious drawbacks to such a porous system of extraterritorial applications of domestic law. The first will be uneven application and enforcement. As already recounted, the international community will occasionally acquiesce in one nation's (or a combination of countries') attempt to "bid" a new rule of international law and will quickly seek to place a novel rule of domestic law (for which extraterritorial effect is sought) on a firm global footing, as with incorporation into a treaty regime. But, much more often, such unilateral initiatives to impose domestic regimes on other jurisdictions will be stoutly resisted, if just on principle. That dynamic leads to the second problem—the legitimacy of unilateralism by a handful of nations seeking to impose their legal and regulatory will over the entire globe. Ultimately, it seems that an effective and legitimate global legal order cannot exclusively depend on the extraterritorial enforcement of selected state domestic enactments.

### *C. Recourse from National to International Institutions*

An alternative paradigm to unilateral, extraterritorial applications of domestic law on the global plane is to design institutional mechanisms by which domestic and international legal authorities can efficiently and effectively interact. In large measure, this process of institutional design for

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<sup>45</sup> See Brigitte Stern, *Can the United States Set Rules for the World? A French View*, 31 J. WORLD TRADE L. 5, 21–23 (1997).

transnational dispute-settlement has been about removing states from the equation. States are notoriously reluctant to initiate virtually any form of institutionalized dispute-settlement, preferring instead to resolve problems via negotiation, or on occasion, through nonbinding conciliation or mediation. That often leaves non-state actors—particularly individuals, transnational companies, and NGOs—without legal recourse.

Under traditional international law, non-state actors were barred from bringing direct claims against nations. Instead, such claims had to be “espoused” by the country of nationality of the victim. The espousing state controlled the international litigation. It can choose whether to bring the claim, whether to subsequently settle or compromise it, or whether to hand over the proceeds to the victim or pocket them for its own account. Although a handful of international claims commissions (including the U.S.-Mexican General Claims Commission, established in 1923, and the Iran-U.S. Claims Tribunal, created in 1981) have dispensed with the espousal requirement for claims, the vast majority insists on government sponsorship as an element of the claim. The first, and perhaps most difficult, aspect of admissibility in such cases is securing the agreement of one’s own government to make an international claim against another state. This is no easy task and often involves the espousing government deciding that making the claim is worth any possible diminution in good relations with the state receiving the claim.

Within the last twenty years, there has been a sea change in the design of international dispute settlement mechanisms: many are now open to the claims of non-state actors, which have none of the reluctance that nations do in pressing their rights in an international legal forum. In some measure, this change can be attributed to the human rights revolution in international law. Universal and regional human rights systems have entertained individual complaints and petitions for years. While the global human rights system, as actuated through the International Covenant for Civil and Political Rights (ICCPR) and the International Covenant for Economic, Social, and Cultural Rights (ICESCR), and various United Nations human rights review and investigatory organs, has not been terribly effective in deterring malefactor countries from mistreating their citizens,<sup>46</sup> regional human rights bodies—especially in Europe and Latin America—have been more successful.

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<sup>46</sup> For prominent exceptions, see *Weinberger Weisz v. Uruguay*, Report of the Human Rights Comm., U.N. GAOR, 36th Sess., Supp. No. 40, U.N. Doc. A/36/40, at 114 (1981); *Shirin Aumeeruddy-Cziffra and 19 Other Mauritian Women v. Mauritius*, Report of the Human Rights Comm., U.N. GAOR, 36th Sess., Supp. No. 40, U.N. Doc. A/36/40, at 134 (1981); *Lovelace v. Canada*, Report of the Human Rights Comm., U.N. GAOR,

The first and most obvious point about regional human rights systems is that they are only as strong and effective as the region's underlying unity and commitment to democracy and individual rights. Although international law (in general) and human rights (in particular) need not be tied to a particular political system, the reality is that human rights regimes can flourish only in representative democracies. Since domestic respect for the rule of law is the first line of defense for human rights, if this esteem is absent in a particular polity, then no measure of regional integration will help. As a general matter, the European experiment with regional human rights norms has been the most successful—in large measure attributable to common European attitudes toward the proper role of government in everyday life. The Inter-American system of human rights, by contrast, has had a much more difficult road to travel, especially during the 1970s and 1980s when many of the regimes in Latin America were dominated by the military and authoritarian government (or worse) was rife. African attempts at creating human rights norms have been notable failures. East Asian and Middle Eastern nations have not even tried.

The European Convention on Human Rights (ECHR) has developed the most sophisticated procedural mechanisms for adjudication of human rights disputes, at least under an international scheme. When created in 1950, the Convention institutions included (1) a Council of Ministers (a political body that conciliated disputes); (2) a Human Rights Commission (which served as an investigator and filter for human rights complaints); and (3) a Court of Human Rights (which actually adjudicated human rights cases). This structure has recently been streamlined to accelerate proceedings and to lessen the role of the Commission.

The European Convention institutions were given the power to hear inter-state complaints, as well as those brought by individuals against their own states of nationality. Unlike the experience under the ICCPR, inter-state complaints in the European system have been quite common, with a long-running series of cases (from the 1950s to 1970s) pitting Ireland and the United Kingdom against each other in matters regarding human rights questions arising from Ulster. As a consequence, the case law of the European Court of Human Rights is vast, amounting to nearly two thousand decisions to date.

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36th Sess., Supp. No. 40, U.N. Doc. A/36/40, at 166 (1981); *Toonen v. Australia*, Communication No. 488/1992, UN Doc. CCPR/C/50/D/488/1992 (1994); see also ALEX CONTE ET AL., *DEFINING CIVIL AND POLITICAL RIGHTS: THE JURISPRUDENCE OF THE UNITED NATIONS HUMAN RIGHTS COMMITTEE* (2004) (identifying setbacks to the successful implementation of international human rights initiatives).

The Court has explored virtually every aspect of criminal procedure in every European nation and has issued opinions on contentious issues of linguistic and ethnic rights, as well as privacy and free speech.<sup>47</sup>

Most importantly of all, the decisions of these human rights institutions are now regarded as “self-executing” by European nations. (The United Kingdom was the last country to make this recognition.) That means that the decisions have automatic effect. European nations have complained bitterly about some decisions emanating from the Court’s headquarters in Strasbourg (including recent rulings ordering that homosexuals be allowed to freely serve in military services), but they have been obeyed. This is an enviable record, and one that has not been approached by any other regional human rights regime. Despite some structural similarities and a significant body of advisory opinions and case law, neither the Inter-American Commission nor Court of Human Rights have achieved such respect or prominence.

Outside of the human rights context, we have seen the emergence in the last decade of what are known as “investor-state dispute-settlement mechanisms.” These are forums for the resolution of disputes arising from nationals of one country making investments in another country. In some situations, property can be expropriated by the host-state, but more frequently the question is whether host governments are free to regulate aspects of the investment in ways that might affect its long-term value (what are known as “regulatory takings” or “creeping expropriations”). The Iran-U.S. Claims Tribunal is one of these forums and has been rendering decisions since the early 1980s.<sup>48</sup> Created by the World Bank in 1965, the International Centre for the Settlement of Investment Disputes (ICSID) in Washington, D.C. remains a favored choice by both foreign investors and host nations. Its jurisdiction is often invoked in forum-selection clauses found in overseas investment or infrastructure contracts. Its growing use indicates a desire by investment host-nations to

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<sup>47</sup> See VINCENT BERGER, *JURISPRUDENCE DE LA COUR EUROPÉENNE DES DROITS DE L’HOMME* (8th ed. 2002); STEVEN C. GREER, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS: ACHIEVEMENTS, PROBLEMS AND PROSPECTS* (2006); *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (P. van Dijk & Yutaka Arai eds., 4th ed. 2006); JOSEPH WEILER, *THE JURISPRUDENCE OF HUMAN RIGHTS IN THE EUROPEAN UNION: INTEGRATION AND DISINTEGRATION, VALUES AND PROCESSES* (1996).

<sup>48</sup> See GEORGE H. ALDRICH, *THE JURISPRUDENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL: AN ANALYSIS OF THE DECISIONS OF THE TRIBUNAL* (1996).

provide regular and predictable dispute settlements. Although some ICSID panel decisions have been controversial,<sup>49</sup> it remains a respected forum.

Perhaps even more startling has been the operation of investor-dispute panels under Chapter 11 of NAFTA. These bodies have adjudicated challenges to a variety of regulatory restrictions on foreign investment in Canada, the United States, and Mexico, including trade and environmental restrictions. In at least two cases, NAFTA Chapter 11 panels even considered—although ultimately rejected on technical grounds—challenges to decisions made by state courts in the United States, which arguably had the effect of diminishing the value of foreign investments in those jurisdictions.<sup>50</sup> Despite protests to the contrary, these sorts of international institutional mechanisms may well be the beginning of supranational review procedures—the advent of a Supreme Court of North America (in the case of NAFTA Chapter 11) or a global system of investment and trade governance that surpasses even that offered by the WTO.<sup>51</sup>

The ultimate form of recourse from national to international legal institutions would be a direct process of reference and referral by a national court to an international or supranational tribunal. The European Union has experimented with such a system of referrals of legal issues from member-nation courts to the European Court of Justice (ECJ) for nearly a half-century with great success in promoting the harmonization of European law.<sup>52</sup> It has been proposed that national courts might want to refer certain kinds of international law questions to the International Court of Justice (ICJ) in The Hague, but (so far) this proposal has not been acted upon.<sup>53</sup>

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<sup>49</sup> See *AMCO Asia Corp. v. Indonesia*, 25 I.L.M. 1439 (ICSID 1986); *AGIP Co. v. Popular Republic of the Congo*, 21 I.L.M. 726 (ICSID 1982); *Benvenuti et Bonfant v. People's Republic of the Congo*, 21 I.L.M. 740 (ICSID 1982).

<sup>50</sup> See *Loewen Group, Inc. v. United States*, ICSID Case No. ARB(AF)/98/3, 42 I.L.M. 811 (NAFTA Ch. 11 Arb. Trib. 2003); *Mondev Int'l Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, 42 I.L.M. 85 (NAFTA Ch. 11 Arb. Trib. 2002).

<sup>51</sup> See Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2029 (2004); Charles N. Brower & Lee A. Steven, *Who Then Should Judge?: Developing the International Rule of Law under NAFTA Chapter 11*, 2 CHI. J. INT'L L. 193 (2001); Henry Paul Monaghan, *Article III and Supranational Judicial Review*, 107 COLUM. L. REV. 833 (2007).

<sup>52</sup> See KAREN J. ALTER, *ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE* (2001); ANTHONY ARNULL, *THE EUROPEAN UNION AND ITS COURT OF JUSTICE* (2d ed. 2006); K.P.E. LASOK, *JUDICIAL CONTROL IN THE EU: PROCEDURES AND PRINCIPLES* (2004).

<sup>53</sup> See Rosalyn Higgins, *The ICJ, the ECJ, and the Integrity of International Law*, 52 INT'L & COMP. L.Q. 1, 17–20 (2003).

Putting aside the legitimacy of these sorts of transnational judicial arrangements, there is clearly a trend in favor of the growing interpenetration of domestic and international legal systems. Whether it is direct recourse to international dispute settlement by non-state actors, review of national court decisions by international bodies, or a process of reference by domestic tribunals of international law issues to international courts, these mechanisms will likely grow in popularity and utility.

#### *D. A Global Regulatory Regime?*

Much of the current debate about legal globalization transcends considerations of private ordering of commercial relationships (the “new” *lex mercatoria*), the extraterritorial applications of domestic law, and recourse from national to international legal institutions. Much attention has been focused on questions of regulatory design for the new global order: Insofar as many transnational activities need to be regulated in a holistic fashion, how is this to be accomplished? Whether one adopts the idiom of the disciplined market-state or the more liberal cosmopolitan vision of cross-border coordination (see the previous section), the question remains of how to structure and initiate many necessary global regulatory reforms.

One issue that needs to be readily confronted is that exclusive reliance on national approaches and modalities to the regulation of transnational activities is almost always doomed to failure. There are two reasons for this. The first, as has been suggested in this Essay, is that cross-border relationships, transactions, and activities tend to be under-regulated by national authorities, producing what are known as regulatory gaps in the application and enforcement of national laws.<sup>54</sup> The second reason implicates the sin of commission, not mere omission. That is because states will often compete with each other in order to offer private actors the most lax regulatory environment possible, in exchange for well-defined benefits (whether foreign direct investment, tax or other revenue streams, or (in extreme cases) corrupt

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<sup>54</sup> See David W. Kennedy, *A New World Order: Yesterday, Today, and Tomorrow*, 4 *TRANSNAT'L L. & CONTEMP. PROBS.* 329, 371–73 (1994); Joel P. Trachtman, *Externalities and Extraterritoriality: The Law and Economics of Prescriptive Jurisdiction*, in *ECONOMIC DIMENSIONS IN INTERNATIONAL LAW: COMPARATIVE AND EMPIRICAL PERSPECTIVES* 642 (Jagdeep S. Bhandari & Alan O. Sykes eds., 1997).

pay-offs).<sup>55</sup> This “race to the bottom” phenomenon has been well documented in international regulatory systems and often accounts for their failures.

Other factors can tend to complicate global regulatory functions. One of these is the interplay between law and policy, on the one hand, and science and technology, on the other. It is often very difficult for policy planners and regime designers to react to technological change, especially in the face of what might (in some circumstances) be perceived as insufficient empirical data on which to base a rational and effective response. Global regulation of various issues, such as climate change, pandemic influenza, and emerging biotechnical innovations, are all examples of this problem.

Lastly, and most importantly, the new global regulatory regime is challenged by some fundamental—and some would say insuperable—contradictions. The first is selecting the relevant “style” of regulatory control for a particular activity: whether “heavy” or “light” in the relative degree of control over the activity; “thick” or “thin” in terms of the amount of detail in the regulatory regime; and “top-down” or “bottom-up” in regards to the extent to which official agencies are actually in charge of regulation or this is delegated to private institutions or actors. Obviously, a “one-size-fits-all” approach to the design of global regulatory systems is a non-starter. Some transnational activities will call for higher, deeper, and more intrusive amounts of regulation than others. The key difficulty is identifying those aspects of the activity to be regulated that give reliable indications as to the proper “style” of regulation to be adopted. So far, global regulatory mechanisms have largely been designed by serendipity or, worse, by a lowest-common-denominator approach that emphasizes the political will (or lack thereof) of countries in facing a particularly transnational regulatory problem.

There is also an important insight about the global political economy of regulation and dispute-settlement at work here, and this acts as a countervailing force to governmental inertia. Sometimes national governments, because of domestic political pressures, realize that international regulation of a transnational activity or the settlement of a cross-border dispute by a supranational authority (an international institution, tribunal, or private body) may offer superior outcomes. Elite associations in national jurisdictions (whether bureaucrats or interest groups) may favor the “elevation” of an issue

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<sup>55</sup> See INTERNATIONAL REGULATORY COMPETITION AND COORDINATION: PERSPECTIVES ON ECONOMIC REGULATION IN EUROPE AND THE UNITED STATES (William W. Bratton et al. eds., 1996); Wai, *supra* note 36, at 250–58.

or matter to an international mechanism precisely to avoid or subvert domestic legislative or judicial bodies that might have been “captured” by more parochial interests. In short, sophisticated actors will “forum shop” for whatever regulatory or adjudicative venue—domestic or transnational—they think will render the decision they desire.

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The problem of developing comprehensive—and coherent—regulatory regimes for various transnational activities seems manifest. When viewed in the context of other challenges posed by the porosity of the contemporary community of nations and the pressures placed on legal regimes to respond to these issues, it is no wonder that many contemporary aspects of globalization have been so vigorously critiqued.

The extraordinary diversity and permeability of contemporary transnational governance can certainly give rise to radical claims of revolutionary change in the global legal order. But this Essay has attempted to outline a more reasoned and nuanced approach to these developments—one that emphasizes the essential continuity and consistency of the international legal system. Only time will tell whether we are seeing an “end of history” or, rather, the continuation of tradition, with new names and labels being added to familiar concepts and principles.

