

**Commercial Law, Legal Pluralism, and the Governance of the Global Political  
Economy.**

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## **Commercial Law, Legal Pluralism, and the Governance of the Global Political Economy.**

My aim in this paper is to explore a number of problems raised by the changing forms and structures of legality in the contemporary political economy. In particular, I am interested in the implications of a deepening legal pluralism for the ability of law to serve as a limit on use of power. Emerging forms of legal pluralism in the global economy, I suggest, pose important challenges to our ability to subject relationships of economic power to the constraint of democratic rule of law values, as commonly understood. The paper begins with a statement of some of the problems involved in thinking about law and economic governance. I then turn to a closer analysis of the sources and character of transnational legal pluralism, which I present as a central structural feature of legality in the global political economy. This pluralism presents a paradox in the area of commercial law: the coexistence of a fragmentation of competing actors and regimes involved in law-making with the seeming dominance of neo-liberal logics and discourses across transnational legal orders. The rest of the paper attempts to explain this paradox, show how both sides of this paradox tend to work to limit the potential of the rule of law in global economic relations, and consider some possible strategies for generating legal orders that limit, rather than facilitate, the ability of the powerful to pursue their ends without any checks. I place special emphasis on the role of private international commercial law as a subject that helps us think through the implications of transnational legal pluralism.

### **1. The “Rule of Law” in Politics and Capitalism.**

The starting point for contemporary discussion of the relationship between law and capitalist political economy is the concept of the “rule of law.” Drawn from the classic works in liberal political theory and jurisprudence, the rule of law proposes a strategy by which to combine effective governance with limitations on the use of state power designed to prevent the abuse of power and the violation of the rights of citizens. The rule of law is contrasted to the arbitrary use of power according to the will of the powerful, and can be defined “...as requiring that state action should rest on norms that are relatively general, clear, public, prospective, and stable.” (Scheuerman, 2004: 151) It is not just the foundational norms of policy, but the operation of the state should take these forms as well. Policies should be articulated through general rules of law that are clear enough to citizens, publicly developed and presented, concern only future action, and do not change too quickly. Moreover, the implementation of policy should take these forms as well, and be enmeshed in a legal culture which places adherence to rules a central priority in public administration. In classic liberal thinking, this kind of governance is necessary to ensure that state power is used to protect and not abuse rights, and thus to allow citizens to organize their lives without fear of arbitrary repression.

In its Enlightenment stage, the liberal theory of the rule of law had little directly to say about the governance of a market economy, beyond an emphasis on the link between the

protection of rights to property as central to the legal order.<sup>1</sup> This changed in the later 19<sup>th</sup> century. Sociologists and jurists began to argue that the liberal rule of law ideal was uniquely suited to the needs of a capitalist market economy. The key to this functional analysis was the role of “calculability” or predictability in a modern capitalist society. In this view, presented most effectively by Weber, the distinctive feature of capitalism is the focus of economic activity on the accumulation of capital and its reinvestment in productive activity for further accumulation. For actors to engage in this kind of behavior, they must have guarantees that the state will not arbitrarily and unpredictably “interfere” in their decisions about the use of capital. The contractual relationships and longer term commitments required to sustain capital accumulation, then, require a stable and public structure of legal rules and the regular enforcement of these rules by courts. Moreover, the development of large scale industrial enterprises made legal stability even more important for capitalism. The liberal rule of law provided exactly these kinds of guarantees and expectations, and is thus a crucial part of the conditions of modern economic life. As Weber put it, while the rule of law and capitalism may have different origins, they have an “elective affinity.”

These arguments seemed to lose much of their currency in the mid-20<sup>th</sup> century. The growth of the positive, interventionist state, the criticisms of classical liberal thought, and the increasing dependence of corporations on internal bureaucracy rather than contractual relationships all worked to minimize the appeal of the liberal rule of law ideal and its relevance to understanding political economy. Within the law itself, “social” theories of law discounted the classical ideal’s aspiration to “neutrality” and reconceptualized the function of law as that of advancing overriding social purposes such as the control of concentrated economic power, the promotion of social welfare, and the advancement of the interests of workers in the name of democracy. Over the same period, however, key debates in American law and policy focused on reappropriating the liberal rule of law model in the name of democratic control over the capitalist economy. Two aspects of this discourse are central for contemporary politics. First, the development of US anti-trust or competition policy from the late 1800s was articulated in terms of the dangers that monopolies of economic power posed for democratic politics and the legal equality of citizens. Preservation of key virtues of the rule of law, and of the social basis of democratic citizenship, required that the state use law to break up concentrations of economic power. Second, the development of a complex regulatory state in the US by the 1940s led to consideration of the other side of the same problem, the potential for administrative agencies to abuse their wide range of discretion to act arbitrarily (sometimes in collaboration with the economic interests they regulated, sometimes not) against the will of the public. The result of this concern was the Administrative Procedure Act (APA) of 1946, which inaugurated the now well-known “notice and comment” procedures, subjecting regulatory agencies to the pressures of democratic participation and oversight by the court system. Here, the norms of the liberal rule of law

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<sup>1</sup> While Locke is often seen as a key source of this argument, the classic liberal view of the relationship between law, property rights, and a market economy was best articulated by Adam Smith in his *Lectures on Jurisprudence*. This often neglected work anticipates many later permutations of the arguments regarding law and capitalism.

model are turned around and applied to the administrative state itself, as part of the overall project of preventing the abuse of power in the political economy.

Over the past three or four decades, this modified democratic version of the liberal rule of law model has emerged as a powerful discourse in Western political thinking. Political theorists, legal theorists, and non-governmental organizations (Amnesty International, Human Rights Watch, etc.) have advanced the idea that the norms of transparency (or publicness), respect for the dignity of all persons, legal equality, the protection of fundamental rights, public participation in rule-making, and judicial review are essential features of democratic governance. Political and legal reformers throughout the world have enthusiastically adopted this complex of norms and discourses to guide the reconstruction of polities and constitutions. The concept of the rule of law, in particular, has proven popular across the political spectrum and has been incorporated into all sorts of projects for political change, from the work of global development banks to local movements protesting oppression. In social and political theory, key elements of the rule of law ideal have been integrated into the discussion of the future of global governance. The work of David Held (2004), for example, envisions a cosmopolitan form of democracy in which legal controls on the exercise of power of both public and private actors are essential to the realization of some degree of popular control over an increasingly globalized world of politics, economics, and culture. Even those who eschew notions of cosmopolitan governance rely heavily on rule of law notions in their attempts to find solutions to the problem of making power accountable beyond the nation-state. An emerging discourse among legal scholars, for instance, is exploring the potential of a global set of norms of administrative law for shaping the changing structure of political power in the context of globalization. (Aman, 1992; Kingsbury, et al., 2005)

These debates have their corollary in the world of political economy. It is fair to say that the emerging patterns of regulation and governance of the global economy are permeated with legality. The most familiar dimension is the transformation of the General Agreement on Tariffs and Trade (GATT) system into the World Trade Organization (WTO), with its more detailed codes governing state policy and highly legalized dispute resolution system. But the forms of legality in the political economy range well beyond the WTO, including regional regimes such as the European Union (EU) and North American Free Trade Agreement (NAFTA), multiple bi-lateral trade and investment agreements, various sector specific regulatory coordination initiatives, the proliferation of international arbitration institutions, emerging forms of “soft law” (including business-NGO agreements), and beyond. Such development have generated a parallel debate regarding the sources, nature, and impact of the “legalization” of political economic relationships, including intensive theoretical and practical contests over the nature of the rules, legitimacy of dispute resolution systems, and opportunities for participation in these regimes. As in the case of the broader debates over global governance, though, these contests proceed from a shared consensus on the relevance and importance of the rule of law ideal for establishing legitimate and equitable structures of regulation. There are intense disagreements over what these concepts mean, but little questioning of the centrality of law to the construction of legitimate authority in the global political economic context.

## 2. Questioning the Rule of Law Orthodoxy: Thesis.

This is precisely the question I want to open up in this paper. In order to do so, I will accept as a starting point the value and importance of the rule of law ideal as part of any legitimate structure of power. My aim, however, is to question the notion that the values implied in the idea of rule of law continues to have an “elective affinity” with the structure of contemporary capitalism, and raise the possibility that established approaches to implementing the rule of law may be ineffective in countering the abuse of political economic power in the global arena. There is little question of the growing impact of legality in global economic relationships, but I contend that many of the forms of legal thought, practice, and institutions that have helped to constitute global economic spaces operate in ways that are at odds with the key features of the rule of law ideal, features long understood to be central to its ability to check the abuse of power. Contemporary commercial and economic law is developing in ways that move it along a different path.

This claim is not unprecedented. Many critical voices have noted the inequities of interest, access, and power that seem to be built into the emerging structures of global economic law, in cases including the WTO, the work of the International Monetary Fund (IMF) and World Bank, NAFTA, and various other forums. There is much evidence that the emerging system of global economic law is shaped by, and reflects the interests and outlooks of, the most powerful states, corporations, and markets. But these criticisms have rarely produced a systematic analysis of the sources and logic of law-making in contemporary capitalism. In order to do so, I begin with the most provocative such attempt to date. In a series of important essays, William E. Scheuerman (2004) has argued that the structural forces of globalization are operating to undermine the effectiveness of the rule of law ideal, and indeed of liberal democracy more generally. Scheuerman’s analysis begins by noting that the rule of law aims to control public and private power by “slowing down” policy-making, by forcing the process to meet criteria of transparency, participation, procedural justice, predictability, and deliberation. Drawing on the work of Carl Schmitt, he argues that speed is understood to be the enemy of the rule of law; it undermines the likelihood that policy-making will respect these criteria, and thus opens the door to secrecy, the influence of powerful actors with easy access to policy-makers, and thus to the abuse of power. Unlike Schmitt, however, Scheuerman locates the contemporary pressure for speed not in the dynamics of democracy, but in the ways in which globalization compresses time and space. These pressures, he argues, lead states and commercial actors to dispense with procedural requirements such as those considered part of the rule of law. Law remains a key instrument for ordering the political economy, but it is a kind of law that is flexible, informal, often private, and manipulated to facilitate the changing needs of the powerful. In its present form, then, globalization threatens to make irrelevant the rule of law ideal.

Scheuerman’s argument, I believe, points us in the right direction. But it remains too general and suggestive, and sweeps too quickly over important aspects of the recent development of commercial and economic law. In the remainder of this paper, I will attempt to work out an account of the changing practice of legality that goes beyond the issue of speed to emphasize the ways in which these legal practices are connected to the

constitution of transnational spaces in the global political economy. This account centers on the construction of power over and through law in an emerging pluralism of sources of law, sites of legal work, and legal actors, as the main dynamic in the evolution of transnational economic law. The main driving features of this pluralism, of which “speed” is only one factor, provide the underlying forces challenging the project of the rule of law in the governance of the global economy. I pay particular attention to the area of private international commercial law, which has become an increasingly important source of legality around the world, and a crucial source for understanding the changing practices of legality that Scheuerman’s account highlights. In particular, private international legal orders are working to deepen structures of law-making and legal practice in which central rule of law values take a subordinate place to the intensification of market competition. In the following sections, I try to show how this logic emerges from the dynamics of international legal pluralism.

### **3. Transnational Legal Pluralism: A Framework for Analysis.**

My argument rests on the view that law-making for the global political economy takes place in a transnational field or set of spaces, and is characterized by a fundamental pluralism. A basic definition of legal pluralism characterizes it as “...legal systems, networks, or orders coexisting in the same geographical space.” (Twining, 2000: 83)<sup>2</sup> Rather than tending towards some neat order or hierarchy, the growth of legality in the political economy has meant the emergence of a variety of legal regimes attempting to govern transnational economic relationships. There are many types of regimes: general or sector specific, public or private, cooperative or competitive, local, regional, or global. The legal work necessary to structure global capitalism goes on continuously in all these regimes, and is carried on by a plurality of actors – states, international organizations, business organizations, corporations, legal (and other) professionals, and (sometimes) NGO’s and social movements. These various legal regimes, though, are not autonomous from one another. The actors involved in law-making pursue legal projects simultaneously in different regimes, and actors are often subject to multiple legal regimes at the same time. As a result, there is a constant interaction between norms, agents, and projects between regimes, and the development of each occurs in constant dialogue with the others. Santos (2002) refers to this fundamental feature of legal pluralism as “interlegality”.

The absence of a clear hierarchy between legal regimes does not mean that the transnational legal field lacks structure. The primary source of this structure, contrary to what Teubner (1997) sometimes seems to suggest, is not the internal dynamics of legal doctrine and argument. Rather, the transnational legal field is structured around a series of key “sites” which are the focal point for the work of law making, interpretation, and

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<sup>2</sup> Santos (2002) rejects the notion of “legal pluralism” and replaces it with that of “legal plurality”. His concern is that the former is tied to a whole history of (misguided) debates in the comparative law tradition, which serve to confuse and limit the application of the concept to current developments. I will stick with the term “pluralism” as it remains widely used by specialists; my use of the term is interchangeable with Santos’ analysis of legal plurality, on which I rely heavily.

enforcement. As Francis Snyder puts it, in discussing the role of law in the globalized economy, "...it is governed by the totality of strategically determined, situationally specific and often episodic conjunctions of a multiplicity of sites throughout the world. These sites have institutional, normative and process characteristics. The totality of these sites represents a new global form of legal pluralism." (2002: 65) In an elaboration of the same point, Santos contends that "...legal plurality is not discourses tautologically defined in terms of the use of the legal/illegal code, but discourses coupled with practices in which sanctions, rules, and social functions such as social control and dispute resolution play a key role." (2002: 95) Snyder's "sites" are the specific places where these practices are instantiated and developed. These include the legal and regulatory systems of states (and sometimes sub-state entities), regional and international institutions and courts, "private" business organizations and institutions for dispute resolution, and organizations of legal professionals. The work of and at these sites, in turn, is driven by the mobilization of political, economic, and normative power to "enroll" them in projects of legal construction.

How are these sites constructed, and maintained? Who operates them, and to what purposes? In order to answer these questions, it seems to me, we need to take a step back. The plural fields of transnational economic law are an emergent property of the process of political economic globalization that has occurred over the past thirty years. We need an account of the key sources and features of this process in order to ground and situate transnational legal pluralism. Any attempt to provide a comprehensive review of the various existing positions on globalization would take this paper much too far a field. Rather, I will base my analysis on the account of globalization presented in the recent work of Saskia Sassen, one which I find especially persuasive and most useful for linking the larger process of globalization to the constitution of transnational legal pluralism. In Sassen's (2006, 2001) account, the transformation of the capitalist economy that began in the late 1970's required a great deal of institutional, legal, and ideational restructuring in both economic and political life. In terms of the structure of accumulation, this "work" includes the creation of new financial instruments and organizations, the construction of globally integrated capital markets, a reorganizations of corporate control that combined more decentralized forms of production, transportation, and marketing with new strategies of control from the center, and a transformation of the labor-capital relationship that ranges from the role of welfarist protections to new patterns of labor migration. These strategies could not have been successful without a great deal of political or "governance" work as well, to reform old institutions and practices of regulation and to build new ones. Examples of this include the reform of national laws and regulatory regimes to facilitate the opening of national economies to global markets and competition, the development of new forms of bi- and multi-lateral regulatory cooperation to manage transnational markets, institutional change at the national and international level to create the capacities for promoting and regulating transnational economies, and the articulation of new legitimation strategies to secure the overall project of globalizing economies and societies.

For my present purposes, two themes in Sassen's account of the construction of governance for the new global political economy deserve special emphasis. First, the

development of rules and institutions able to effectively govern transnational spaces required a combination of reform of existing governance systems and the creation of new ones, at both the private and public levels. In the former category, we can observe the reform of national legal and regulatory regimes in the areas of trade, anti-trust/competition policy, financial markets, commercial arbitration, corporate governance, labor regulation, etc. For the most part, this kind of work involved the reform and reorganization of existing regimes, especially at the national level. But the same process can be seen internationally, with the changing practices of the IMF, World Bank, EU, and Organization for Economic Cooperation and Development (OECD). In the latter category, various new institutions and practices emerged to deal with the unique challenges of transnational regulation, including WTO and new regional economic organizations, new patterns of inter-governmental cooperation (G-7, International Competition Network (ICN), regulatory networks, etc.), investor-state dispute resolution practices, various emerging systems of business “self-regulation,” and the articulation of new legal norms by and through these institutions. Second, this work of reconstructing global economic governance has unsettled formerly clear boundaries between the “national” and the “international.” It does not eliminate the centrality of national states, but turns a substantial part of their work into the facilitation of transnational economic movements, a process Sassen terms “de-nationalization” of state work. Internationally, institutions and forms of interstate cooperation previously designed to protect national economies from outside disturbances are redesigned to promote the spread and deepening of transnational processes within (as well as between) the borders of states. Meanwhile, key “global cities” have emerged as crucial intermediaries between national and international activity. The emergence of the transnational political economy transforms the purposes and relationships between the various levels and sites of governance, without necessarily privileging one level over others.

Here, I believe, is the key to understanding the sources of transnational legal pluralism. In the place of a relatively clear division between national and international law-making, the emergence of transnational flows of capital, goods, and services has brought a variety of different sources of law – local, national, and international, public and private – into play, each claiming some jurisdiction to govern or regulate similar areas of economic activity. In the major capital markets, for instance, a gamut of legal regimes are in play for potential transactions – New York and London civil law and stock market regulations; key regulatory authorities in Washington, London, Brussels, Tokyo, etc.; professional expert firms and self-regulatory organizations of lawyers, accountants, and credit-rating agencies; inter-governmental regulatory networks, formal (i.e. the OECD, the Bank for International Settlements and Basle Committee) and informal; arbitration institutions and practitioners; and in some contexts international institutions such as the IMF. The same pattern holds in other sectors, but is also evident in areas of law and regulation that cross industries, such as environmental, intellectual property, and consumer protection. The institutions that generate and manage these legal regimes constitute the key “sites” in the global political economy. In this context, private and public actors develop strategies and form coalitions to “work” these sites to generate legal regimes they support and frustrate regimes they oppose. As a result, these sites are brought into continuing contests (and

sometimes cooperation) for influence and support, in which the central goal is to develop widely accepted standards, norms, and codes of law.

This structural complexity of this situation is central to the phenomenon and importance of interlegality. Because multiple sites at different “levels” and positions in the transnational economy are engaging the same actors, and are continually “enrolled” by them in strategic law-making projects, legal principles, norms, and models migrate continually from site to site.<sup>3</sup> It is through this process that legal regimes may emerge to dominate multiple sites, and thus the direction and content of transnational economic law. Santos (2002: 179) distinguishes two major forms through which this can happen. “Globalized localisms” are the result of the emergence of the norms of one regime as the dominant one throughout the system. Often, the “localism” is the legal order of one particular state. A good example of this, well documented by Sell (2003), is the emergence of reformed US intellectual property law as the foundation of the Trade-Related Intellectual Property (TRIPS) agreement as part of the foundation of the WTO. In some contexts, though, attempts to globalize competing norms lead to the construction of hybrid transnational regimes, a process of growing importance as I will discuss below. The international competition policy regime and US-EU privacy regimes may be a good examples of this. “Localized globalisms,” on the other hand, describes the impact of a dominant global regime on states and other actors forced to integrate such a regime into their particular area of practice. (Here, again, the integration of norms may in turn modify them as they are applied to a given context.) The requirement that states joining the WTO, or signing various bi-lateral trade and investment treaties with the US, accept global intellectual property norms provides one of the better examples of this phenomenon.<sup>4</sup> In these (and other) ways, the inter-linking of law-making sites creates many continuing contests for the creation of globally-dominant norms and rules for the transnational political economy.

#### **4. Legal Pluralism, Power, and the Rule of Law: The Problem.**

What are the implications of transnational legal pluralism for the project of governing global economic relationships through the rule of law? There are two characteristics of this emerging legal structure which, while seemingly contradictory, both pose serious challenges to this project. The first is the very plurality of sources of law, actors involved in law-making, and sites of legal production. In the classical understanding of the rule of law, the ability of law to constrain power is dependent upon a clear hierarchy of legal authority, usually centered on the ultimate sovereignty of the state. This sovereignty allows the state to generate order among various legal systems, and to thus subordinate all legal practices to a set of common, public ends representing a conception of the

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<sup>3</sup> This concept of “enrollment” comes from the work of Bruno Latour, but I derive my usage from the work of Braithwaite and Drahos (2000).

<sup>4</sup> In describing the same phenomenon, Braithwaite and Drahos (2000) distinguish between “law makers” and “law takers” in the global political economy. This distinction, which includes states but applies to all transnational actors, points us to the central role of power differentials in shaping the transnational legal field. I turn to this theme below.

common interest of society. Clearly, there is no such overarching structure of authority in the transnational legal context. Proliferating legalities are generated at a variety of sites – local, national, regional, and international; private, public, and mixed forms – in a constantly shifting pattern of influence sustained by the effects of interlegality. Legal norms and principles are generated by a variety of actors at all of these levels operating in shifting coalitions of interest and power and pursuing a variety of legal projects. Most importantly, there is no clear structure of authority in this system. Transnational legal orders can emerge and gain traction from a variety of sources – states, business organizations, international institutions, etc. – and take a variety of forms, from formally articulated and state-enforced codes to intergovernmental coordination by regulatory agencies, emerging contractual practices, various forms of voluntary “codes of conduct” and the “soft law” of model laws, emerging consensus of experts, and the practices of international arbitration. To further complicate the situation, many emerging norms and regimes claim authority over specific sectors or practices in the global economy, but not others. This “functional” differentiation has been at the center of Teubner’s account of transnational law. (2004, 1997)

It is possible, of course, that we are in a transitional situation, out of which a form of hierarchy and coordination of global economic law will emerge. This is the aspiration behind Held’s attempts to theorize forms of transnational democracy that can re-establish popular control over the global economy. It is also central to the functionalist reasoning that drives the influential “legalization” framework in international political economy. (Goldstein, et al., 2000) In this view, the pressures of global economic integration for lead states to construct more effective and organized regimes for the collective governance of economic relationships. There are good reasons for skepticism regarding these arguments. Scheuerman’s account, for instance, suggests that the speed of global economic practices will frustrate the ability of any such institutional order to effectively control transnational flows of capital and goods. The legal pluralism argument points to a more fundamental problem. As the shape and direction of global economic activity evolves, it will continually generate new actors and interests with new legal projects, new sites of law making and new relationships between these sites, and thus continuing challenges to existing legal regimes. If, as Brutsch and Lehmkuhl (2007) suggest, pluralism is not a temporary but a fundamental feature of transnational legality, the traditional strategies of securing forms of sovereign order over legal practices are unlikely to be successful in taming that pluralism. The establishment of a liberal and democratic model of the rule of law will require fundamentally new political strategies.

The second aspect of the transnational legal structure, equally challenging to the liberal democratic rule of law model, seems at first look to be in contradiction to the first. For all the variety and diversity of legal sites and regimes that have emerged since the 1970’s, transnational economic law has been dominated by legal thinking and practice rooted in the neo-liberal project. The central principles guiding this project – privatization of government institutions and responsibilities, “de-regulation” of key sectors of capital and/or the creation of new capital-friendly regulatory regimes, the removal of barriers to trade and investment across national borders, the reduction of establishing levels of protection for the rights of workers, the creation of new sets of protections for the rights

of capital – have been central to the work of most of the major law-making sites in the global economy. Despite the continuing conflicts among the major private and public actors in the global political economy, the potentially fragmenting impact of legal pluralism has been limited and the resulting legal orders have been tethered to a common vision and project. We need to explore two resulting questions – How has this been accomplished, and in what sense does this neo-liberal project frustrate the achievement of rule of law values? The answer to the first question goes far to help answer the second question.

The unifying thread here is the construction and mobilization of power, but this can be understood in different ways. One approach is to identify a set of dominant actors who can identify a common legal project and impose it effectively across a number of sites. There are two especially compelling versions of this approach. Daniel Drezner (2007) argues that the central factor at work is the power of dominant states to control international institutions and outcomes. As the US, UK, and later the EU came to share the neo-liberal project, they were able to impose it through their preponderant power at the international level. (They did this, of course, while continuing to work through conflicts over the meaning of this project and each actor’s attempt to bend it to favor their own interests.) There is no doubt that this is a key part of the explanation. But Drezner’s model relies too heavily on the traditional national/international division, leaves out of account many important sites of law-making in which states are not necessarily the dominant actors, pays too little attention to the role of non-state actors, and has trouble explaining how state interests are turned into specific legal discourses. A. Claire Cutler (2003), on the other hand, emphasizes the centrality of a global “mercatorocracy” of state officials, corporate interests, and legal practitioners and theorists in shaping the direction of international commercial law-making. This approach gets us closer to the heart of the matter; Cutler is attuned to the reality of the pluralism of legal regimes and the importance of legal discourse in turning interests into projects of legality. In the end, though, her approach too easily skims over the indeterminacy of the connections between the three major actors she identifies, the tensions between different actors within each category, and the strategies through which actors enroll plural institutions in a common project.

In order to get a more complete picture of how some coherence has emerged in the context of legal pluralism, I suggest, we need to look beyond actors to explore the strategies used to make transnational economic law, and their relationship to the structural opportunities in place. We can begin by noting that political economic projects can only be turned into legal regimes through the specifically legal work of constructing norms, principles, and rules, and then spreading them effectively through sites of law-making. In the contemporary transnational context, this has been done in two ways. First, specific local or national legal norms and practices have been “globalized” through the work of state officials and private actors, who push their adoption by other states, regional and international institutions, and various private actors. As I indicated earlier, a good deal of the transnational legal regimes of which we are familiar are made up of these “globalized localisms.” But it is often politically or technically difficult to apply a single national model to a variety of other contexts. As a result, we often see a second

strategy, that of creating modified transnational norms; these either combine aspects of different local/national models, or are developed as standards towards which existing law should aspire. Much of EU law seems to take this form, and it is common in the legal prescriptions offered to emerging market states as part of various law reform programs. (Trubek and Santos, 2006) These modified norms can be developed in anticipation of specific law-making projects, or can emerge as unintended consequences of the interaction of legal projects generated by the dynamics of interlegality.

The argument I want to advance here is that the current structure of transnational legal pluralism privileges the ability of the most powerful to successfully pursue these strategies. For actors trying to shape the direction of legal practice, legal pluralism poses the challenge of mobilizing political, economic, and ideational power across a number of fields and sites. Successful strategies require access to substantial resources, and the ability to use these resources to enroll institutions with different modes of operation, varying responsiveness to appeals of interest and norms, and shifting internal agendas. Simply put, the global political economy concentrates these resources in the hands of a minority of states, the most dynamic corporations, and specialized networks of elite legal practitioners and scholars. In order to shape legal regulation across various legal sites, coalitions of actors must combine these resources in different ways. In particular, political and economic actors must be able to mobilize legal expertise to transform projects of power and interest into persuasive legal agendas; they must be able to offer their own “localisms” as global models, or to contribute to the development of modified global norms. The capacity to do this remains very unevenly distributed, and power over emerging legal orders follows this distribution. In the transnational context, the plurality of legal sites works to empower a small and already privileged set of actors, and poses significant obstacles to the ability of the less privileged to shape the direction of legal change.

This conjuncture of structures, strategies, and agents helps account for the specific pattern of conflict and consensus characteristic of the transnational legal system. The pluralism of the system was a necessary product of its creation through the weakening of the boundaries that had isolated different law-making sites, and limited their jurisdiction within definite national borders. The dominant actors involved in shaping this project, especially US (and UK) state officials and commercial interests, used their unique structural power to “imprint” neo-liberal norms and principles as the starting point for legal thinking and law-making at most of the major sites in the plural system.<sup>5</sup> As transnational legal processes have evolved, the very pluralism of the system helps generate all sorts of conflicts regarding the norms, practices, and institutions through which the global economy will be governed. The nature of the resources necessary to participate effectively in these processes and the ingrained influence of neo-liberal norms, however, work to limit most of these conflicts to contests among major states, international institutions, and global corporate actors and markets to shape which

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<sup>5</sup> My use of the idea of structural power in this context comes from Susan Strange’s (1988) pathbreaking work. Both Drezner’s and Cutler’s accounts show in more how this power has been mobilized in the global political economy.

versions and interpretations of these norms will dominate different parts of the transnational field. At times, otherwise weaker forces have begun to show the ability to mobilize transnational legal processes to challenge dominant trends; the HIV/AIDS drug campaign discussed earlier provides a good example of this. For the most part, however, the constraints of the structure of legal pluralism as it has been developed leaves most influence over law-making in the hands of the most powerful actors and those emerging actors willing to play within the rules of the system broadly understood (e.g. China, India, Brazil, etc.).

This brings us back to the rule of law model. If my analysis is correct, the system of transnational legal pluralism turns the aspirations of the rule of law model upside down. Instead of providing tools for the control of power, it sets up a structure of constraints and opportunities in which law-making and enforcement serves primarily to protect the most powerful. At the same time, this legal pluralism tends to frustrate traditional strategies for reigning in the powerful and subjecting their projects to broader collective democratic norms. In the process, as Scheuerman emphasizes, the values of equal access, formality, fairness, clarity, and transparency are easily lost. Is there a way out of this dilemma? Some analysts have identified possibilities in the unintended consequences of “legalization.” The juridification of the WTO legal process, for instance, seems to offer some room for less powerful actors to exercise some constraint on dominant actors. Here, we see pressures for more transparency, access, and formality emerging from within the dynamics of a legal system increasingly dominated by legal actors and reasoning. The interlegality that comes with legal pluralism, moreover, may allow subordinate norms and practices to filter into key law-making sites in unexpected ways, as we have seen in some areas of development, resource, and environmental law. Before considering these trends in detail, though, I will shift focus to the area of private international commercial law. As Cutler and Scheuerman note, it is here that the dynamics and problems in transnational economic law are the most clear. It is also the area in which we can find some of the most interesting thinking about how to reconstruct the rule of law ideal in the context of transnational legal pluralism.

## **5. The Challenge of Private International Law.**

Private international commercial law is derived from and constituted by rules that directly shape the activity of businesses (and other actors) – rules regarding contract practices, the regulation of torts, the definition of property rights, dispute settlement, the management of insolvent firms, corporate governance, corporate finance, etc.<sup>6</sup> These rules create the essential legal framework through which markets and corporations are constructed, and within (and around) which they operate in international transactions. Historically, the evolution of private international law has been closely linked with the evolution of the modern state and capitalism. Cutler (2003) has examined this relationship in the most

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<sup>6</sup> My account is based on an ongoing research project on the significance and dynamics of private international commercial law. For an early version of this work, see Cohen, 2007. Because of the awkwardness of the term, I often shorten it to “private international law”; technically, though, this term includes areas of law (such as family and estate law) that do not directly affect international commerce.

depth. In the late medieval and early modern period, international commercial law was a relatively autonomous system of rules, customs, and institutions, governed by merchants and merchant organizations; this is the classical system of *lex mercatoria*. Emerging national states and their legal orders tended for the most part to accept and secure this autonomy. (Berman and Kaufman, 1978) Beginning in the 18<sup>th</sup> century, however, national states in Europe reversed course. They gradually internalized the rules of international commerce into their increasingly distinct legal orders, and subjected them to the authority of national legislation and court systems. As a result, the rules governing the action of individuals and corporations involved in international commerce came to be determined by the jurisdiction in which these actors were located and/or in which their activity took place. This remains the case today, as most of the rules of private international law derive from national legal systems and most conflicts are adjudicated by national courts. As Caruso (2006) puts it, private law has had a crucial “state-making” function in the international order.

The nationalization of commercial law, however, created a problem for the regulation of international transactions. In a world of separate sovereign states, any international commercial actor and/or transaction is likely to be subject to multiple, and often conflicting, national rules, with no obvious way of determining which rules govern discrete commercial practices and conflicts. Since the mid-nineteenth century, Western legal systems have responded to this problem with the development of rules of “conflicts of law,” which aim to determine which national rule(s) applies to any specific international commercial activity. This sub-discipline of conflicts of law has long been identified as the essence of private international commercial law, and is understood as a discipline and practice centered on the problems posed by these conflicts. The basic principle in this area of law, then, has been that international commercial actors and transactions are best governed by being “nationalized,” subjected to the most appropriate national legal order. While there are competing theories and doctrines concerning what is “appropriate” in specific contexts, for the most part the conflicts of law approach has until recently proven a durable and effective way of governing commercial practice that crosses national boundaries.

The globalization of economic activity presented a fundamental challenge to this system. Increasingly, practitioners, commercial actors, and policy-makers came to the conclusion that the strategy of legally “nationalizing” commercial activity was inadequate to the tasks facing private law. The result has been a process of continuing legal work, through which private international law became a key force in the constitution of transnational legal and commercial spaces. This work takes three major forms. First, national (and local) private law systems were reformed to facilitate the new business strategies and structures emerging in the global economy, such as financing arrangements, restructuring of commodity chains and production processes, and new forms of labor regulation. Second, commercial lawyers developed new forms of contract drafting, creating a variety of new legal structures to regulate transactions that cut across national boundaries, a development ratified by a renewed emphasis on respecting “party autonomy” in contracts. (Muir-Watt and Radicati Di Brozolo, 2004) The most important strategies here are the innovative use of “choice of law” and “forum selection” clauses in contracts,

through which market actors could choose the legal orders and court systems which would govern their relationships, irrespective of the actual location of the actors or the transactions. Finally, an explosive growth in the use of private commercial arbitration to resolve conflicts among market actors led to the emergence of a parallel, transnational form of dispute resolution. Here, contract drafters include agreements to arbitrate disputes, and specify the location, process, and substantive rules that will govern the arbitration. By some estimates, the majority of contracts in international business now include arbitration clauses. As Wai (2002) puts it, private international law has been crucial to the “liftoff” of international economic relationships from a grounding in national states into transnational spaces.

In the resulting contemporary practice of private international law, these practices work through and reinforce the phenomena of pluralism and interlegality to create a set of legal sites and regimes especially responsive to the norms of market competition, market efficiency, and the primacy of choices and projects of commercial interests. The principle of “party autonomy” allows commercial agents to adopt regimes most suitable for the pursuit of their interests. National states and certain sub-national jurisdictions compete to dominate the choice of law, by offering regimes that commercial agents find most amenable to their needs.<sup>7</sup> In the area of banking and commercial finance, for instance, the legal rules, courts, and practices of England (particularly London) and of New York State compete to dominate transactions across the globe. International maritime and insurance practices rely heavily on institutions and markets in London. Moreover, national courts often act aggressively to assert jurisdiction over transnational commerce by offering jurisprudential practices favored by commercial actors. The system of private commercial arbitration allows businesses to choose not only which laws will govern their activities, but the place in which, the rules by which, and institutions in which their disputes will be resolved. In addition to corporations and their lawyers acting on their own, sectoral and general international business and professional organizations – i.e. the International Chamber of Commerce (ICC), the International Bar Association (IBA), the American Bar Association (ABA), and the London Court of International Arbitration – are key players in developing the norms of standard business practice and rules of arbitration available for adoption by commercial actors.

Together, this transformation of private international commercial law amounts to the emergence of a new kind of legal order(s). Instead of the dominance of national law enforced by national courts, we see plural sets of practices in which the rules by which global commercial actors conduct business are established to a great extent through the choices of those actors themselves, acting through contractual innovation, self-regulatory organizations, and evolving arbitration practices. To be sure, this structure is not as autonomous from state power and regulation as claims of a “new” *lex mercatoria* often imply. Commercial actors still choose primarily from legal regimes established by or within national states, contracts still depend for their validity on state recognition, and the

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<sup>7</sup> There is a large legal literature in the US that illustrates a similar and much older phenomenon in the competition between US states to offer the most commercially friendly regimes of corporate law. For an important recent discussion of the literature, see Roe, 2005.

system of international arbitration relies on the willingness of national courts to enforce the rulings of arbitration tribunals. What is most striking and important, however, has been the role of major states in facilitating the construction of this type of legal order. In ways that parallel the “legal work” Sassen describes, state officials and legal agents have worked unilaterally, cooperatively, and at times multilaterally to loosen the restrictions on commercial contract practice, encourage and accept the initiative of commercial agents in shaping the norms of commercial law, and in promoting and securing the role of arbitration as a means for commercial actors to resolve conflicts in ways that avoid the usual forms of recourse to national legal systems.

The world of private international law does not escape the conflicts endemic to transnational legal pluralism more generally. But, in a manner even more decisive than in the broader context, these conflicts involve a limited range of interests – corporate actors and market institutions based in the most advanced economies, dominant states attempting to promote their own economic power and through the legal practices that secure this power, and a small legal elite of corporate law practitioners and academic experts, primarily based in North America and Europe, vying for prestige and business. These contests take two primary forms. The most important is the competition for influence over the choices made by commercial actors, who are able to select from a growing variety of local, national, and regional norms as they design contractual and regulatory regimes for their business practice. Legal pluralism in transnational private law manifests itself in a competitive market for the influence of different legal models and principles, and this market is dominated by the most powerful states and corporate actors. The other primary venue for these contests is the growing activity of private law harmonization, in which actors attempt to define common standards of legal practice for areas of global commerce. Harmonization projects are pursued bi-laterally, regionally, and through a set of specialized international institutions – the United Nations Commission on International Trade Law (UNCITRAL), the International Institute for the Unification of Private Law (UNIDROIT), and the Hague Conference on Private International Law. The work of these intergovernmental bodies is dominated by the same set of interests and actors already identified, and centers around contests to globalize local legal models and to influence the development of hybrid legal regimes.<sup>8</sup> In both of these forms, the contests for influence over private international law involve a limited set of commercial and political interests and actors who share a general commitment to market opening and deepening projects while struggling to shape these to their own benefit.

The emergence of this structure of private international law further complicates the idea of a rule of law in the global economy. On the one hand, it is even more resistant to the classic rule of law values than the system of public international law. Here, access to law-making processes is even more limited, and influence over the content of law even more concentrated, than in the larger transnational system. The role of market agents in shaping the development of law, the greater inaccessibility of the institutions and

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<sup>8</sup> Over the past two decades, this work has focused on areas such as general contract principles and practices, insolvency law, arbitration practice, and forms of business finance.

processes in which law is created and changed, and the key role of private arbitration in dispute resolution, make it even more difficult to enforce the norms of publicity and clarity in this context. In addition, the greater locus of initiative in the hands of private actors and the competition to enroll the support of these actors for specific legal regimes contributes to both a further pluralism of law and an ever greater emphasis on flexibility and a corresponding weakening of support for the norms of consistency and stability in law. Indeed, contemporary private international law constitutes a system of legal regulation for markets that presents the most formidable challenge to the Weberian notion of an “elective affinity” between capitalism and the liberal rule of law.<sup>9</sup> It presents us with a legal order centered on plural and competing norms, private initiative and autonomy in shaping norms, flexibility in the legal context for governing commercial activity, and opacity in the law making and dispute resolution processes. And it is through this legal order that the structures of capitalist accumulation are increasingly structured and stabilized.

In itself, then, the contemporary world of private international law presents a serious challenge. But its significance is even broader. Over the past two decades, we can observe a growing impact of this world of legal thought and practice on state practice in public international law. Two aspects of this development can illustrate this point. The first is the spread of private arbitration into the context of international trade and investment treaties. From NAFTA to numerous bi-lateral treaties, arbitration has emerged as the preferred system for resolving disputes between states, and especially between private investors and states. The models used for these arbitration provisions, from the structure of arbitration processes to the individuals and institutions involved in them, have their roots in the practice of private commercial arbitration.<sup>10</sup> The second is the increasing interest on the part of states and regional groupings in using model laws drawn up by private and intergovernmental organizations in private law settings as the basis for legal reform within states. The EU, for example, is now actively exploring UNCITRAL’s model law and legislative guide for insolvency as a basis for reform of insolvency law and practice in Europe. This kind of interlegality works to spread many of the procedural and substantive norms drawn from private international law into the public realm, and further deepens the challenges posed for any project to discipline transnational legal pluralism through the rule of law.

## **6. Where Can We Go From Here?**

I have no good answer to this question. We can identify two dominant approaches in theory and practice for the reform of global economic governance through law. The first

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<sup>9</sup> For these reasons, private commercial law provides most of the material for Scheuerman’s analysis of the threats presented to the rule of law by “social acceleration.”

<sup>10</sup> This development is most clearly evident in NAFTA, in which arbitration panels are chosen by the parties and often include individuals active in private arbitration, there is no formal structure for the development of precedent or the review of decisions, and the UNCITRAL Principles for Commercial Arbitration – developed for use in private commercial arbitration – are increasingly used to organize the proceedings.

centers around using regional and international institutions, and forms of interstate cooperation within and outside these institutions, to establish some hierarchical order in international economic law, and then to infuse this order with democratic rule of law values. This is probably the most common discourse for thinking and mobilizing around the reform of law, and is closely connected to the projects for democratizing global governance associated with Held's work and underway in many different contexts. In the area of private international law, Caruso (2006) has articulated a similar proposal; in her view, private law can again become a tool of the construction of forms of political authority able to effectively regulate markets, replicating on the international level the role of private law in state-building on the national level. Scheuerman's work also suggests that the solution lies in reinvigorating structures of political authority, though he focuses on the need to find ways to "speed up" law-making to make it adequate to the challenge of global capitalism while sustaining the classic rule of law values.

The second approach attempts to work within the system of legal pluralism to find ways to assert democratic rule of law values at the level of individual sites or groups of sites. The general thrust is to create alternative or parallel structures of governance, and to use them to pressure key actors within dominant sites to open these sites to wider participation and thus reform their practices of legal regulation. We have seen many examples of this, including the movements challenging the WTO, IMF, and World Bank, the emergence of business-ngo agreements in sectors like forest management and resource extraction, the use of consumer boycotts to change the behavior of corporations, and the formation of transnational social movements in areas such as the marketing of HIV/AIDS drugs and the problem of the child labor. Santos work has provided a theoretical articulation of the logic behind such movements, which suggests that they may be able to gradually shift the balance of power in transnational economic law and governance.

Scholars who place more emphasis on private international are beginning to articulate an alternative approach that attempts to incorporate both of these alternatives in a different framework. The central idea here is that weaker actors can and must use the "sited-ness" of law-making and the networks between these sites to shift the direction of transnational economic governance. The work of Sassen and Braithwaite and Drahos provide crucial starting points. While their underlying approaches differ, they share an emphasis on the critical role of networks of actors – the participants in which are based in the key sites of law-making and regulatory power – in doing the work of governance in the global economy. In this view, attempts to mobilize around particular institutions and issues are only the starting point for legal change. Longer term success is a possibility only if actors use the kinds of networks and strategies that dominant actors have learned are necessary for pushing legal development in the context of pluralism. Sassen suggests, for example, that the critical position of a network of global cities provides leverage for oppositional movements. Just as these networks create networks among political and financial elites, the movements of persons between these cities provides a critical resource that can be exploited for coordinating challenges to elite projects and priorities. In this sense, the networked sites at the heart of legal pluralism create structures that can be used for alternative projects of law and governance.

The literature on private international law is providing some important suggestions in this area. Robert Wai (2005) is exploring the potential of the law of torts and liability as a tool by which actors can use private law processes to check abuses of corporate power. He points to the campaigns to use private law litigation to in the contexts of the Bhopal disaster or the oil exploration activities of UNOCAL in Burma as examples of the potential in this strategy. For Wai, private law processes offer little understood advantages for otherwise weak actors to mobilize courts to protect their interests. Because most of the legal regimes in transnational commerce are ultimately located in some national court systems, these court systems provide potential leverage in constraining how these legal regimes are used by commercial actors. Wai's argument rests on the notion that legal systems have their own logic autonomous from any pure commercial logic. If these logics are constrained to some degree by rule of law values, and Wai suggests many are, they present opportunities for shifting the direction of legal change. In this sense, Wai's argument dovetails with Teubner's notion that the various transnational legal regimes contain within themselves logics of legal practice that are open to much more robust conceptions of the rule of law than they have demonstrated to this point.

Any such strategies face formidable obstacles, as I have suggested throughout the paper. Even if we accept the notion that transnational legal regimes retain in themselves the possibilities for alternative directions of development, they remain deeply inscribed with the project of deepening existing forms of commercial globalization. The key to how these regimes will develop, then, remains the issue of power. The current transnational legal order is dominated by actors for whom, despite various divisions, classical and democratic rule of law values play a secondary role to the pursuit of commercial advantage. Projects that aim at significant change in this situation can not rely on the hope that legal pluralism will disappear, or on the notion that an "elective affinity" between the rule of law and capitalism will reassert itself through the dynamics of legal change itself. Rather, they will be successful only if they are able to mobilize alternative sources of power within the key sites of transnational law-making. In this sense, I am ending with a lesson that Judith Shklar (1964) offered us over forty years ago. Law generally, and the rule of law ideal in particular, is rooted in politics and political power. Legal orders are made, enforced, and changed through political mobilization, and this is nowhere more important to recognize than in the legalities of contemporary political economy.

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