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# Transnational Legal Orders

*Terence C. Halliday and Gregory Shaffer*

Social orders increasingly are legalized transnationally. Whether the social order concerns observance of civil rights or financial stability, the facilitation of trade or the protection of public health, the regulation of noxious chemicals or the movement of peoples, protections for women or formation of new businesses, the ordering of responses to these issues inside the state and across national frontiers seems progressively to reach beyond domestic to transnational legal norms. This book aims to build theory and empirical understanding of transnational legal orders. It does so by reframing the study of law and society in today's world from a predominantly national context – or one that dichotomizes the study of international law and national law, or international regimes and national politics – to a perspective that places processes of local, national, international, and transnational public and private lawmaking and practice in dynamic tension within a single analytic frame. The book shifts attention from a dualist orientation toward international law and national law to a focus on how legal norms are developed, conveyed, and settled transnationally, integrating both bottom-up and top-down analyses. Our interest is on social ordering and how it is produced in discrete domains through human rights, business, and regulatory legal norms that are transnational in scope.

Since the rise of sovereign nation-states in the seventeenth century, law has been conventionally associated with the law of the nation-state. National law was "an essential element… of national construction," facilitating social integration, public order, and the resolution of conflict through the nation-state's monopolization of the legitimate use of force (Glenn 2003: 839). Accordingly, the study of law and society conventionally focused on nation-state law and practice. From this perspective, to quote the great jurist Oliver Wendell Holmes (1963: 5), "[t]he law embodies the story of a nation's development." Or as the inscription of the classic 1815 Courthouse (Domhus) in Copenhagen states, "With Law We Shall Build the Land."[1]

International law developed concomitantly with the creation of nation-states, pursuant to which nation-states mutually recognized each other's sovereignty, including the exclusive authority of each to make and apply law within its borders, and thus to be free from interference in its "internal affairs" (Glenn 2003). The conventional concept of *international law* is thus nation-state-centric in that it largely addresses relations

[1] The Danish reads: "Med lov skal man land bygge."

between nation-states, and not legal ordering within nation-states (Malanczuk 1997:3). The Westphalian legal order was built on these two pillars of national law (within a national constitutional order) and international law (regarding relations between these nation-states). Because law and society scholarship focuses on the relation of law to actors and communities within particular societies, in contrast to the traditional study of international law that reifies the nation-state, there has been much less law and society scholarship assessing international law.

Modern processes of economic and cultural globalization have, in recent decades, blurred the basic coordinates of the Westphalian nation-state juridical system (Walker 2010). In response to these transformations, scholars have increasingly explored new concepts of "global" and "transnational" law to make sense of legal processes that are not adequately captured by the concept of international law (Twining 2000; Tamanaha 2007; Zumbansen 2010; Berman 2012; Shaffer 2013). The term "global" law implies that legal norms are being created and diffused globally in different legal domains that do not necessarily involve traditional international law between nation-states.[12] Such terminology of "global" law is misleading because much legal ordering today is not global in its geographic reach, but it nonetheless involves variation in legal ordering beyond the nation-state. Because the geographic, substantive, and organizational scope of such legal ordering varies, and because it involves both public and private actors, these processes are best captured by the concepts of *transnational legal orders* and *transnational legal ordering*.[3]

Existing work on the development of global and transnational law has not focused on the production of *order*, or, in our terms, on the *normative settlement* of law, within nation-states and societies. This book, in contrast, focuses on the settlement and unsettlement of legal norms at different levels of social organization, from the international and transnational to the national and local. It does so with respect to discrete, differentiated areas of law. These differentiated areas define the legal scope of a transnational legal order (TLO), which combine with its geographic scope to

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2 See, e.g., Boyle & Meyer 1998: 213–232 (applying a world polity model); Braithwaite & Drahos 2000 (examining thirteen areas of business law); Kingsbury 2009a: 3 (the global administrative law project chose the title of "global" administrative law under the intuition that regulatory structures are being pressed to respond to common demands "that have a common normative character, specifically an administrative law character. The growing commonality of these administrative law-type principles and practices is building a unity between otherwise disparate areas of governance").

3 For recent conceptual and empirical analysis of transnational law and legal ordering, see Shaffer 2013 (including a literature review around two conceptions of transnational law) and Cotterell 2012 For earlier distinctions between international law and transnational law, see Jessup 1956, and between international and transnational society, see Friedmann 1964: 37 ("international society is represented by the traditional system of interstate diplomatic relations, the relations of 'coexistence'"). See also Steiner et al.1994; Vagts 2010.

determine the boundaries of a TLO.

The development and normative settlement of TLOs differing in their legal and geographic scope raises the ensuing question of how distinct TLOs *align* with a particular issue and how these TLOs interact. Although there has been considerable work on the fragmentation of international law and international regimes (Raustiala & Victor 2004; Koskenniemi 2006; Alter & Meunier 2009), the existing literature has not focused on how the alignment of one or more international (or, in our terms, transnational) legal orders affects the legal order's institutionalization at different levels of social organization. In this book, we examine the relation of one or more TLOs' alignment with an issue to the institutionalization of legal norms across national jurisdictions and levels of social organization. Together these two dimensions of normative settlement and TLO alignment shape the *institutionalization* of a TLO, which occurs multi-directionally and recursively up from and down to the national and local levels.

In a recent book project, we investigated the question of how transnational legal ordering affects state change (Shaffer 2013; Halliday 2013). This new book project asks the ensuing and fundamental question – how do *transnational legal orders* rise and fall in their capacity to constrain and enable behaviors in diverse spheres of social life? Subsumed under this question are three subsidiary questions. First, what is a transnational legal *order*? Here the issue is: What is ordered? What behaviors are entailed in the notion of order? From a law and society perspective, these questions are fundamental for the study of law, whether law is viewed in international, transnational, national, comparative, or local terms. Second, what is a transnational *legal* order? If there are varieties of orders – social, political, economic – what is it about a *legal* order that renders it distinctive? Third, what is a *transnational* legal order? Why transnational rather than bilateral, regional, international, or global?

The answers to these questions ground our definition of a TLO as *a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions*. We construe "associated organizations and actors" broadly to include any organization or social formation, including networks. By actors we refer both to collective actors and to individuals whose activities and careers cross national boundaries. By authoritative we refer to the acceptance of the legal norms as reflected in law's understanding and practice. Nation-states remain central to TLOs (we do not live in a post-national world), but they do not alone define the territorial boundaries of legal ordering.

Our theory-building enterprise addresses a series of questions that this introductory chapter elaborates and the book's contributors address in their substantive chapters. They include:

- What is the *value-added* of the concept of TLOs compared to alternative frameworks?
- What are the *boundaries* of a TLO in terms of its geographic and legal scope?
- For *what reasons and under what conditions* are TLOs created?
- What processes drive the *settling and unsettling* of transnational legal norms?

- *How do TLOs interact and align?* Under what conditions are TLOs competitive or complementary?
- How do TLOs become *institutionalized*?
- What are the *impacts* of variously institutionalized TLOs on nation-states, markets, and other forms of social order?

This chapter sets out an analytic framework for building theory and studying TLOs, and it consists of six sections. Section I defines the concept of TLOs and its three composite terms – transnational, legal, and order. Section II compares and contrasts the theory and analytic framework of TLOs with three others developed in the disciplines of political science, sociology, and law – regime theory, world polity theory, and legal pluralism. In this way, it highlights the value of developing TLO theory and using the TLO analytic framework. Section III examines the differentiated scope of TLOs along two dimensions – their legal scope and geographical scope. Section IV formulates theoretical foundations for understanding the formation, development, and change of TLOs in terms of facilitating circumstances, precipitating conditions, and the recursivity of lawmaking and implementation across levels of social organization. Section V assesses the institutionalization of TLOs along our two dimensions – normative settlement and issue alignment among one or more TLOs. Section VI examines five classes of potential impacts of variously institutionalized TLOs. This chapter creates a conceptual framework for studying both the institutionalization of legal orders across national boundaries and the ensuing implications for law and social ordering more generally. Our concluding final chapter in the book then builds hypotheses from the case studies for future research addressing the framing, rising, contestation, nesting, mapping, resisting, structuring, decline and fall, moralities, and recursivity of TLOs.

## I. WHAT IS A TRANSNATIONAL LEGAL ORDER?

### A. What Is a Transnational Legal *Order*?

Law provides structure that enables humans to order the complexity of their environment. It does so, according to Niklas Luhmann (1985: 77), by creating "generalized normative behavioral expectations" through which humans communicate and interact.[4] This project broadly conceives of social *order* in terms of shared social norms and institutions that orient social expectations, communication, and behavior. In complex societies, social ordering is substantially done through law. This ordering becomes *authoritative* when the legal norms become accepted and institutionalized across national jurisdictions (Hurd 2008), in contrast to those legal norms that are

[4] "Law is essential as structure, because people cannot orient themselves towards others or expect their expectations without the congruent generalization of behavioral expectations." Luhmann 1985: 105.

simply formal or symbolic.

Yet before addressing the issue of law, one must ask: What is being ordered? What behaviors are entailed in the notion of order? A TLO is oriented to the regulation of behavior. More precisely, it endeavors to produce some order out of chaos, anarchy, unpredictability, or irregularity. The effort to produce order conventionally arises from a problem or issue whose occurrence or consequences are thought by one or another actor to be deleterious, or amenable to improvement.[5] Such problems include the ones studied in this book, including human trafficking, lack of access to life-saving medicines, the unaccountability of perpetrators of atrocities, the risks of climate change, double taxation across borders, harmful tax competition, insufficient domestic credit,and monetary stability and financial contagion.

Sociologically speaking, there is nothing "natural" about the diagnosis and rhetorical construction of a social behavior as a problem (Schneider 1985; Benford & Snow 2000). Behaviors may exist for a very long time before they are thought to be problematic by one or another actor, thereby setting in motion efforts to solve the problem. Agendasetting in general requires that "conditions become defined as problems when we come to believe that we should do something about them," which often reflects changes in values (Kingdon 2002: 109). For example, for years economic cartels were considered less as a problem and more as a solution to provide price stability and social stability between management and labor; today, in contrast, cartels are commonly viewed as a "supreme evil" (Shaffer et al. in press). Not only are problems socially and politically constructed; frequently there are diagnostic struggles by competing actors over the nature of a problem, whether there should be some social ordering to solve it, and what form that social order might take (Halliday 2009).

The construction of a "problem" is closely related to the purposes or goals of salient actors in creating a TLO. If an actor's generic purposes are to produce order, the particular purposes derive from imagined alternatives to existing problems. Put another way, a struggle over definition or specification of a problem lays the foundation for a struggle over a set of prescriptions to produce a particular outcome. Each of our case studies, therefore, aims to identify both the problem that some actors intend a TLO to solve and the kind of order or outcomes that proponents of a TLO aspire to accomplish. In an institutionalized TLO, the link between problems and outcomes is shaped through *legal* means, as we elaborate in the following discussion.

Table 1.1 illustrates a variety of areas addressed in this book, in which problems are construed that explicitly or implicitly seek certain outcomes. TLOs are directed to economic development through business facilitation (Block-Lieb & Halliday, Chapter 2 in this volume; Macdonald, Chapter 3), trade and monetary regulation (Shaffer & Waibel, Chapter 5), climate stabilization (Bodansky, Chapter 8), protection of intellectual property rights and public health (Helfer, Chapter 9, restraint of arbitrary state power through rule of law (Rajah, Chapter 10), and human rights protection

[5] A TLO may be oriented to further something advantageous such that the current situation is deleterious only in the sense of being less desirable than an alternative.

through criminal law (Lloyd & Simmons Chapter 12; Payne, Chapter 13). For instance, if transnational lawmakers confront a wide-ranging problem of how to limit the damages that failing companies might have within and beyond their national borders, then they also imagine economic and legal orders that would save rather than destroy companies, preserve value in the assets rather than allow that value to be eroded, save jobs rather than lose them, and protect financial stability in a country rather than allow instability to occur that may have regional or global adverse effects (Block-Lieb & Halliday, Chapter 2). Similarly, if governments and private traders wish to avoid beggar-thy-neighbor problems in a financial crisis, they imagine rules and institutions that can constrain such behavior (Shaffer & Waibel, Chapter 5). Notwithstanding the desire to create order, there is often considerable contestation regarding the appropriate substantive rules and monitoring organization in light of alternative constructions of a problem and diagnoses of its causes, which can reflect the normative and distributive concerns at stake.

It is critical to insist that for socio-legal scholars, the ultimate outcomes analyzed are not simply the creation of a set of international or transnational legal norms and organizations or the construction of a legal edifice inside a country or across countries (although these may be important first steps). Rather, they are changed normative orientations of those applying and practicing the law so as to affect behavior. Formal international and national law can often be simply expressive and symbolic, in which case formal legal change does not fundamentally change normative orientations but, at best, gives a sense to a relevant audience that a problem is being addressed. Thus, for socio-legal scholars, it is changed normative orientations of those applying and practicing the law that will increase the likelihood of producing changed behaviors, whether of heads of state, high-level officials, lower-level bureaucrats, judges, firms, managers, consumers, ship captains, military personnel, or men in their relations with women. Those behaviors will be structured in a social organization of some kind.

The concept of a legal "order," like a political order, is a broad one. Just as an illiberal political order may range from a totalitarian Stalinism to a National Socialist fascism to a Maoist Cambodia to an African kleptocracy to a Singaporean urbane authoritarianism, so, too, may a legal order not only contain much space for variation but also permit ongoing adaptation, differentiation, and evolution. If "order" provides the outer bounds of a TLO, its inner elements will usually permit comparable variation. An "order," in other words, connotes some regularity of behavioral orientation, communication and action, but it remains open to incremental change and considerable variation.

## B. WHAT IS A TRANSNATIONAL *LEGAL* ORDER?

If the goals of a TLO are to produce a certain kind of order that solves problems, then these goals raise the question of what is distinctive about a transnational *legal* order. There are a variety of ways to produce order that ameliorates a problem or produces regularity of normatively constrained behaviors. Social order can occur through traditional or habitual ways of confronting a problem, such as the norm against incest that can be found among most peoples. Political order is manifested in a variety of distributions of power, ranging from a medieval European monarchy or seventeenth-

century African kingdom to a liberal twentieth-century democracy, an illiberal totalitarian state, or balance of power politics in international relations (Bull 1977; Halliday & Karpik 2012). Religious order occurs when a system of beliefs regulates what clothes people should wear or what food they should eat or how they should treat their spouses or what provisions should be made for the poor. Economic order varies from subsistence economies to systems of bartering to asymmetries in economic bargaining to the emergence of impersonal markets of transactions in goods, services, labor, and capital.

We have defined a TLO as a *collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions*. In determining what is legal, we must stipulate what we mean by law in order to distinguish legal norms from other social norms. This distinction is not an easy or an uncontested one. We thus do not adopt a timeless definitional concept of law (Tamanaha 2000). Rather, we recognize that, from a socio-legal perspective, *law* establishes generalized normative expectations understood and used by actors within a particular context for purposes of constraining and facilitating particular behaviors.

We stipulate what we mean by law for purposes of organizing a coherent, cross-cutting, collective research project. To capture the dynamic of the formation and institutionalization of TLOs, we stipulate that a transnational order is *legal* when it involves international or transnational legal organizations or networks, directly or indirectly engages multiple national and local legal institutions, and assumes a recognizable legal form. The legal in a TLO, we stipulate, includes the following three attributes, which vary in terms of their combination, affecting the authority of the norms.

The first attribute: *The norms are produced by, or in conjunction with, a legal organization or network that transcends or spans the nation-state*. Within the nation-state, primary institutions of law include legislatures, executive departments, agencies, and courts, often viewed in terms of separation of powers (Montesquieu 1748). At the international and transnational level, the relevant analogous institution producing transnational legal norms might be a quasi-legislature engaged in secondary lawmaking, such as the UN Security Council (Alvarez 2005); the International Monetary Fund (Shaffer & Waibel, Chapter 5); the Conference of the Parties to a convention, such as the members of the Convention on Trade in Endangered Species (CITES) that meet around once every three years to revise lists of endangered or threatened species; or UNIDROIT and the Hague Conference on Private International Law (Block-Lieb & Halliday 2007). It could be a quasi-regulatory body such as the International Civil Aviation Organization (ICAO) or the International Atomic Energy Agency (IAEA). Or it could be a court, such as the Court of Justice of the European Union, the European Court of Human Rights, the Inter-American Court of Human Rights, the Andean Court of Justice, the International Criminal Court, the International Court of Justice, or the Appellate Body of the World Trade Organization (WTO) (Alter 2009).

The degree of institutional formality of this first attribute may vary considerably in degree. Much transnational legal ordering involves networks that develop legal

norms that are directed toward enactment or recognition and enforcement within nation-states, our second attribute. For example, transnational competition law norms are developed through the informal International Competition Network (ICN) as well as the formal Organisation for Economic Cooperation and Development (OECD) (Shaffer et al. in press). Similarly, networks of financial officials lobbied by private banks and other actors develop transnational financial law norms (Helleiner, Chapter 6).

The resulting transnational legal norms may reflect preexisting national ones, such as those of powerful nation-states, or they may reflect norms developed by private parties and networks through bottom-up processes. These parties, whether they are nation-states or non-state actors, nonetheless tend to enroll international and transnational organizations and networks to legitimize the norms and thereby enhance their authority. The legal norms, in other words, are not simply produced through an international or transnational legal organization or network. Rather, these organizations and networks are part of the process of the legal norms' formation, conveyance, and potential institutionalization.

These organizations and networks are important not only for the production of legal norms but also for communicating, interpreting, monitoring, and enforcing compliance with them, including through peer review and (sometimes) adjudication. The organizations are often formal, having permanent staffs, but they may also be informal, consisting of networks of officials or other actors that periodically meet (Vabulas & Snidal 2013). The international trade law of the WTO, for example, consists of both formal dispute settlement and more informal peer review–based networks.[6] Competition law, in comparison, is less institutionalized at the international level but is developed both through the OECD, a formal organization, and the ICN, an informal one, involving peer review of networked government officials and legal professionals.

The second attribute: *The norms, directly or indirectly, formally or informally, engage legal institutions within multiple nation-states, whether in the adoption, recognition, or enforcement of the norms*. Although our conception of law may seem broad, in practice our stipulation generally accords with a positivist conception at some stage of legal ordering, because international and transnational soft-law instruments are directed toward, or can otherwise indirectly affect, the application of national law, including through the recognition and enforcement of private custom and contract. We contend that the nation-state remains central to lawmaking, law recognition, and law enforcement in the world today, and it is not simply bypassed by transnational legal ordering. The propagation of transnational legal norms can give rise to a TLO by shaping domestic statutes, regulations, and their interpretation, or through the recognition of business custom and privately made norms. TLOs are thus typically connected at some point to nation-state law and practice, including through the enforcement of private contracts and undertakings (Whytock 2009). It would be a mistake to develop a concept of transnational law that is wholly autonomous from

[6] The WTO resolves not only international-level disputes but works most effectively through penetrating into national legal systems by including substantive and procedural requirements that national government agencies and courts apply. Shaffer 2014.

national law and legal institutions. Private lawmaking is facilitated and structured by public lawmaking (Bartley 2007). The nation-state participates in its own transformation in transnational legal ordering. Transnational legal orders are thus not wholly autonomous of nation-state legal institutions.

To give examples, UNCITRAL's 2007 Legislative Guide on Secured Transactions is directed to legislatures across the world with the aim of facilitating the granting of credit (Macdonald, Chapter 3). The World Bank and International Monetary Fund (IMF) use diagnostic instruments, such as Reports on the Observance of Standards and Codes (ROSCs) to provide legal norms regarding financial standards to be enacted by national lawmakers (Shaffer & Waibel, Chapter 5). The Codex Alimentarius Commission adopts food safety standards that member states are encouraged to adopt nationally, further incentivized by WTO rules (Büthe, Chapter 7). The UN Human Rights Commission promotes the Paris Principles for national adoption to improve human rights practices (Merry 2003; Merry 2005; Merry, Chapter 11). The World Bank and World Justice Projects design rule of law indicators to spur change through domestic legal institutions (Rajah, Chapter 10). The initial transnational legal norms may or may not be binding. In fact, what these instruments have in common is that they are not binding legal instruments in themselves; rather actors aim to catalyze through these instruments the adoption, recognition, and enforcement of binding, authoritative legal norms in nation-states.

Our concept of a TLO incorporates private lawmaking. Private transnational institutions develop formalized norms that are to be used in contracts and, if necessary, ultimately recognized and enforced by national courts. The International Chamber of Commerce (ICC) in Paris issues rules regarding letters of credit, known as the Uniform Customs and Practices (UCP), which are incorporated by banks into contracts and enforced by courts. Because of their predominant use in trade, these norms affect business custom and in turn shape the interpretation of the meaning of national public law statutes on letters of credit, so the norms become embedded in national legal orders (Levit 2008). The ICC also issues INCOTERMS for incorporation into international sales contracts that again are recognized and applied by national courts as the prevailing law between contracting parties, whether through interpreting contracts or business custom. Similarly, private international standard-setting bodies, such as the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC), issue product standards that are adopted by private companies and trade associations around the world (Büthe & Mattli 2011). The "fair trade" labels created by private bodies, such as for apparel, coffee, and sustainably harvested timber, are subject to national contract and consumer law. These various privately made rules and standards, as well as more informal business custom, are incorporated into contracts and are recognized and enforced by national agencies and courts and international arbitral bodies. They thereby affect the liability of parties in disputes and the general understanding of the allocation of risk of loss for goods and services in international commerce.[7] Private commercial arbitration awards, although

[7] Gunther Teubner in writing about "global law without a state" similarly views transnational private "contracting itself as a source of law." See Teubner 1997. Unlike

made outside of official public law systems, are validated through the recognition and enforcement of arbitral judgments by these systems, once again instantiating the transnational links between private transnational institutions and national legal systems (Whytock 2009).

Similarly, religious organizations develop norms that may be codified in texts, as reflected in the canon law of Roman Catholicism, the Koran in Islam, and the Torah and Talmud in Judaism. Religious figures and institutions, such as Eastern Orthodox synods, Roman Catholic ecumenical councils, Muslim imams and judges, and Jewish rabbis, interpret these texts. These norms have a transnational geographic scope. For the purposes of this collective project, however, we view them in terms of religious ordering until they become recognized within national or local law and applied and enforced by national or local legal institutions. In many nation-states, the state formally recognizes religious law and religious institutions as interpreters and enforcers of these norms, in particular, in Islamic states and in Israel as regards much of family law. In these cases, for the purposes of our project, the norms are legal ones that are derived from religious norms, just as we consider private business norms to be legal norms when they are subject to recognition and enforcement through nation-state institutions.[8] We address the interaction of state legal norms with religious and market norms in Section VI. 5.

The third attribute: *The norms are produced in recognizable legal forms*. We distinguish the legal from other forms of social ordering in that the legal is *formalized* through the use of formal texts, whether these texts take the form of written rules, standards, model codes, or judicial judgments.[9] Such legal texts include substantive and procedural law in the form of statutory, regulatory, and case law in national settings and their analogues (or family resemblances) in transnational settings, namely treaties, codes, model laws, administrative rules and guidelines, and court-like decisions.

Here again we can note the family resemblances between what is produced by international and transnational bodies and by national ones, even though the formalized texts may more frequently take a soft-law form at the transnational level. For example, UNCITRAL and UNIDROIT produce conventions or model laws (Block-Lieb & Halliday, Chapter 2; Macdonald, Chapter 3). International regulatory bodies, such as

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Teubner and his followers, however, the TLO project highlights the ongoing importance of the nation-state.

[8] We recognize that during the Middle Ages, a *lex mercatoria* developed outside of a nation-state system and that some have claimed that a "new *lex mercatoria*" is developing. Empirical work, however, shows that such a "new *lex mercatoria*" is marginal in dispute settlement. See Dasser 2008; Drahozal 2005. Arbitral decisions to enforce it depend on national courts. See Whytock 2009. The attributes of a transnational network or body, legal form, and linkage with the nation-state's legal institutions bring this phenomenon within our TLO concept. Similarly, new work addresses Islamic finance as a form of transnational legal ordering. See McKeen-Edwards & Porter 2013: 141–146. The contracts at issue certainly reflect the attribute of legal form that we noted earlier in the chapter. They too ultimately depend on recognition before national courts for enforcement and thus are included in our concept of TLOs.

[9] Legal principles as addressed by Ronald Dworkin, for example, become formal when they are set forth in statues, regulations, and court judgments.

Codex Alimentarius and the World Animal Health Organization, produce rules drafted in legal language (Büthe, Chapter 7). The World Bank and IMF draft and sign "arrangements" with conditionality – formally named stand-by arrangements but commonly called structural adjustment agreements – which build from common templates and set forth conditions for further financing tied to changes in national law and practice (Shaffer & Waibel, Chapter 5). Regional and international courts and arbitral tribunals, as well as national ones, produce rulings in legal disputes that interpret, clarify, develop, and apply the legal norms, whether this involves the interpretation of treaties, customary international law,[10] or commercial contracts or the assessment of the compliance of national, local, or business law and practice with them.

The texts that interest us include those that are of a hard-law and a soft-law nature (Abbott & Snidal 2000; Shaffer & Pollack 2010), including those developed by private organizations. This range of texts is of interest because the texts generally aim to shape the production, understanding, or application of law, including through national legal institutions. Private organizations, such as business associations and multinational companies, formalize text in form contracts and in internal guides to practice that shape meaning (Edelman & Talesh 2011). Walmart, for example, does so through its contractual requirements for global supply chains (Backer 2007).

As part of the lawmaking and law-application process, these texts may assume both *prescriptive* and *diagnostic* forms that complementarily aim to shape, monitor, and enforce particular legal norms (Halliday & Carruthers 2007). Prescriptions express legal principles, standards, or rules that may be immediately binding or are only prospectively binding through subsequent national statutes, agency regulations, or judicial decisions. Diagnostic instruments complement them by measuring law, legal compliance, and national adherence to transnational standards, and these instruments are increasingly used in transnational legal ordering (Davis et al.2012; Halliday 2010). Both Rajah and Merry (in Chapter 10 and 11, respectively) demonstrate how proponents construct indicators to shape the understanding of human rights law and rule of law principles and thus discipline legal actors. Proponents direct these texts to shape the meaning, understanding, and practice of law within nation-states and among private actors.

Although we conceive of the legal in terms of texts and organizations, transnational legal ordering is ultimately processual in nature, as reflected in our second attribute, which states that the legal norms are directed at, or indirectly engage, legal institutions within nation-states. This process is both top-down and bottom-up, involving the formation, conveyance, and practice of legal norms and the recursive interaction between different levels of social organization through which legal norms become institutionalized. This process often involves considerable contestation in light of different perspectives, values, priorities, and distributive implications. If institutionalized, the legal norms orient social expectations, communication, and

[10] Customary international law fits within our definition of legal, as do general principles of law and other forms of non-treaty international law, in that it ultimately becomes formalized through institutional recognition and application. In this way, it has some similarities to common law.

action.

For legal theorists, our processual conception of legal ordering highlights a number of key characteristics of the TLO framework. First, those using the TLO concept address the contingent, dynamic, and *interactive processes* whereby "incipient law" (Llewellyn 1940) that is generated becomes binding and authoritative through its incorporation into national law and legal practice across jurisdictions. These generative processes are transnational in scope, involving the interaction of transnational, national, and local lawmaking, implementation, and practice (Brunée & Toope 2010; Koh 1996; Shaffer 2013).

Second, this conception of legal ordering includes both mandatory legal norms that are binding and backed by coercion as well as non-binding norms that are developed by transnational bodies and directed at nation-states (often referred to as *"hard" and "soft" law* in the legal literature). Actors aim for soft-law norms to provide a common orientation and means of communication that will ultimately shape behavior, such as through enactment into or recognition and enforcement under national law.

Third, these binding and non-binding norms may be developed by public bodies, such as the WTO or UNIDROIT, and private bodies, such as the ICC or ISO. They thus involve both *public and private transnational lawmaking*. Actors as diverse as bureaucratic networks of public officials, hybrid public-private networks, and associations of purely private parties develop and convey these norms.[11]

Fourth, the TLO concept embraces a legal realist perspective in which law is constituted by both *power and reason*, exercising its authority both through coercion and a normativity that is grounded in legal reasoning and process (Dagan 2007; Nourse & Shaffer 2009). Actors invest in law precisely to advance their perceptions of their interests and normative goals. More powerful economic and geopolitical actors often prevail in having their interests and goals reflected and furthered in law. It is no surprise, as captured in many of the book's chapters, that U.S. and European legal norms are often reflected in transnational ones. Transnational legal norms can, however, concomitantly convey normativity outside of the control of their initial sponsors. Consistent with legal realism, law's reason and power remain in a constant and dynamic tension that is constitutive of TLOs, just as it is of national law viewed separately. Stated otherwise, this project is concerned with perspectives addressed in both functional and conflict theories of the sociology of law and in both rationalist and constructivist theories of international and transnational law.

Fifth, from this processual perspective, transnational law will vary in the *weight*

[11] Cf. Kingsbury et al.2005: 53 ("with some exceptions, global administration consists mostly of administrative bodies with the power to make recommendations but not binding rules, or of regulatory networks or other intergovernmental cooperative arrangements with informal decisionmaking procedures").

*of its authority* as a reflection of perceptions of the legitimacy of its mode of production (Franck 1990; ; Suchman 1995; Bodansky 1999; Hurd 2008) and other properties, such as its rationality, proportionality, and rule of law-type characteristics.[12] Law's weight, in other words, cannot be reduced to power and coercion. Law's weight rather reflects these characteristics that facilitate law's acceptance by those to whom it applies (Tyler 2006). Social scientists who ignore law's normativity fail to fully capture how legal norms matter; a central aim of this project is thus to call attention to the role of transnational *legal* orders, including through their enrollment of national legal institutions and actors.

For legal theorists, our processual concept of legal orders both overlaps and contrasts with other concepts of law. Unlike for many legal positivists, the legal in TLOs requires no single hierarchy of norms; nor is it always formally binding; nor is it invariably backed by coercion.[13] Unlike pedigree concepts of law, a focus on the dynamic interaction of actors producing, interpreting, and otherwise engaging with legal norms lessens emphasis on sources of law, primary and secondary rules, and a rule of recognition.[14] Unlike foundationalist theories of law, we do not rely on normative criteria to stipulate what we mean by law,[15] even though we stress that law's normative character requires closer attention than it has often been given in social science scholarship.

## C. WHAT IS A *TRANSNATIONAL* LEGAL ORDER?

If a national legal order refers to a legal system inside a nation-state that exercises sovereign jurisdiction, and if a global legal order refers to legal ordering that covers all nations and localities, then TLOs span legal orders that vary in their geographic scope, from bilateral and plurilateral agreements to private transnational codes to regional governance bodies to global regulatory ordering. Such TLOs may apply to trans-

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[12] Cf. Kingsbury 2009a:29, 30, 34 (focusing on law's "publicness," which includes principles of legality, rationality, proportionality, rule of law, and human rights). Kingsbury is up front in noting that, from the perspective of legal theory, "any particular concept of law is in part political and in part conceptual." Ibid.:57; Kingsbury 2009b. Similarly, David Dyzenhaus (2009) turns to Lon Fuller's eight criteria of legality – those of generality, publicity, non-retroactivity, clarity, non-contradiction, possibility of execution, constancy, and congruence – to call for a theory of global administrative law that more clearly specifies global administrative law's normative implications. From our perspective, these properties should be considered variations on the attributes of formal law that will yield more or less authority.

[13] Cf. Hart 1961 (rule of recognition); Austin 1832 (coercion); Weil 1983; Klabbers 1996 (binding nature).

[14] See, e.g., Rubin 1989 (critiquing the pedigree concept of law in light of the rise of the administrative state).

[15] Cf. Kingsbury's approach in the global administrative law project, which has been critiqued for being a natural law theory in positivist Hartian garb, partly because of his turn to Fuller. See Somek 2009; d'Aspremont 2011: 120–121, 124–125.

boundary activities or simply have effects in more than one jurisdiction (Shaffer 2013).

TLOs respond to the development of new forms of transnational social connections that reflect economic and cultural globalization (Cottereell 2008; Sassen 2008). In disparate fields, regulators, businesses, and civil society actors now frequently participate in social contexts beyond the nation-state. These processes spur the development of intersecting, transnational economic, social, regulatory, and judicial networks that vary in their geographic and substantive scopes. Participants in these networks act as intermediaries among local, national, and transnational governance arenas (Slaughter 2004; Halliday & Carruthers 2006; Shaffer 2013). A TLO instantiates and helps institutionalize these processes.

Legal norms that become transnational can originate inside or outside of the nation-state. These norms may emerge from particular nation-states, which Boaventura de Sousa Santos (1995) calls "globalized localisms," or they may be formulated in transnational arenas. Even where the legal norms of a particular nation-state, for instance those of the United States or Europe, infuse transnational legal norms, they invariably are adapted transnationally both to resolve divisions among conflicting public and private actors and to legitimate the norms. These transnational legal norms enable transnational coordination to address common challenges and thus enhance the pursuit of national goals, and they constrain the sovereign choices of nation-states by elevating some regulatory alternatives over others (Grewal 2008). In such cases, the authority of transnational legal norms will often depend on the regulatory authority of nation-states, requiring settlement of the legal norms in the practices and mentalities of national and local legal actors. Nation-state institutions provide legitimating mechanisms within the national context by implementing and enforcing the legal norms, so the nation-state is engaged in its own transformation (Sassen 2008; Shaffer 2013).

The TLO concept thus encompasses, but it is not limited to, what is conventionally considered to be *international public* and *international private law*. Traditionally, international public law refers to legal ordering (largely) covering relations between nation-states and the operation of international organizations created by nation-states.[16] International private law traditionally addresses conflicts between national jurisdictions asserting authority over the transnational activities of private actors.[17] The

[16] Malanczuk 1997: 3 ("International law… is primarily concerned with the legal regulation of the international intercourse of states"). Human rights and some regulatory law are now conventionally included within public international law, although the regulatory turn of public international law is a relatively new one.

[17] In Europe, private international law continues to mean conflict of laws and is a standard course in the law school curriculum. In the United States, academics sometimes colloquially refer to private international law as the law addressing international business transactions, comprised mostly of national law but also potentially including some non-state law called *lex mercatoria*.

concept of transnational law encompasses both and extends beyond them.[18]

Whereas international law is also ultimately concerned with order (Bull 1977), transnational legal ordering today involves more than nation-state relations and rather reaches deep within nation-states. The TLO concept is thus conceptually different, although it encompasses traditional international law and compliance with it. Many international law scholars have tried to stretch the conventional concept of international law to account for the proliferation of transnational legal normmaking across substantive fields, but the concept has a dualist bias (international/national) and has been stretched to such an extent that it has lost its mooring. We need an orienting concept that addresses legal ordering in the world today that reaches across and deep within nation-states. We need a concept that addresses both bottom-up and top-down processes of legal ordering across nation-states in light of significant shifts in transnational social connectedness. We need a concept, moreover, in which national law and practice remain integral to the formation and institutionalization of legal norms, one in which they are neither viewed as being bypassed by transnational legal ordering nor as being autonomous from processes of international and transnational legal normmaking and conveyance.

In sum, the concept of a TLO has three key elements:

1) A TLO seeks to produce *order* in a domain of social activity or an issue area that relevant actors have construed as a "problem" of some sort or another;

2) A TLO is *legal* insofar as it has legal form, is produced by or in connection with a transnational body or network, and is directed toward or indirectly engages national legal bodies;

3) A TLO is *transnational* insofar as it orders social relationships that transcend the nation-state in one way or another.

It immediately becomes apparent that TLOs may occur in bewildering profusion, variety, and complexity. The impact of transnational legal ordering will vary along a spectrum, so one may speak at times of a fully fledged TLO or, more frequently, of only partial transnational legal ordering. In the latter case, the development, understanding, and application of national legal norms are influenced but not determined by transnational legal ordering, so a TLO is not fully institutionalized. In this respect, it is important to recall that national legal ordering also varies along a spectrum, as long depicted in law and society research regarding the "gap" between the law in action and the law on the books. Consider the history of U.S. civil rights law (Rosenberg 2008) or of child marriage law in India (Goodwin 2013), for instance. Our task is to begin to produce a theoretically infused and empirically based approach to

[18] Compare Jessup (1956) (in which he encompasses traditional public and international public law as part of transnational law) to Teubner (2012); Zumbansen (2010); and Calliess (2012) (all viewing transnational civil society as a lawmaker and not including international law within their conception of transnational law).

mapping and explaining the formation, institutionalization, and impact of TLOs.

One concern with the TLO concept might be that its focus on order could create a false sense of coherence and of static social relations and thus elide the contestation, power, and ideology that are part of transnational legal normmaking, from the conceptualization of a "problem" through legal normmaking to its transnational, national, and local institutionalization. We believe, however, that it would be a fundamental mistake not to focus on order, given that, from a socio-legal perspective, order and ordering lie at the core of law and its institutionalization. Our socio-legal focus on the dynamic, recursive processes in which legal norms become settled and unsettled helps unpack both the contests and the normalization processes within normmaking and its institutionalization. The ensuing chapters on the TLO processes that give rise to shifting conceptions of human rights, the rule of law, business law, and regulatory law exhibit what is at stake across all areas of law.

## II. TRANSNATIONAL LEGAL ORDERS AND CONTRASTING THEORETICAL FRAMEWORKS

The concept of a TLO seeks to build on and transcend limitations in three related bodies of theory respectively from political science, sociology, and law.

### A. *Regime Theory*

International relations scholars developed regime theory in the 1980s to respond to the dominant theory of realism, which, in turn, had reacted against what it termed "idealist" approaches that placed hope in international law and institutions, such as the United Nations and the earlier League of Nations. Realists contended that these institutions had no impact on nation-state behavior, because all international politics could be understood in terms of nation-state interests and structures of power.[19] Regime theory, in contrast, addressed the impact of institutionalized principles, norms, rules, and procedures on outcomes and thereby staked out a middle ground between idealism and realism. It viewed regimes as "intervening variables" between such basic causal variables as power, interest, and values, on the one hand, and outcomes and behavior, on the other hand (Krasner 1983: 1).

Stephen Krasner's "consensus definition" of "regimes" (Hasenclever et al. 1997: 11) defined them as "sets of implicit or explicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations" (Krasner 1983: 2).[20] Principles, norms, and rules can be

[19] Realist theory reached its apogee in the "billiard ball" metaphor applied to structural realism, which explained international politics simply in terms of the interaction of states, such that the internal politics and society of nation-states exercise no influence.

[20] For Krasner, changes in principles and norms constituted a change of a regime, whereas changes in rules and decision-making procedures constituted a change within a regime.

expressed in legal terms, so regime theory is an important predecessor to TLO theory. Nonetheless, TLO theory distinguishes itself from regime theory in three important respects.

*From exclusion to inclusion of domestic politics as endogenous to TLO theory*. Regime theory is nation-state-centric; it focuses on international relations and does not integrate domestic politics in its analysis of normative development and change. It thus neglects entirely the recursive interaction of the domestic and international in the endogenous dynamics of legal ordering, which we develop below. Even an alternative definition of regimes that casts its lens on national behavior, defining regimes "as multilateral agreements among nation-states aiming to regulate national actions within an issue area" (Haggard & Simmons 1987: 495),[21] fails to capture the multi-level, dynamic, recursive (both bottom-up and top-down), transnational element of transnational legal ordering. TLO theory responds to the call for "theories of domestic processes or theories linking the international and domestic levels" (Haggard & Simmons 1987: 515–516). It does so by focusing on the interactive, recursive processes that give rise to TLOs. Unlike regimes in regime theory, transnational legal norms, even though they may be thoroughly settled and uncontested at the transnational level, do not constitute a TLO until some evidence can be adduced that the transnational norms are reflected in national legal norms and that national legal norms place their imprint on local legal norms, and there is some degree of normative concordance among these several levels.

*From state-centric to actor-centric*. Regime theory, like most international relations theory (as reflected in the term "inter-national relations"),[22] is nation-state-centric. In contrast, the theory of TLOs does not posit unified nation-states and does not focus on nation-states as the sole relevant actors in creating TLOs. Rather, TLO theory calls attention to the fragmentation and disaggregation of the nation-state in its constituent branches and agencies, as well as to the key role in TLOs of private actors, such as business representatives, professional lawyers and accountants, and representatives of non-governmental organizations. All of these may variously conflict or cooperate in ways that limit the explanatory power of understanding legal ordering only through nation-states.

*From politics to law*. Regime theory failed to adequately address law and law's normativity. For instance, a comprehensive review of regime theory published in 1997 (Hasenclever et al.1997) had no entry for "law" in the index, and the term "international law" is scarcely found in the entire text. Arguably, regime theory spoke

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The dividing line between these components nonetheless blurs. As Stephan Haggard and Beth Simmons (1987) note, the term "norms" is defined to include "standards of behavior defined in terms of rights and obligations," and the term "principles" includes beliefs of "rectitude."

[21] Haggard and Simmons cite, among other works, Young 1980.

[22] Robert Keohane (neo-institutionalist), Stephen Krasner (realist), and Alexander Wendt (constructivist) all focus on states.

the language of law by addressing principles, norms, rules, and procedures,[23] but, in the spirit of Molière, regime theorists spoke law without knowing it (or at least acknowledging it), likely because of their desire to distance themselves from any hint of the legacy of idealism.[24] Yet we cannot understand social ordering today without studying how legal norms settle and, in our case, in a manner that is transnational in scope.

In the past decade, international relations theory has turned to law, signified notably by the special issue of *International Organizations* on *Legalization and World Politics* (2000) and the responses to it.[25] Yet it often does so with a simplified notion that the place of law in regimes can be encapsulated in terms of compliance by nation-states with international law. It thereby fails to capture the rich and complex interplay of law in the recursive interaction of international, transnational, and national law and politics in legal ordering. This constricted analysis misses a number of the broader dimensions of law. The dimensions of (a) legal form (such as soft and hard law) and (b) legal institutions (such as agencies and courts) have been increasingly addressed in international relations theory.[26] However, the dimensions of (c) legal concepts and doctrine (including legal meaning conveyed through the practice and interpretation of law) and (d) legal professionals (such as government lawyers, private lawyers, prosecutors, judges, and academics) have been addressed much less. Legal professionals with their legal epistemologies create, interpret, and apply law, and they thus shape law's meaning, scope, and impact. These legal professionals can be viewed collectively as part of a "legal complex" (Karpik & Halliday 2011).

More recently, with the proliferation of international organizations and treaties, scholars have begun to address the phenomenon of "regime complexes," defined as "a collective of partially overlapping and nonhierarchical regimes" (Raustiala & Victor 2004: 277). This concept has been applied to many issue areas, in particular to the environment, plant genetic resources (Raustiala & Victor 2004), genetically modified foods (Pollack & Shaffer 2009), trade (Alter & Meunier 2009), and climate change (Abbott & Snidal 2012b). The concept of regime complexes converges with that of our concept of institutional alignment (see below) as a key factor in explaining the degree to which a TLO is institutionalized in a particular domain. The critical difference with

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[23] For example, even the legal theorist H. L. A. Hart (1961), with his expanded conception of inclusive legal positivism, was open to including principles in his concept of law.

[24] Jean Baptiste Poquelin Molière (1670), *Le bourgeois gentilhomme*, act II, scene V: "[I]l y a plus de quarante ans que je dis de la prose sans que j'en susse rien, et je vous suis le plus obligé du monde de m'avoir appris cela."

[25] For an earlier call within international relations for such studies, see Finnemore & Sikkink 1998:915 ("Since normative contestation in law is so explicit and well documented, and since much of contemporary norm politics in the world has a strong legal component, we believe an examination of legal mechanisms for norm selection and dissemination will be instructive for IR scholars").

[26] These first two dimensions are explicitly covered, for example, in the special issue of *International Organization* on *Legalization and World Politics*, in the articles on Hard and Soft Law in International Governance (Abbott & Snidal 2000), and on Legalized Dispute Resolution: Interstate and Transnational (by Keohane et al. 2000).

the TLO concept, once more, is that the TLO concept focuses on the recursive interaction of international, national, and local lawmaking and practice in transnationally shaping social orders, ultimately looking to convergence in legal norms to constitute an institutionalized TLO.

### *B. World Polity Theory*

In the latter day turn of sociology toward the study of law and globalization (Halliday & Osinsky 2006; Shaffer & Ginsburg 2012), the most prominent sociological theory of the diffusion of legal norms, at least in the United States, has been the neo-institutionalism of world polity or world society theory.[27] World polity theory seeks to solve the puzzle of why it is that there is much less variation than might be expected in laws that have been adopted by nation-states in past decades. The theory proposes that the degree of isomorphism in "rationalized" legal systems and procedures follows from the power of global models or "scripts," including legal ones, to shape nation-state, society, and individual identities and behavior in a top-down manner involving large-scale structural processes (Meyer et al. 1997a; Boyle & Meyer 1998). Through a mechanism of acculturation, rather than bargaining or persuasion (Goodman & Jinks 2004; 2013), nation-states are socialized to adopt a modern, rationalistic culture that is based on law. World polity theorists argue that global norms become rhetorically stylized as "universal," "modern," and "advanced," and they maintain that nation-states adopt global norms in order to ensure the nation-state's own legitimacy. Hence, the "world polity" (or rationalistic world cultural system) constitutes the transnational order, so certain nation-state legal orders are given ascendancy over other organizational forms.

Armed with this theory of a world society and polity, much research demonstrates the diffusion of legal norms across multiple domains, such as those of human rights, the environment, and family law, in order for nation-states to signal their adherence to global cultural norms (Boli-Bennett & Meyer 1978; Boyle 2002; Goodman & Jinks 2004). Organizations and elites within nation-states, and in particular non-governmental organizations with transnational links, promote normative frames to advance change within nation-states (Boyle & Meyer 1998; Kim & Boyle 2012). For example, Meyer et al. (1997b) explain the development of a "world environmental regime" not in terms of nation-state power or interests but rather in terms of the expansion of a global, scientific, rationalistic culture and discourse. This in turn facilitated the development of a world organizational structure, principally the UN system, which in turn supported the diffusion of governmental and non-governmental organization and activity in this area.

[27] As Halliday & Osinsky (2006: 447–448) earlier wrote, "law has had an equivocal status in the sociology of globalization, just as globalization has not received the attention it warrants in the sociology of law. On the globalization side, most scholarly literatures avoid law, with the notable exception of world polity theory."

World polity theory does not predict that nation-states will actually practice the universal legal norms that they adopt. Rather, it predicts that there will often be significant "decoupling" between the law adapted and actual practice in light of the diverse social settings implicated. They thus show how the adoption of global legal norms can be superficial, leading to institutional isomorphism, in which nation-states adopt similar bureaucratic forms but in which there is a decoupling of form and practice (Hafner-Burton et al.2008). Elizabeth Boyle (2002), for example, shows that global legal norms based on "universal" scientific, moral, and legal claims prohibiting the practice of female circumcision are diffused throughout civil society networks, but their implementation is subject to particular local conditions that have a greater affinity with "modern" norms.

The theory of TLOs shares with world polity theory the problem of explaining the expansion and diffusion of law in different domains across societies. Both projects address the social construction of problems and imagined solutions beyond the nation-state, and both address transnational ordering through law. Yet TLO theory distinguishes itself from world polity theory in three major respects.

First, the TLO framework pays much greater attention to *politics, material power, and agency* in the construction of TLOs. In TLO theory, power and agency complement and supplement the role of structural framing within a global cultural context.

Second, the TLO project replaces a global-centric, top-down concept of norms traveling from the center to the periphery with a *dynamic, recursive process* of exchange and negotiation between transnational, national, and even local norms. In particular, it addresses how legal norms developed by powerful nation-states, as well as by others, can be conveyed into international normmaking arenas. It likewise assesses the diachronic development, settlement, and unsettlement of these norms through the recursive interaction of international, transnational, national, and local arenas in which actors promote, resist, adapt, and aim to shape these norms (Halliday & Carruthers 2007; 2009; Shaffer 2013).

Third, the concept of a TLO does not postulate an analytic starting point of universal global norms that form part of a modern world culture. Rather, it posits that *transnational* legal orders will vary in geographic and legal scope as a result of the recursive interaction of public and private actors engaged in different social arenas over time.

### *C. Global and Transnational Legal Pluralism*

Building from work in anthropology on colonial and neo-colonial law (Merry 1991) and from historical work on medieval law (Tamanaha 2008), legal scholars have increasingly addressed global and transnational legal developments from the perspective of legal pluralism, whether in a fragmented international law system (such as Burke-White 2004 and Koskenniemi 2006), in transnational private legal ordering (such as Teubner 2012; Calliess & Zumbansen 2010; Zumbansen 2010; and Michaels 2009), or in the interaction between global and transnational lawmaking and national

legal orders (such as Berman 2012 and Krisch 2010).[28] This recognition of the plurality of legal orders accords with research on TLOs and the pluralities of TLOs that can conflict or cooperate and that vary in their substantive legal and geographic scope.

Legal pluralists focus on normative contestation and conflict between disparate legal orders. For legal pluralists, conflicts between legal norms occur horizontally between different international and transnational regimes and vertically between different international, transnational, and domestic legal orders.[29] Legal pluralists also use the term "legal pluralism" to characterize not only "the interaction between competing and conflicting official legal systems" but also "between an official legal system and … other normative systems."[30] Legal pluralists thus assess how groups and individuals defend one particular normative system (such as an official legal or non-official normative system) compared to another or how they strategically take advantage of differences among legal orders on an ad hoc basis (Tamanaha 2008: 400).

Many legal pluralists focus on conflict because they adopt a normative commitment against the establishment of a hierarchy of legal institutions and norms.[31] Paul Berman (2009: 229) thus writes, "legal pluralists of all stripes have seen themselves in opposition to so-called legal centralists, who focus on formal state law," so "pluralism offers possibilities for thinking about spaces of resistance to state law" (237). Legal pluralists tend to view state law as "jurispathic" because it "kills" other forms of normative ordering.[32] More recently, global legal pluralism has taken a stand against the idea of a monist international legal order that constrains choices, whether they are those of communities or of nation-states (Berman 2009; Krisch 2010).

Although TLO theory overlaps with legal pluralism in addressing a plurality of legal orders and highlighting contestation regarding the development and application of legal norms, including how different TLOs compete with each other, it contrasts

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[28] We adopt these categories from Tamanaha 2008. The authors cited come from our own literature review.

[29] See Teubner & Korth 2012 (focusing on "clashes," "conflicts," and "collisions"); Teubner &Fischer-Lescano 2004. Teubner and Korth theorize about the "double fragmentation of world society and its law," which is double because, "firstly, the functional differential of modern society causes collisions between different social functional systems and the legal norms coupled to them" and, "secondly, differences between social organizational principles cause clashes between the formal law of modern society and the socially embedded legal systems of indigenous societies." Id.

[30] As Tamanaha writes, "[a] state of 'legal pluralism,' then, exists whenever more than one kind of 'law' is recognized through the social practices of a group in a given social arena, which is a relatively common situation." Tamanaha 2000: 315.

[31] The concept of legal pluralism grew out of studies of the interaction of colonial law and native legal traditions, on the one hand, and the law of the Austro-Hungarian Empire and local law, on the other hand. See, e.g.,Ehrlich 1913; Merry 1991; Merry 2000; Likhovski 2009 ("Indeed, if there is a central theme in Ehrlich's work, it is rejection of the identification of law with the state"). See also Tamanaha 2008 (for an excellent overview).

[32] See Cover 1983, discussed in Berman 2009.

with much of legal pluralism in two principal respects. First, TLO theory imagines and assesses not only dynamic tensions between potentially conflicting TLOs but also the prospects of political and normative settlements that lead to cooperation and coordination, to legal norm settling and TLO alignments in a kind of normmaking division of labor. That is, unlike legal pluralism, when addressing international and transnational law, TLO theory addresses not only normative contestation and conflict but also the transnational settlement and institutionalization of legal norms giving rise to a TLO. Second, TLO theory takes no categorical normative position on TLOs, whether positive or negative, even as it acknowledges the important normative implications for those who attempt to create particular TLOs in order to address common problems, on the one hand, and those who attempt to resist particular TLOs in order to defend national and local prerogatives, on the other hand.

In brief, a theory of TLOs builds from and overlaps with other analytic frameworks in political science, sociology, and law, but it differs from them in critical respects. It differs from regime theory by focusing not on nation-state interaction at the international level but on the interaction of international, transnational, and national arenas of legal normmaking involving both state and non-state actors, giving rise to the institutionalization of transnational legal norms in local practice. It differs from world polity theory by focusing not on top-down, globalized, socialization processes involving "modern," "universal" norms but rather addressing the two-way flow of legal norms in recursive cycles that lead to variegated TLOs through the settlement and unsettlement of legal norms. And it differs from global and transnational legal pluralism by focusing not only on collisions, clashes, and conflicts among transnational, national, and local legal and other normative orders but also on processes of transnational normative settlement and alignment that gives rise to the institutionalization of a TLO.

## III. Scope of TLOs: Legal and Geographic

A TLO articulates a set of legal norms for legal subjects over a given territory. We designate these respectively as the *legal scope* and *geographical scope* of a TLO. Depending on the combination of legal and geographical scope, TLOs might take a variety of forms. In one, the legal scope may be narrow but the geographical scope broad. In another, the legal scope may be broad but the geographical scope narrow. It is an empirical challenge, exemplified by case studies in this book, to map the varieties of TLO scope.

Let us take corporate bankruptcy law to exemplify this conceptual point. If we take a snapshot of the world in 1999, there were five incipient TLOs with varying *geographic* scope – one in Asia, one in Europe, and three competitors for global reach. With respect to geographical scope, the Asian Development Bank (ADB) sought to obtain primacy for its incipient TLO in the countries of South and East Asia and the Pacific; the European Bank for Reconstruction and Development (EBRD) spearheaded creation of a TLO for nations making the transition from command to market

economies in the former Soviet Union; and the IMF and World Bank separately began to build TLOs that would respectively span the world, followed by UNCITRAL, which signaled in 1999 that it would enter the fray to develop global bankruptcy law norms.

With respect to *legal* scope, these TLOs overlapped a great deal, but they still differed importantly on the range of behaviors they sought to regulate. In the case of corporate bankruptcy law, the Asian Development Bank TLO did not purport to cover out-of-court bankruptcy workouts, whereas the World Bank norms encouraged them. The IMF norms focused on substantive law, whereas the World Bank placed much emphasis on bankruptcy law institutions.

It can readily be observed that these TLOs were likely to overlap or compete, complement, or parallel each other. With respect to legal content, where differing legal norms overlapped, there was potential for competition among them. With respect to territory, if our interest were only Asia, then we would identify three TLOs (the ADB, IMF, and World Bank) that were in potential contention for normative primacy; if Europe, there were likewise three, but this time they involved the EBRD, IMF, and World Bank; if the world, then (initially) there were the IMF and World Bank, but the ADB and the EBRD were potential competitors in particular regions.

The prospect for competition or interdependence, therefore, depends considerably on the degree to which legal substance and territory overlap. If they are entirely discrete, then TLOs might divide the world among them, either by legal substance (e.g., IMF does substantive law, whereas World Bank does institutions) or by territory (e.g., the ADB covers Asia, whereas the EBRD covers Central and Eastern Europe), or both. When TLOs overlap on either legal substance or territory, then competition and conflict, actors' power and influence, and institutions' relative legitimacy become increasingly salient determinants of the scope of respective TLOs.

This comparison or contrast of TLOs should be not only synchronic but diachronic. A succession of TLOs can be mapped in terms of scope in order to assay the changing territory and substantive scope that TLOs cover as their legal norms become settled or unsettled over time.

Consider a succession of TLOs that govern carriage of goods by sea. A long-standing convention, known as the Hague-Visby Rules (1968), may be superseded in the next several years by the recently promulgated Rotterdam Rules (2009). There are important differences on both dimensions between these conventions. With respect to territorial scope, the Hague-Visby convention covered transport from one port to another port by sea. Hence, it would only cover machinery loaded in the port of Hamburg and unloaded in the port of New York, and not subsequent transport. UNCITRAL's new Rotterdam Rules, in contrast, seek to cover a significant amount of transportation from point of production to point of distribution (i.e., door to door). For example, they could cover machinery loaded into containers in the inland city of Frankfurt, transported by road to the port of Hamburg, transported by sea to New York, and then shipped by truck to Kansas City. In this sense, the law itself reaches beyond sea transport to include land transport. These TLOs differ not only in their geographic

scope but also as regards their legal scope, in that they provide alternative sets of legal norms. The Hamburg Rules presuppose paper bills of lading, whereas UNCITRAL's new Rotterdam Rules expand paper bills of lading to cover electronic forms of claims to ownership. The Rotterdam Rules also add further provisions regarding transport regulation that were not part of competing and successive TLOs that rose and fell from the 1920s to the early 2000s.

Variations on changes of legal and geographic scope over time can be observed in many chapters in this book. Laurence Helfer (Chapter 9) shows how, until the 1990s, the intellectual property and human rights TLOs did not intersect and were quite soft in the obligations imposed. Following the creation of the WTO and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), the legal norms in the TLO for intellectual property rights became highly settled and appeared to be unchallenged. However, this TLO was soon confronted in the area of access to medicines by a new TLO advancing the economic and social right to health protection. International institutions, networks of transnational activists, and national courts all contributed to the development of this rival TLO. Similarly, Shaffer & Waibel (Chapter 5) describe how monetary policy traditionally was under the international jurisdiction of the IMF, but the IMF has lost some authority in this domain, most recently with the rise of China, which has thwarted the IMF's attempts to assert its authority over China's exchange-rate practices. As a result, key nation-states pressed for currency issues to be addressed within the G20 Group of Finance Ministers and Central Bank Governors and the WTO, even though they are also being addressed bilaterally, such as between the U.S. Treasury and China. Likewise, the IMF's role over the issue of capital controls on the capital account and their implications for monetary relations, which the IMF Articles explicitly permit to maintain financial stability, has been challenged by a series of free trade agreements and bilateral investment treaties that require the elimination of capital controls to ensure free trade in financial services and investment protection (Shaffer & Waibel, Chapter 5).

The dynamics of these different TLOs underline the point that transnational legal norms can be promulgated by competing organizations or revised over time by the same transnational body. Those dynamics shape the degrees of choice that nation-states and private actors have about which normative order they adopt.

Questions of TLO scope inevitably raise the empirical problem of defining the boundaries of TLOs and changes in their boundaries over time. When can it be said that a prior TLO is succeeded by a subsequent TLO? What evidence can be adduced to demonstrate that certain norms belong to one TLO and other norms belong to an adjacent or competing TLO? Boundaries in social organization are often difficult to determine because they do not have a discrete geographical or discursive marker. This book shows that boundaries between TLOs, whether assessed synchronically or diachronically, will include some combination of the following four characteristics: discursive attributes; ideological attributes; actor perceptions of legal obligation; and actor alliances and conflicts in relation to legal norms.

First, boundaries might be sharply drawn by distinctive *discursive attributes* of a

TLO. A TLO that relies on the concepts and doctrine of intellectual property and expresses itself in a legal discourse identified with intellectual property law will distinguish itself from a TLO that relies on the language of rights and access to medicine and the doctrinal underpinnings of economic and social rights. A discourse analysis would reveal systematic differences in language and concepts.

Second, a succession of TLOs, and hence the boundaries between them, can be observed by fundamental shifts in *underlying ideological frames*. A close discursive analysis can map precise shifts in the ideological core and the practical expression of the TLO, even though it goes under a similar name. Here it is possible to show some discursive continuity across TLOs, but that is eclipsed by ideological displacement.

Third, whereas the scholarly observer may discern the discursive and ideological bases for distinguishing between TLOs, an alternative basis for distinguishing one TLO from another can be found in the *perceptions of actors whose behavior is subject to constraint or facilitation* by legal norms (using what Max Weber called *Verstehen*).[33] Whether that actor is a nation-state, an industry, a firm, or a legal professional, an actor whose behavior will be consequentially enabled or constrained by a legal normative order will be able to discern whether one set of norms has quite different consequences than another. Political leaders, for example, in a post-conflict state will aim to determine how vulnerable they are to a set of legal norms that emphasize accountability for past atrocities versus those that permit amnesty for atrocities (Payne, Chapter 13).

Fourth, the boundaries of TLOs can be revealed through *alliances and conflicts among actors*. When respective TLOs address different aspects of a problem, it will increase the likelihood that they draw on different ideologies or express themselves in different discourses so that their distinctiveness as alternative TLOs becomes manifest. If the respective proponents of distinct TLOs seek to work out a political settlement regarding how the TLOs' respective norms interact in relation to an issue, then their actions will reveal the politics behind the setting of a TLO's boundary. For example, Helfer (Chapter 9) examines how different clusters of actors worked to shape the boundaries of the respective TLOs for economic and social rights and intellectual property protection in respect of access to medicines.

## IV. Formation of TLOs

What determines the geographic and legal scope of TLOs at a particular time? Increased transnational social connectedness and growing social complexity create new demands for legal ordering. This complexity can be managed through the creation

[33] See Weber 1947: 87, n.2 ("As Weber uses [*Verstehen*] this is a technical term with a distinctly narrower meaning than either the German or the English in everyday usage. Its primary reference in this work is to the observation and theoretical interpretation of the subjective 'states of mind' of actors").

of legal orders of functionally differentiated legal scope (Luhmann 1985). The boundaries of these functionally differentiated areas reflect relevant actors' conceptualizations of a problem and the varying interests, perspectives, and priorities in question. The broader the geographic and legal scope covered, the more the legal order may address perceptions of externalities arising from activities in any particular geographic location. However, the broader such scope, the less tailored the TLO will be to the particular challenges facing a particular location and the more distant it will be from affected stakeholders, raising challenges to its legitimacy.

Why and how do particular TLOs, with particular legal content and with particular geographic boundaries, originate? Transnational legal normmaking is not constant. It is rather punctuated and characterized by cycles. It varies in intensity and pace. It represents a form of law reform episodes in a transnational context.[34] We adopt a simplified process that can be applied to the study of the creation and change of TLOs over time.

The circumstances of coming into being of a TLO should affect its coherence, institutionalization, and impact. TLOs can rise or fall in rapid bursts or in long, drawn-out, incremental cycles. They may entail trial and error or big bang–like events. The rise of a TLO can be explained by a combination of facilitating circumstances and precipitating conditions. Transnational recursivity theory provides a framework for understanding the dynamics of TLO formation (Halliday & Carruthers 2007; 2009; Halliday 2009; Shaffer 2013).

### *A. Facilitating Circumstances*

The onset of episodes to create, adapt, reform, replace, or destroy a TLO frequently begins amorphously and often begins imperceptibly. They occur through such factors as: a growing mismatch between national regulation and global markets in light of changes in economic *interdependence*; changes in the interests and *power* configurations of nation-states and other actors regarding the demand for and content of transnational legal ordering; shifts in *ideas* and the conceptualization of problems shaping the regulation of economies and political institutions; *technological changes*, industry inventions, and developments in the organization of business; and the *unintended consequences* of existing TLOs themselves.

*Increases in transnational interdependence: the mismatch of markets and law*. The extensification and intensification of processes of economic globalization is clearly a major facilitator of transnational legal ordering. These processes lead to greater transnational social and economic connectedness, creating common frames of reference and demands for coordinated legal ordering. Increased economic interdependence recasts domestic issues into global ones, with the result of public and private actors increasingly conceiving of problems as transnational in scope and calling

[34] For further conceptual analysis of "episodes" in recursivity theory, see Halliday & Carruthers (2007).

for international and transnational lawmaking. At times, actors engage in transnational legal ordering to enhance the effectiveness of domestic regulation, such as combatting money laundering (Machado 2012), cartel behavior (Shaffer et al. in press), and human trafficking (Lloyd &Simmons, Chapter 12), or to address competitiveness concerns that could trigger a "race to the bottom" in regulation (Bodansky, Chapter 8). At other times, actors reconceive what previously were viewed as nation-state sovereign concerns in terms of "global public goods" (Shaffer 2012). For example, domestic banking regulation and domestic tax avoidance are now viewed in global or transnational terms because of their impact on national sovereign debt, which in turn implicates global financial stability.

The mismatch between the perception of a problem and existing law often creates pressures conducive to the formation of TLOs. When markets become increasingly regional and global, and law remains national, the mismatch creates slow-building pressures for change. For instance, proponents of transnational reform of corporate bankruptcy law over the past twenty years have stylized it as a correction of the widening mismatch between the scope of market activity and the ability of national law to regulate it (Westbrook 2000; Block-Lieb & Halliday, Chapter 2). A similar mismatch underlies demand for a new transnational financial legal order (Helleiner, Chapter 6), an intellectual property legal order (Helfer, Chapter 9), a common legal order for product standards (Büthe, Chapter 7 and a coordinated order for the allocation of taxing authority (Genschel & Rixen, Chapter 4).

*Shifts in the relative power of nation-states and other actors*. The ability of nation-states and other actors to create and shape TLOs reflects shifts in geopolitics over time. Powerful nation-states and other actors seek to create and shape TLOs that advance their particular interests in the face of challenges from others. The involvement of the U.S. delegations at the WTO, UNCITRAL, and the new Transpacific Partnership (TPP), for instance, clearly exhibit an effort by the United States to advance its international trade interests, in support of particular constituencies within it, through the creation of TLOs. The United States was the preeminent global actor following World War II and, even more so, during the 1990s following the collapse of the Soviet Union. More recently, the rise of China and the other BRICs should affect the creation, operation, reform, and potential demise of some TLOs. The BRICs indeed are trying to create new TLOs, such as through a new development bank, and shift authority to institutions in which they play a greater role, such as from the G7 to the G20 group of finance ministers and central bank governors. The combined share of global GDP of the United States and European Union dropped by 10 percent between 2002 and 2012. This loss of relative economic power affects their leverage in organizations such as the WTO and IMF, and already it has led to a shift in normmaking on financial regulation from the G7 to the G20. Non-state actors also gain and lose leverage over time, facilitating and constraining their ability to advance their interests and goals through TLOs. The ways these groups organize affects their ability to influence transnational normmaking (Büthe & Mattli 2011). Multinational companies and industry groups press for TLOs that govern investment, intellectual property protection, and other business regulation (Braithwaite & Drahos 2000). Professional groups seek to shape the regulation of markets to advance their and their clients' concerns. Transnational

civil society groups and social movements seek to build and shape human rights TLOs and to counter economic ones.

*Shifts in ideas and conceptualizations of problems shaping the regulation of economies and political institutions*. Cultural globalization, supported by new media, communication, and transport technologies, facilitates the circulation of ideas and the common conceptualization of problems and imaginings of solutions that entail legal ordering, such as the protection of individual rights and the organization of economies. The diffusion of ideas concerning political and economic liberalism in the 1990s, in particular, facilitated the development of TLOs in many domains. The breakdown of communist and socialist models in many states led to transformations in their economies and political institutions that stimulated a demand for TLOs and destabilized some existing ones. For example, command economies across Central and Eastern Europe and the steppes of Central Asia were propelled into rapid transitions toward open markets when the Soviet Union collapsed at the end of the 1980s. The more that contracts came to replace bureaucratic directives in these emerging market economies, the more they required basic commercial law. Any number of advanced market economies might have exported their legal norms (and many sought to do so). Yet rather than engaging in a contest of all-against-all in exporting legal norms, these nation-states also worked with non-state actors through international institutions to create TLOs based on hybrid norms that would result in a convergence on basic commercial standards. Similarly, the resurgence of ideas concerning the role of the state in conjunction with the rise of the BRICs should affect legal ordering transnationally.

*Invention, technological change, and the organization of business*. A new TLO may also arise in response to technological change. When DuPont developed chemical alternatives to ozone-depleting chlorofluorocarbons (CFCs), it facilitated the international negotiation of legal rules to ban CFCs (Canan & Reichman 2002). When containerization proved a vastly more efficient way to package and transport goods, it complicated the allocation of liability to carriers at various points of a journey that began at the production facilities of one country and ended at the distribution centers of another (Block Lieb &Halliday, Chapter 2). The development of new plant breeding technology raised new issues about agricultural production, agribusiness power, biodiversity, and consumer protection, spurring competitive transnational lawmaking regarding the governance of genetically modified foods (Pollack & Shaffer 2009). In each case, these inventions facilitated the creation and change of TLOs.

A new episode in TLO creation can emerge, as well, from developments in the organization of firms and business relationships. Changes in corporate organization spurred business demand for limiting double taxation of corporate income, as well as for common regional and global product standards. Today, policymakers are rethinking the scope of multilateral trade rules in light of the growth of decentralized global and regional supply chains (Baldwin 2011).

*Unintended consequences of TLOs*. In forming, multiplying, and disintegrating, TLOs themselves may have unintended consequences. In the process, they may affect underlying conditions that eventually result in calls for new transnational legal normmaking. For example, the TLO developed to limit double taxation gave rise to increased tax arbitrage by corporate entities, spurring the push for a new TLO to reign in "harmful" tax competition (Genschel & Rixen, Chapter 4). The expansion of the TLO for intellectual property to mandate pharmaceutical patent protection helped spur the development of a parallel TLO for public health (Helfer, Chapter 9). A growing threat that several regional TLOs might complicate the carriage of goods by sea created pressure for the development of a single global TLO that would simplify transport and increase certainty (Block-Lieb & Halliday, Chapter 2).

### *B. Precipitating Conditions*

A slow build-up of pressures for change often requires a trigger to galvanize affected audiences and actors to create or reform TLOs. In the past few decades, such triggers have included financial crises, geopolitical shifts, outbreaks of armed conflict, sudden epidemics, environmental crises, sudden policy changes in key nation-states, and conflicts between existing international organizations. The development and change of TLOs, like law more generally, is often triggered by a sense of crisis. These precipitating conditions at times overlap with what we call facilitating conditions, but they differ in terms of the degree of punctuated change and the perception of crisis, as in the following examples:

*Financial crises*. Financial crises repeatedly have triggered a push for new TLOs and law reform efforts across the world. During an earlier era, the Great Depression helped spur the adoption of beggar-thy-neighbor monetary and trade policies, and nation-states created the International Monetary Fund in 1945 and the General Agreement on Tariffs and Trade (GATT) in 1948 in response. The debt crises of Ecuador, Mexico, Russia, and, most dramatically, the Asian Financial Crisis, unleashed a wave of law reform and TLO construction, as transnational developments on corporate bankruptcy, secured transactions, and financial law illustrate. The Asian Financial Crisis impelled the G7 and G20 to press the World Bank, IMF, and other international organizations into remedial steps that could mitigate the severity of the current crisis and forestall another, although they were unsuccessful in relation to the crisis in 2008. The result has been an enormous institution-building enterprise in which TLOs are prominently situated. In the current financial crisis, the IMF has advocated the reconsideration of Financial Action Task Force (FATF) standards to include tax evasion in light of the challenge of tax collection and the resulting public debt of Greece and other countries and their implications for global financial stability (Financial Action Task Force 2010: 10).

*Geopolitical crises*. Geopolitical crises have sparked vigorous efforts to build TLOs. World War II and the Holocaust helped catalyze the creation of international human rights law, and the Nuremburg and Tokyo trials are the forbearers of international criminal law. This new body of criminal law was substantially developed and institutionalized following the Rwandan genocide and the Balkan wars in the

1990s, first through regional criminal trials, and then through the establishment of the International Criminal Court. Similarly, the fall of the Soviet Union and the Berlin Wall spurred economic law reform efforts that were more structured than the ad hoc initiatives emanating from one or another professional association or bilateral aid program. The founding of the European Bank for Reconstruction of Development led to the setting up, in short order, of a law and transition program for the former communist countries of Central Europe and Central Asia. The terrorist attacks of 9/11 propelled the frantic construction of a new TLO to preclude the financing of terrorism, where standing international organizations obtained new functions and new regional and other bodies sprung up to fill the gaps in regulation. After 9/11, the IMF expanded its activities to cover money laundering, resulting in a dramatic expansion of its legal department (Gordon 2010). The attacks also spurred a reconsideration of human rights norms developed following World War II, such as the norm against practices constituting torture.

*Environmental and health crises*. Environmental and health crises have driven the development and reform of TLOs. News about the rapid disappearance of the ozone layer over Antarctica spurred the development of the Montreal Protocol on Substances that Deplete the Ozone Layer. Concerns over climate change have spurred, less successfully, a variety of transnational legal responses (Bodansky, Chapter 8). The World Health Organization expanded its mandate for overseeing global public health in response to the SARS epidemic and other threats with new International Health Regulations in 2005 that require institution building and reform across nations and, for the first time, grant the WHO Director-General the authority to declare an international public health emergency (Fidler & Gostin 2006). The AIDS epidemic spurred a reevaluation of the issue of access to medicines and pharmaceutical patents, unsettling the baseline for patent protection that the United States and Europe had thought was settled through the WTO TRIPs Agreement (Helfer, Chapter 9).

*Policy changes in key nation-states*. Sudden developments in key nation-states can precipitate legal reform. The vigorous mobilization of the United States in support of a modernized carriage of goods TLO arose from two dramatic developments inside the United States. In one case, the U.S. Supreme Court ruled in the *Sky Reefer* case that, in effect, U.S. shippers and carriers could not predict which courts in the world would adjudicate their disputes over liability, thus radically increasing uncertainty over the costs of global transport. In another instance, the U.S. Congress failed to produce a new carriage of goods statute to modernize U.S. practice. These twin shocks to U.S. shippers and carriers not only caught the attention of domestic players, but they signaled to the rest of the world that a new regime was needed, and if it was not produced soon, the United States might again produce a new law that it would then seek to impose on the world. U.S. politics galvanized other countries and UNCITRAL into the normmaking that produced the UNCITRAL Convention on the Carriage of Goods by Sea.

*Competition among transnational lawmakers* can also precipitate the creation or transformation of a TLO.UNCITRAL moved swiftly to claim its authority as the formative arena for lawmaking on transport when it appeared that its lawmaking rival,

the UN Commission on Trade and Development (UNCTAD), might move first (Block-Lieb & Halliday, Chapter 2). Similarly, UNCITRAL jumped suddenly into the drafting of a legislative guide for secured transactions when its secretariat heard that a rival organization, UNIDROIT, might build on its prior successes and initiate a lawmaking effort. The IMF closely followed Brazil's initiative for the WTO to address the issue of currency manipulation, a move that could tread on its domain and spur a response within the IMF (Shaffer & Waibel, Chapter 5).

The perception of crises may be manufactured. Actors may create a pretense that there is a crisis in order to compel legal action. The "war on terror," for many liberal and left-leaning observers, provides an example; the dangers of the proceeds of crime and money laundering, for some, represents another; and the threat of climate change, for some, constitutes yet another. Whether a crisis is genuine or manufactured, it creates a window of opportunity for the creation or reform of a TLO that may be temporally limited.

### *C. Transnational Recursivity Theory*

We have elsewhere addressed the primary mechanisms that drive legal ordering in global and transnational contexts, such as bargaining, coercion, persuasion, modeling, and socialization (Halliday & Osinsky 2006; Shaffer & Ginsburg 2012). These mechanisms can affect actors' incentives and shape their cognitive perceptions. The problem with focusing on these mechanisms alone, however, is that they tend to be top-down and unidirectional. The production and implementation of transnational legal norms are not independent processes, as they are conventionally treated in international relations and international law scholarship. Legal academics tend to assess the interpretation and practice of law but not how it relates to the politics of lawmaking, a domain addressed by political scientists. Political scientists, in turn, tend to assess the politics of lawmaking, but they pay less attention to how legal norms are developed through interpretation and practice. When they view the production and the implementation of law separately, international relations and international law theories assume a top-down perspective.

Transnational recursivity theory, in contrast, integrates the study of law production and law implementation within a single frame. It assesses how the production and implementation of transnational legal norms among international, transnational, national, and local lawmakers and law practitioners dynamically and recursively affect each other. Sometimes the impetus for the formation and change of TLOs comes from "below," and sometimes it comes from "above," but it always involves engagement across sites and levels of lawmaking. Each recursive cycle has a constrained logic in that it is affected by what came before it. Thus, transnational recursivity theory assesses the dynamic interplay of cycles of normmaking within and between transnational and national lawmaking forums and sites of implementation. Figure 1.1 depicts these interacting processes.

Figure 1.1 Here

Halliday and Carruthers (2009) identify four mechanisms that drive recursive processes and that shape patterns of settlement of transnational legal norms in national and local settings. These four mechanisms can interfere with normative settlement until some sort of concordant understanding and practice is reached.

First, actors engage in *diagnostic struggles* to frame the problem to be solved, a step that has significant implications for its proposed treatment in lawmaking.[35] Actors diagnosing a problem (be they state or non-state actors) may seek other actors (such as international organizations or powerful states) as allies to promote a particular diagnosis. Competitors who seek to promote alternative solutions to problems may contest their diagnosis. Lawyers are often pivotal in tailoring legal responses to particular diagnoses and in advancing particular diagnoses in light of the experiences of their clients. Those actors who prevail at the stage of diagnosis may face considerable implementation challenges, because those who wield authority at the national and local level diagnose the problem in competing ways.

Second, *actor mismatch* occurs when those actors who wield power in the national and local implementation of transnational legal norms are not represented, or otherwise do not prevail, in international and transnational negotiations. In other words, the politics of transnational lawmaking, including its legitimacy, affects the probability of their implementation. Similarly, if domestic actors integral to the implementation of a transnational legal norm are not represented in domestic lawmaking, they will be less invested in the law's implementation and may effectively veto it in practice, potentially triggering a new cycle of legal normmaking to resolve the differences.

Third, legal norms negotiated at the transnational level may contain internal *contradictions*. These may be *ideological contradictions* because lawmakers draw variably from unresolved ideological clashes in order to reach a negotiated outcome. They may also imply *institutional contradictions*, insofar as transnational legal norms are diffused and implemented by bodies that identify with conflicting ideologies poorly resolved in the law or by bodies that disagree on the emphasis given in applying open-ended legal norms. For example, trade agreements have increasingly embraced liberalized trade in services and may ban or severely limit the use of capital controls, whereas the IMF Articles permit them on the grounds that financial authorities prudentially must be able to protect the country's capital account and ensure financial stability (Shaffer & Waibel, Chapter 5). Contradictions can arise, most generally, between transnational efforts to address a problem and the demand for the retention of national and local autonomy, reflected in both the international law concept of sovereignty and the federalist concept of subsidiarity.

Fourth, law's meaning is often *indeterminate* (or, perhaps better stated,

[35] Diagnostic struggles relate closely to the process of framing, which is central to theories of social movements and political mobilization. See Fiss and Hirsch 2005; Merry 2006; Lloyd & Simmons, Chapter 12.

underdeterminate) (Mertz 1994: 1246), whether because of the inevitable limits of language, because it is too costly for actors to create detailed law to address future contexts that are difficult to foresee, or because actors decide to gloss over their differences with vague language to conclude an agreement. These internal contradictions and indeterminacies in transnational legal normmaking can lead to considerable divergence at the stage of implementation in different nation-states and localities, undermining the aims of a TLO's promoters. These divergences in national implementation can spur further transnational legal normmaking to address the ongoing, unresolved problems.

Transnational recursivity theory addresses both the vertical and horizontal interaction of different arenas in which transnational legal norms are made, implemented, and applied. Vertically, global and transnational structures, organizations, and discursive frames affect national lawmaking and legal practice, but they do not do so seamlessly. Socio-legal studies have long assessed the significant gaps that arise between legal norms and practice within national jurisdictions. The prospect of such gaps arising with transnational legal norms is even greater. Transnational recursivity theory extends a central finding of law and society scholarship that black letter law seldom is implemented as its designers intended, and frequently it is resisted, subverted, or neutralized in practice. It helps explain not only the existence of the gaps but also how they expand or close over time. From the perspective of the recursive interaction of transnational legal normmaking, national lawmaking, and local practice, we can better assess how TLOs are formed, change, and become settled and unsettled.

Contrary to a structural realist perspective, transnational recursivity theory also helps explain the contexts in which weaker state and non-state actors retain greater autonomy from transnational influences, on the one hand, and exercise influence on transnational legal normmaking, including as a condition for enhancing its legitimacy and effectiveness, on the other hand. Although actors from the "north" indeed have been dominant in the formation and development of TLOs, actors from the "south" play important roles if legal norms are to settle locally so that TLOs institutionalize. Moreover, actors from the "south" (and most saliently those from the "east") may play greater roles in the reflection of shifts of economic power.

Horizontally, the interaction of one TLO with another can unsettle another TLO's legal norms or otherwise shape their interpretation and understanding. To understand the horizontal dimension, we can redraw Figure 1.1 to add a second TLO that operates in parallel to and interacts with the first one (see Figure 1.2). These interacting TLOs can be public or private, and they often respond to and affect each other (Shaffer 2009; Shaffer & Pollack 2010). When multiple organizations compete for transnational normmaking, recursive processes will drive the development of the transnational legal norms at issue. Conflict may be prolonged so that no normative settlement is reached, or competition can spur institutional alignments, further catalyzing normative settlement. These interactions involve varying configurations of institutional alignment between different TLOs and an issue (see Part V).

Figure 1.2 Here

At first glance, transnational recursivity theory may appear only to explain why normative settlement and institutionalization of a TLO confront significant challenges. Yet the aim of recursivity theory is to highlight the mechanisms through which the meaning and application of legal norms are contested and are dynamically shaped until some sort of settlement is reached – that is, until diagnostic struggles, actor mismatch, internal contradiction, and indeterminateness are overcome. It is normative settlement – an understanding of which legal norms apply in which situations – that instantiates a TLO's institutionalization.

Transnational recursivity theory has important links with historical institutionalism in political science and its dynamic of feedback loops (Thelen 1999; Pierson 2004;Mahoney & Thelen 2010) and with neo-institutionalism in sociology and its attention to a logic of appropriateness (Powell &DiMaggio 1991), as well as its resulting study of the development of hybrid norms to adapt transnational ones to national and local settings (Campbell 2004). TLOs do not necessarily result in mimesis across national jurisdictions, but they often result in a convergence of legal ordering that is transnational in geographic scope. John Campbell (2004: 71) uses the concepts of "bricolage" and "translation" to capture variations in convergence. As Campbell writes, "the concept of bricolage focuses our attention on a creative process in which actors make decisions about how to combine the institutional elements at their disposal." The resiliency of national institutions and their path dependencies can limit transnational legal ordering. But transnational legal ordering can also have significant impacts on national and local legal practice. Transnational recursivity theory takes account of historical contingency, path dependency, and inertia at the level of national and local implementation while also assessing the legal adaptation and change that give rise to a TLO's institutionalization.

## V. INSTITUTIONALIZATION OF TLOS

Fundamental to a TLO is its institutionalization. Institutionalization has a double-sided aspect. With respect to norms, institutionalization occurs when normative understandings of appropriate behavior become stabilized (March & Olsen 1998). With respect to practice, institutionalization can be observed when practices are widely enough diffused and adopted that they come to be taken for granted (Heimer 1999). A TLO is institutionalized when legal norms and practices converge to guide actors over what norms apply in given situations. The ultimate test of successful institutionalization of a TLO occurs when actors behave according to a set of legal norms that they simply take for granted as being appropriate in a particular situation.

We assess the extent of institutionalization of TLOs along two dimensions: most

fundamentally, the settlement of legal norms and, correspondingly, the degree of alignment of a TLO with a particular issue. Normative settlement is most determinative of a TLO's institutionalization, but because multiple TLOs can address an issue, one cannot fully understand institutionalization without assessing the alignment of one or more TLOs with an issue.

### *A. Normative Settlement*

The concept of the settlement of legal norms has received the most sustained treatment by sociologists of law within a national jurisdiction, the United States (Grattet et al. 1998; Phillips & Grattet 2000; Grattet & Jenness 2001). In a logic similar to recursive theory, they trace legal settlement through a sequence of stages, from the framing of a problem to a concept embedded in legislation to the elaboration of meaning through judicial decisions to the understandings of meaning reflected in the practices of officials, or what the legal realist Karl Llewellyn (1940: 1357) referred to as "law-ways."

This sociology of law research has focused on two aspects of normative settling. First, these empirical studies reveal how courts stabilize the meanings of terms in ambiguous legislation so that meanings narrow, "become cognitively taken for granted by actors, and/or attain a high level of normative consensus" (Grattet & Jenness 2001: 670). Stabilization occurs through waves of lawsuits that gradually diminish as legal ambiguity is reduced. The number of cases in a given year that are required to specify the meaning of the statute and subsequent doctrine is used as a metric of normative settling. Second, and most importantly, settling occurs in the practices and mentalities of those who implement and apply law, such as police and prosecutors, ground-level regulators, corporate counsel, tax advisors, and litigators, who come to settle on the norms that guide their activities and behave accordingly, so much so that little reflection is required on the norms themselves. Here metrics include the number of arrests and prosecutions, as well as surveys of the practitioners' understandings of the law (in the case of Grattet and Jenness 2001, regarding hate crimes).

#### 1. Sites of Settling

A similar logic can be followed in assessing TLOs. For heuristic purposes in comparative and historical inquiry, we situate the settling of legal norms at three levels: the transnational, national, and local (i.e., subnational) level. At each level, there are canonical or standard texts and normmaking institutions.

Table 1.2 Here

*Transnational settling on legal norms*. Settling at the transnational level involves a common understanding of the meaning in the texts that are promulgated by international and transnational organizations. The texts include human rights conventions, interpretive guides, and diagnostic indicators (such as those from the United Nations, regional, and other bodies); economic law treaties, model laws, legislative guides, and indicators (such as those from the WTO, IMF, World Bank, UNCITRAL, and UNIDROIT); standards (such as those from Codex Alimentarius, the ISO, and the International Chamber of Commerce); and court and arbitral decisions (such as those from the WTO Appellate Body, the International Criminal Court, and regional and ad hoc international and hybrid tribunals).All sorts of law-producing and law-monitoring international and transnational organizations promulgate such texts. At the point of promulgation, and after recursive cycles to settle meanings, transnational legal norms will be considered settled when civil servants, legal practitioners, other relevant professionals, businessmen, scholars, and judges can agree on the meaning, for example, of the soft law of the Financial Actor Task Force (FATF) on money laundering, on a health regulation from the WHO, or on a provision of trade law, possibly following a ruling from the WTO Appellate Body. The settling applies both to the substantive scope of the legal norms and the geographical scope of their coverage. Actors are clear regarding which norms apply where and in what situations.

*National settling on legal norms*. Here settlement arises regarding the meaning of the legal norm through the interplay of statutes, regulations, and judicial rulings within a country, whether the normmaking involves public or private bodies (such as private standard-setting or arbitral bodies). A series of reform cycles slows down or stops through a decisive piece of legislation, a regulation, or an accumulation of definitive court cases. In a settled national legal order, the respective lawmaking institutions will no longer be producing frequent rounds of new national laws and interpretations of them, except insofar as they are part of normal incremental changes.

*Local settling on legal norms*. Here the meanings of legal norms stabilize within the minds and practices of the actors who implement and apply the norms, whether these actors are public officials or private professionals. Often these norms are set forth in local texts, whether they are protocols of law enforcement officials, practice guides from a local bar or other professional association, or a manual or publication from a law firm, an accounting firm, a personnel department, or a legal compliance unit within a corporation or corporate group for their respective professionals and clients. The legal norms become internalized and are reflected in practice.

## 2. Concordance

Settling at each level signifies little about how much concordance there is on norms among these three levels. [36] On the one hand, settling at each level might vary significantly. On the other hand, settling within levels might vary considerably in the

[36] This section on concordance takes from and is developed further in Block-Lieb & Halliday, Chapter 2.

degree of their *concordance* among each other. That is, it is imaginable that transnational norms will be settled with one cluster of meanings, national norms could settle with very substantial deviations, and local norms could differ yet again from national and transnational norms. In short, TLOs might vary from high concordance to discordance among levels. Helleiner (Chapter 6), for example, shows how the legal norms of a transnational financial legal order are more settled at the transnational level through soft law than they are at the national level in terms of national regulations and practices.

There are at least four variations possible:

(1) In a highly concordant TLO, transnational, national, and local legal norms and practices will all be settled with meanings closely resembling each other;

(2) Between concordance and discordance, a TLO might display concordance between settled transnational and national legal norms but discordance with settled local understandings and practices. This is the classic situation of symbolic compliance, where governments adopt transnational legal norms, but those norms do not penetrate inside a country to its localities;

(3) Another equivocal variety of concordance occurs where there may be concordance between transnational legal norms and those held by local actors, but legal norms settled in a legislature deviate from both. This may be rare, but it can occur when local groups appeal over the heads of their governments directly to settled transnational legal norms, using them as tools within national and local contests;

(4) Discordance will occur when transnational legal norms are settled but neither national governments nor local actors have yet adopted them. In this case, a TLO might scarcely be said to exist but rather to be incipient.

The variations in patterns of concordance may be a function of *sequencing* through recursive cycles. Local settling may occur before global or national settling (as in the case of the United States, from which global norms for corporate insolvency law in large part derive). Transnational settling will frequently occur before national or local settling. In these and other variations, it becomes an empirical question about the sequences in which concordance may occur and whether those sequences affect either the pace or efficacy of a TLO's institutionalization.

The double challenge of achieving, on the one hand, settling at each level and, on the other hand, concordance among levels demonstrates the complexity of constructing a TLO. Where successful, it is a substantial feat of legal ordering. Even though we may adopt the shorthand of characterizing a TLO as *settled* or *unsettled*, in fact it is a composite judgment that encompasses many possible variations. We will stipulate that TLOs are *more settled* when there is settling within levels and greater concordance among levels, and they are *less settled* when one or more sites of normmaking remain unsettled and/or there is a higher degree of discordance across levels.

In sum, transnational recursivity theory postulates that the settling of TLOs can be observed when the pace or frequency of normmaking slows and the significance of each round of changes in law becomes incremental rather than maximal. For legal orders, the reaching of a new normal in cycles of change should produce some certainty or predictability in the meaning of the law for practice within a given legal and geographical area. In operational terms, this settling will mean that legal commentators and practitioners will agree on the meaning of the law and be better able to predict legal outcomes, including legal claims, judgments, and administration. In a fully settled TLO, participants will take for granted that a particular set of norms is applicable to legal ordering in a given situation.

### *B. TLO Alignments*

A TLO is always situated in relation to an issue area. Actors construe the issues or behaviors as problems that need to be addressed transnationally. This book canvasses issues involving business, regulatory, and human rights law (see Table 1.1). Each of the issues construed as a problem involves one or more incipient or actual TLOs and their alignment with it.

Actors may construe behaviors as problems in quite different ways because of differences in ideologies, cognitive perceptions, professional epistemologies, and strategic interests at stake. As a result, one set of actors may construe the same set of behaviors as one kind of problem and another set of actors as another kind of problem. For example, human trafficking might be construed as an immigration problem, a human rights problem, or a criminal law problem (Lloyd & Simmons, Chapter 12). Pharmaceutical patents may be viewed within an intellectual property rights frame or an access-to-medicines economic and social rights frame (Helfer, Chapter 9). The lack of credit available for domestic investment and business lending may be construed as a function of too few forms of security for lending, a loss of trust among members of a business network, or a failure of governments to ensure the supply of credit transfers through underwriting loans (Macdonald, Chapter 3). Free movement of capital can be viewed as an important contributor to economic development in a globalized economy or a critical risk to domestic and global financial stability (Shaffer & Waibel, Chapter 5).

| Figure 1.3 Here |
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The alignment of a particular TLO, or of multiple TLOs, to an issue can thus vary extensively. There are at least four possibilities of TLO alignment with an issue. These different configurations of alignment give rise to different hypotheses regarding their potential interactions with normative settlement and their resulting impact on a TLO's institutionalization. We set forth hypotheses in italics within each category.

1. Correspondence: A Single TLO Aligns Closely with the Underlying Issue

In this type of alignment, a TLO corresponds in its legal and geographical scope to an underlying problem or issue area, such that legal ordering encompasses the full scope of the underlying issue. *Here we hypothesize that it is likely that such a TLO will be (a) more tightly focused on the underlying behaviors it seeks to order, (b) more coherent in its content, and (c) more closely identified with particular actors that are dedicated to its propagation as drafters, advocates, and implementers. We hypothesize that this alignment should positively affect the prospects of both the settlement of the legal norms and the institutionalization of the TLO*. Macdonald (Chapter 3), for example, addresses the development of narrowly defined sectorial TLOs in the area of secured transactions, both for particular sectors of activity (such as factoring) and types of asset (such as mobile equipment). Nonetheless, narrow alignment and institutionalization of a TLO can endogenously lead to new problems implicated but not addressed within the TLO's legal scope. Genschel and Rixen (Chapter 4), for example, show how confining the scope of a tax TLO on double taxation facilitated its institutionalization. However, this narrowly defined TLO endogenously facilitated tax avoidance strategies and tax competition that subsequently gave rise to calls for a new tax TLO to address harmful tax competition.

2. Partition: One or More TLOs Align with Different Subsets of an Underlying Issue

Whether entirely or partially settled, one TLO (call it TLO I) will legally order one subset of the underlying problem, and another TLO (call it TLO II) will order a distinct subset. As a result, multiple TLOs may align with different aspects of an issue in a complementary division of labor, wherein they divide the legal scope or the geographic scope amongst themselves. In this case, there may be a broad issue – such as restructuring or liquidating failing companies – but different TLOs will govern different aspects of it. A single TLO may also govern different aspects of an issue using different instruments. For example, in transnational bankruptcy law, one international instrument promulgated by UNCITRAL (e.g., its Model Law on Cross-Border Insolvency) deals with only a small part of the issue's legal scope, whereas a second instrument deals with a much larger slice (e.g., UNCITRAL's Legislative Guide on Insolvency) but still leaves thorny issues untreated, and a third instrument ventures further into uncharted areas (e.g., bankruptcies of corporate groups). Alternatively, one TLO can create the legal norms and another can apply them in dispute settlement. For example, the IMF creates and interprets norms regarding the use of current account restrictions in the event of a balance-of-payments crisis, and the WTO applies them in

dispute settlement by calling an IMF representative to present the official IMF view (Shaffer & Waibel, Chapter 5). *Here we hypothesize that there may be coherence and alignment to the extent that the TLOs do not interfere in each other's domains, their geographic boundaries and legal boundaries are clear, and their respective legal norms are not in conflict*. However, coordination can be complex if their geographic or substantive areas of jurisdiction risk overlapping, giving rise to tension or conflict when one TLO encroaches on another. Such encroachment can eventually lead to the situation in SectionV.B.4 , in which TLOs compete with each other and potentially undercut each other.

### 3. Non-Alignment: A TLO Applies to Part or All of a Given Issue but Extends Well beyond It

A TLO can apply to part or all of a given issue but extend well beyond it. Although it deals with some aspects of one issue, a TLO may extend to ordering other issues, as well. In the case of access to life-sustaining drugs, the respective TLOs of intellectual property protection and the human right to health each exemplify this situation. Lack of universal access to drugs can be regulated in part by intellectual property law, but intellectual property law goes far beyond property rights in medicines and arises from sets of problems that far transcend medical issues. Lack of universal access to drugs can also be addressed by reliance on economic and social rights, including a human right to health. A TLO erected on the basis of that frame may be much closer in fit to the underlying problem, but it too goes beyond drugs and reaches health care services, medical facilities, public health measures, and medical workers. *Here we hypothesize that the less that transnational legal norms are tailored to and closely align with a specific issue, the greater the likelihood that they will be deemed to be inappropriate for dealing with that issue in particular contexts, and thus there will be less institutionalization of the TLO*. Such non-alignment also raises the prospect that different TLOs may encroach on each other regarding the appropriate framing to address the issue, again potentially leading to the situation in the next section.

### 4. Competitive or Antagonistic Alignment: Multiple Incipient TLOs Compete or are Antagonistic with Each Other Because They Operate under Different Orienting Issue Frames

TLOs can frame problems in competitive or even fundamentally different and mutually incompatible ways and thus lead to open conflict over which TLO frames and provides the relevant legal norms. The theory of regime complexes predicts that alignment and normative settlement may be more difficult in such circumstances (Raustiala & Victor 2004; Shaffer & Pollack 2010). Helfer shows how this contestation operates in the domain of intellectual property protection and public health (Chapter 9), as do Shaffer and Waibel in the domain of capital controls (Chapter 5). Within this category, the situation of competitive and antagonist TLOs can differ significantly. With competitive alignment, different TLOs may operate within a common frame but involve different organizations and actors attempting to predominate in providing the relevant legal norms (as in the case of corporate insolvency norms). With antagonistic alignment, different organizations and actors advance legal norms that can directly conflict and

undermine the aims of the other (as in the cases of IP and access-to-medicines norms, as well as free capital and financial stability norms). *The latter situation of antagonism constitutes the least amount of institutional alignment, and we hypothesize that it undercuts the prospects for TLO institutionalization across levels*.

As with normative settling, alignment at each level can vary and affect the degree of *concordance* among levels. In other words, it is imaginable that one TLO (say, an intellectual property TLO) may be more closely aligned with an issue at one level (say, the national or transnational level), and another TLO (say, an access-to-medicines TLO) may be more closely aligned with an issue at another level (say. at the local level). In short, TLOs might vary from high concordance to discordance of issue alignment among levels.

Like normative settling, the process of alignment is likely to be dynamic and diachronic – a process of repeated recursive cycles that proceed incrementally and that lead ultimately to the stabilization or destabilization of a TLO. Helfer (Chapter 9) addresses the dynamic moves of separate IP and health TLOs. Before the 1990s, there were two separate but relatively weak TLOs, each regulated by different international organizations; from the mid-1990s to the 2000s, the IP TLO expanded exponentially and sharply narrowed the domestic options around health policy; but after 2000, a burgeoning rights emphasis on health and access to medicines sharply contested the IP TLO such that there was no clearly distinguished alignment among TLOs regarding the treatment of the underlying issues. Similarly, Rajah (Chapter 10) shows that the World Bank rule of law indicators came under increasing attack after those indicators established a relatively quick hegemony, which led to a non-governmental alternative, the World Justice Project's competing indicators. The latter TLO has nothing yet comparable to the global penetration achieved by the World Bank, but it is beginning to mount a plausible alternative. Likewise, Shaffer and Waibel (Chapter 5) show how the monetary TLO long viewed capital controls as good policy to foster the financial stability necessary for development and "embedded liberalism" (Ruggie 1982), but economic orthodoxy changed and became reflected in new rules curtailing their use, first in Europe, then as a condition to being a member of the OECD, and then through a web of bilateral trade and investment treaties that grant free transfer rights to private investors. More recently, these legal changes have spurred renewed concerns regarding the implications of uncontrolled capital flows for financial stability.

The double challenge of achieving, on the one hand, alignment at each level and, on the other hand, concordance among levels again demonstrates the complexity of constructing a TLO. We stipulate that a TLO or TLOs are *more aligned* when there is a single TLO addressing an issue or multiple TLOs clearly dividing tasks or territory among them and when there is greater concordance among levels; and a TLO or TLOs are *less aligned* when there are multiple TLOs competing against each other with countervailing norms in relation to an issue or a single TLO that poorly aligns with an issue and when there is a higher degree of discordance across levels.

The alignment of a TLO (or TLOs) with an underlying issue construed as a particular problem can have significant consequences for outcomes. It is a central

challenge of TLO theory to understand how variations on the dimension of alignment affect the prospect of the institutionalization of a TLO. When multiple TLOs converge on an issue area, how do they resolve the incipient conflict: through open competition, negotiation, conflict, the imposition of solutions from powerful nation-states or groups of nations, or otherwise? Does a failure of transnational organizations or networks to agree on diagnoses of underlying problems, or on legal prescriptions to address such problems, significantly impede the institutionalization of a TLO?

### *C. Settling, Alignment, and Institutionalization*

Institutionalization of a TLO occurs when relevant actors clearly understand which norms apply in what situations and which behaviors will be considered in conformity with those norms. Institutionalization is most fully realized when conformity to norms in practice is less a matter of cognition and more an expression of taking for granted the applicability and "rightness" of norms for a given situation.

We have proposed that institutionalization of TLOs depends on normative settling and TLO alignment with an issue. Analytically these are distinct dimensions. A TLO might be highly settled and concordant at the transnational and national levels, for instance, but be poorly aligned with issues at the local level, where the transnational and national norms may be irrelevant or compete with other TLOs or indeed other forms of ordering, such as tradition or religion, that make claims for normative adherence and that are in tension with national and transnational norms. An incipient TLO may be well aligned with an underlying issue area because there are no other competing TLOs, but the TLO itself is as yet in nascent form or weakly settled or discordant at one or another level.

#### 1. Configurations

The combination of these dimensions produces a two-dimensional space in which distinctive configurations of TLOs may be arrayed from lesser to greater institutionalization (Figure 1.4).

| Figure 1.4 Here |
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The lower left-hand quadrant represents the least amount of institutionalization, where legal norms are not settled and a TLO does not closely align with an issue. The overall issue of addressing climate change and the architecture of the global climate change regime represent this situation. Although one can identify what Bodansky calls "micro-TLOs" addressing particular aspects of the issue, such as accounting for national carbon emissions, these micro-TLOs do not come close to addressing the fundamental, underlying problem that proponents of the TLO wish to see addressed (Bodansky, Chapter 8). Similarly, although advocates push for a new TLO on harmful tax competition, they have failed to develop binding substantive legal norms but have rather focused on transparency and information-exchange initiatives. Moreover, the OECD is no longer central to defining the norms within this TLO, in contrast to the TLO on avoiding double taxation, so there are a greater number of players with

different perspectives and interests (Genschel & Rixen, Chapter 4).

The upper left-hand quadrant captures situations of low institutionalization, insofar as a single, relatively aligned TLO can be observed as a potential claimant to legal order but the legal norms of the TLO itself are unsettled. Violence against women is a case in point. The underlying problem for advocates is to protect women from sexual violence, whether in civil wars, such as in Bosnia, Sierra Leone, Rwanda, the Democratic Republic of the Congo, or Darfur, or during international conflicts, such as World War II. There is an emerging international criminal law, based on doctrines of genocide and crimes against humanity, which is part of an incipient TLO whose norms have been formally adopted by most nations by signing the Rome Treaty. Those norms are slowly being settled at the transnational level through international and regional criminal and human rights tribunals. Some nation-states are adopting them in post-conflict situations. Yet they remain fairly weak at all levels. There is no competing TLO that would authorize violence against women or would propose an alternative legal framing. Hence, even though this issue area, with its emerging set of norms with limited progression toward settling, involves the alignment of only one potential legal order with an issue, it remains relatively poorly institutionalized. Similarly, there is an emerging TLO at the transnational level regarding the accountability of political leaders for severe and massive human rights violations. Although this TLO appears to be settling within some countries, the degree of settlement varies significantly (Payne, Chapter 13).

The bottom right-hand quadrant also represents a situation of some institutionalization, insofar as there is relative normative settlement but still some challenges with TLO alignment. Although there is significant institutionalization in the area of carriage of goods by sea, it is undergoing transformations that currently give rise to less TLO alignment and normative settlement than there was in the past. The TLOs treating carriage of goods by sea in 2012 illustrates multiple TLOs midway between unsettled and settled. Two carriage of goods TLOs already have been well settled in the issue area of handling liability for goods damaged, lost, or delayed at sea: the Hague Rules and the Hague-Visby Rules. Yet Block-Lieb and Halliday show in Chapter 2 that the geographical partition of the world between these two TLOs was unsettled first by a rival TLO under the Hamburg Rules, which has more recently come into effect, and by a new UNCITRAL product, the Rotterdam Rules, which has many signatories but is not yet in effect. Hence, in this issue area, there are two settled and highly concordant TLOs and two incipient TLOs with settled transnational legal norms but not yet with a concordant national and local settling of norms across countries.

The upper right-hand quadrant represents the highest level of institutionalization, insofar as there has emerged a single TLO aligned with an issue in which the legal norms are settled. The TLO to avoid double taxation has a narrow focus that gave rise to a close alignment with the underlying issue and in which legal norms became settled, even though concerns over harmful tax competition led to some national reinterpretations of the rules (Genschel & Rixen, Chapter 4). Likewise, the UNCITRAL norms on corporate bankruptcy law are well advanced toward constituting a single global TLO aligned with an underlying problem and increasingly on the way

toward normative settling. With respect to alignment, there is a clearly defined problem – how to manage by legal means companies facing financial failure – and the UNCITRAL Legislative Guide (2007), complemented by World Bank diagnostic instruments and other norms from international financial institutions, converge in a single TLO in the making that represents high alignment with the issue. The transnational legal norms are settled, and many countries have drawn those norms into their domestic law, not least because it is an imperative of the World Bank and IMF to implant robust corporate bankruptcy regimes to ensure domestic financial stability. In some countries, local practice conforms to the national and transnational legal norms in a demonstration of normative concordance, but this is by no means universal. Developmentally, therefore, there is an impetus toward a highly settled single TLO to regulate corporate insolvency.

Institutions can divide tasks as part of an institutionalized TLO. For example, the WTO and IMF together provide for a highly institutionalized legal order regarding trade restrictions on balance-of-payments grounds. The two international organizations divide tasks to assess the existence of a balance-of-payments crisis (the IMF) and enforce such determination (through the WTO balance-of-payments committee and dispute settlement system) (Shaffer & Waibel, Chapter 5). Likewise, the WTO and World Customs Organization (WCO) together provide for a highly institutionalized system for the tariff classification of goods and the setting and application of tariff rates. Tariff classifications are agreed upon in the WCO, which issues detailed guides. Maximum tariff rates, in parallel, are agreed upon in schedules to the Agreement Establishing the WTO and in countries' Protocols of Accession to the WTO. The tariff classifications and tariff rates are adopted in national law and applied by local customs officials. Any disputes over them are addressed through the WCO and WTO committee systems, as well as the WTO dispute settlement system. National customs officials are part of international professional networks that meet under the auspices of the WCO. The WCO, in turn, coordinates the provision of technical assistance, training, and capacity building to developing countries that helps ensure common normative understanding of the rules.

## 2. Transformations

TLOs rise and fall, adapt, and compete. Figure 1.5 illustrates how the dynamism of TLOs may be plotted over time. Genschel and Rixen (Chapter 4) demonstrate the value of diachronic analysis in their analysis of TLOs regulating the tax treatment of cross-border economic activities, such as investment. They show how the initial success of an institutionalized TLO for avoiding double taxation of cross-border economic activities created a subsequent problem of international tax competition. From around the 1920s to the 1960s, actors focused almost entirely on relief from double taxation, and the OECD emerged as the institutional center of the TLO by providing model tax rules and guidelines that were diffused through a web of tax treaties. This TLO, however, opened new options for taxpayers to reduce tax payments through cross-border arbitrage, so governments competed for attracting investment by lowering effective tax rates. Tax competition accelerated from the 1980s to the present, creating pressure to form a new TLO addressing harmful tax competition but with significant

resistance from vested interests. The result was some unsettlement of the legal norms for the TLO on double taxation on account of their interpretation by national officials and an attempt to create a new TLO that has been only minimally successful in addressing harmful tax competition. Helfer (Chapter 9) similarly uses diachronic analysis to assess the formation and interaction of a TLO for intellectual property rights that gave rise to a new problem of providing access to medicines in developing countries. The resulting conflict helped spur the creation of a rival TLO for access to medicines and a partial unsettlement of the IP TLO's norms in this area.

Figure1.5 Here

## VI. *Impacts of TLOs*

The development and settling of legal norms are not to be confused with behavioral outcomes. This is true in purely national settings – witness laws against racial discrimination in the United States or child marriage in India. It is also true with TLOs that may or may not have an impact on behavior, both intended and unintended. Nonetheless, the proponents of TLOs aim to affect behavior, and TLOs often do.

Proponents of TLOs intend to confront problems that they frame conceptually. The problems may be predominantly economic in conception, such as liberalizing trade, lowering the cost of transport in goods across the world's oceans, increasing credit and foreign investment in cash-poor economies, rescuing and restructuring companies in default, eliminating double taxation of corporate profits, or protecting intellectual property. They may also be rights-oriented, such as making perpetrators of systematic crimes against women accountable before criminal courts, reducing torture by domestic law enforcement authorities, lowering the volume or severity of human trafficking, or increasing the availability of medicines to those needing them in poor countries.

Through recursive cycles of TLO construction, institutionalization, and adaptation, the configurations of TLOs have the capacity to order behavior at all levels of the TLO. It is a premise of socio-legal scholarship and recursivity theory that gaps of varying width always open between law on the books and law in action. The gaps themselves are disjunctions between the law as intended and the law as practiced. Those gaps drive successive rounds of reforms involving different ordering mechanisms, including reciprocity, coercion, persuasion, modeling, and socialization (Braithwaite & Drahos 2000; Halliday & Osinsky 2006; Shaffer & Ginsburg 2012). Thus transnational recursivity theory posits that norms and practice, and law and behavior, engage each other through the construction of a TLO such that, in an institutionalized TLO, a point may be reached where norms and behavior have some discernible fit with each other. In such a case, from the legal norms, it is possible to predict with some confidence likely behaviors; from the behaviors, it is possible to extrapolate what legal norms govern them. In these circumstances, a new normal is reached where legal norms are sufficiently internalized in the behavior of actors that impact can be observed. Empirically it can be demonstrated that before the institutionalization of a TLO, there was a state-of-affairs where norms could be

comprehended and behaviors observed; after the institutionalization of a TLO, there is a new state-of-affairs where different norms can be recognized and new norms observed in behavior.

TLO theory insists, however, on caveats: (1) the fit between legal norms and behaviors will always exhibit variation and will never be perfect; (2) whatever the intentions of normmakers, unintended consequences often arise; and (3) an institutionalized TLO may produce a new normal in practice, but it is never entirely static and never permanent. This book shows repeated cases of TLOs that were short-lived and long-lived, but all of them sooner or later confront potential competitors and successors.

We propose that a TLO can produce five categories of impacts, including: (1) impacts of transnational legal norms on national and local ones; (2) impacts of local and national legal norms on transnational ones; (3) impacts of one set of national legal norms on others; (4) impacts of one TLO on other TLOs or on prospective TLOs; and (5) impacts of transnational legal norms on other non-legal forms of ordering. Because the concept of a TLO is infused with recursive dynamics, the concept does not assume that legal orders in a transnational world necessarily are driven only from above, that is, from beyond the nation-state. In fact, the impacts of a TLO must be traced concomitantly in multiple directions.

### 1. Of the Transnational on the National and Local

Given that an institutionalized TLO is an amalgam of norms at the transnational, national, and local levels, scholars of international law and organizations instinctively suppose that impacts flow from the transnational to the national and local. Research in this book, as well as in our previous work (Shaffer 2013; Halliday 2013), demonstrates that TLOs do indeed exert significant impact on national and local legal norms and practices.

First, TLOs frequently *shift the boundary between the state and the market*. In some TLOs, the state may take on new responsibilities involving new forms of regulation (such as regulation over corporate restructuring), new subjects for criminalization (such as human trafficking), and new rights to be protected (such as a human right to health). In other TLOs, the state may curtail regulation and outsource responsibilities to the private sector, such as through reducing or eliminating tariffs and subsidies, leaving standard setting to private associations and curtailing state claims to tax corporate profits.

Second, TLOs frequently involve a *restructuring of nation-state institutions and the allocation of power among them*. In redistributions of authority among nation-state institutions, executive agencies can be invested with new regulatory powers, often in connection with transnational networks, such as those pursuing trade liberalization, financial monitoring, and standard setting. Executive power may be curtailed through the delegation of authority to new independent agencies, such as competition law authorities. Parliaments may lose power to executives when international financial institutions insist on immediate executive-led reforms, or they may gain power when

executive-led state development is challenged by transnational legal norms providing for constitutional rights and democratic governance. Transnational legal norms may press courts to increase their authority vis-à-vis executives and legislatures, even to hold executives criminally accountable. But the authority of courts may also be curtailed when transnational legal norms press for the delegation of powers to new regulatory agencies.

Third, transnational legal institutions and norms create *new mechanisms for accountability* with their attendant normative frames. National regulators engage in transnational peer review processes to which they must report and before which they are held accountable (Shaffer 2013). These monitoring and peer review processes are embedded in particular normative frames encoded in transnational legal norms regarding problem diagnostics, policy goals, and governance practices. The actors in these processes conceive of and prescribe what is deemed right and appropriate. Engaging in these transnational networks and patterns of association affects the professional identities of the participants.

Fourth, TLOs *shape the constitution and practices of professional and civil society*. In the process, a TLO will often lead to changes in the division of labor inside the market or state or both. New transnational legal norms can induce *professional specialization*, such as in patent and copyright law or in corporate accounting for tax avoidance or domestic insolvency proceedings. Elites, in particular, invest in these forms of expertise to enhance their careers and their roles in technocratic forms of governance.

A TLO can normatively empower non-profits and civil society groups to champion transnational legal norms in domestic settings. Participants in human rights TLOs seek to empower the media, religious groups, social movement organizations, and workers' groups within nation-states because the TLOs gain traction in doing so. TLOs can also change private relations within nation-states, and thus they can change local civil society itself. In many ways, proponents of human rights TLOs seek to transform not only conduct in civil conflict (e.g., through norms for the protection of women, children, and vulnerable populations in civil wars) but also family and gender relations (e.g., through proscriptions against violence against women or female circumcision). The classic human rights norms inscribed in the Universal Declaration of Human Rights include both protections that shield individuals from predations of the state and positive rights for speech and religion that indirectly reinforce and transform civil society organizations and networks that advance and practice those rights.

## 2. Of the Local and National on the Transnational

Transnational recursivity theory and research demonstrates that the transnational itself can reflect the national (cf. de Sousa Santos' "globalized localisms") and can indeed be transformed by the national or local. To observe impact in this direction is a necessary corrective to the "top-down" instinct of the majority of international,

transnational, and global specialists. Just as a TLO can catalyze transformations within nation-state institutions and local civil society, so too can "bottom-up" dynamics transform the transnational, whether it is a transnational organization or transnational civil society.

First, *local and national innovations can shape the agendas of transnational institutions*. The promulgation of transnational legal norms by IOs can often be traced to notable practices in a nation-state or from local groups. In many fields of business law, U.S. legal norms are reflected in global and transnational ones. For example, in the fields of corporate bankruptcy, secured transactions, and carriage of goods by sea, significant U.S. innovations, practices, and political bargains infused the global legal norms promulgated by UNCITRAL. After international and transnational legal norms are enacted, those who participate in international and transnational dispute settlement can shape the meaning of these legal norms through jurisprudence, whether they are particular nation-states or well-organized interests within them, such as those from the United States and Europe within the WTO (Shaffer 2013). Influences on transnational lawmaking organizations, nonetheless, may derive from countries other than the United States or in Europe. For example, Brazil's successful efforts in WTO cases have shown developing nations a way to defend their perspectives regarding the meaning and application of WTO law (Shaffer et al. 2010). The notable success of the Grameen Bank in Bangladesh in its programs of micro-lending to the very poor influenced international organizations (e.g., the World Bank) to adopt new policies on micro-enterprise lending, which were then diffused across the world through aid and development programs. The apparently transformative effect of the South African Truth and Reconciliation Commission, as well as the Rwanda *gacacas*, affected international multilateral and non-state bodies for post-conflict resolution and transitional justice.

Second, actors' successful promotion and institutionalization of a TLO can *empower civil society and business groups and, in the process, change the relative autonomy of international and transnational organizations vis-à-vis nation-states*. It is a demonstrable premise of constructivist theory in international relations scholarship that the ability of an international organization to promulgate norms that are widely adopted by nation-states across the world is likely to increase the power of those international organizations themselves. That is to say, the transnational propagators of legal norms become more than the sum of the interests of nation-states – they become emergent actors in their own right and thus come to exert organizational interests that cannot be reduced to an amalgam of their constituent state delegations. As secretariats of international organizations grow in power to shape agendas, attract resources, and form alliances with state and non-state actors, the relative power of nation-states in transnational normmaking may diminish, whereas that of non-state actors correlatively increases. This shift in the distribution of power can be accompanied by a strengthening of alliances and co-dependency between the international organization secretariats and non-state actors. These non-state actors may be formally recognized as delegates, whether from within a particular nation-state (e.g., the Business Law Section of the American Bar Association) or across nation-states (e.g., the International Bar Association). They may also work informally as allies of the secretariat, for example,

in the development of international and transnational environmental and health law through or with the support of UNEP and the WHO.

Third, a TLO's proponents and critics, whether they are nation-states or private actors, can affect a *redistribution of powers among international and transnational organizations*. Although it may seem paradoxical that the institutional overseer of transnational legal norms can itself be transformed by those norms, many examples reveal that the substance of the legal norms affects the properties of the normmaking institutions. The impetus for that transformation can come from nation-states or influential actors within nation-states, such as major firms, industry groups, or NGOs. In the carriage of goods by sea, the United States perceived that UNCTAD had been captured by small, non-aligned nation-states that were responsible for a small fraction of world trade. It therefore shifted its normmaking efforts away from UNCTAD, thus diminishing UNCTAD's global normative influence, and toward UNCITRAL, thus amplifying UNCITRAL's power as a global trade lawmaking organization in this area. The proponents of UNESCO's cultural preservation treaty aimed to constrain aggressive application of WTO trade liberalization norms implicating cultural concerns (Shaffer & Pollack 2010). The relative power of the International Criminal Court and other post-conflict tribunals vis-à-vis national tribunals is influenced by the interests of national leaders (i.e., whether they will yield to the jurisdiction of the court) and by the resources nation-states offer (e.g., their levels of funding for international criminal courts).

## 3. Of One Nation-State on Another

A TLO can enhance, constrain, or otherwise affect the impact of one nation-state on another, whether in trade, finance, or human rights. Litigation in the WTO affects nation-states' and private actors' leverage over each other. Those with greater legal capacity can enhance their leverage over those without it, potentially favoring larger and wealthier WTO members. Yet a WTO decision in favor of a weak nation-state in the global economy also demonstrates the power of a TLO to restrain the raw market power of the United States or European Union in favor of smaller countries. Double tax treaties enable countries to alter the financial playing field in relation to other countries, and they can facilitate tax avoidance strategies that lead to corporate registrations in one country that harm the public fisc of another. The adoption and effective implementation of global norms for anti–money laundering by a nation-state can shift the flow of illicit moneys out of one nation-state into another whose regulatory regime is less threatening. A transnational regulatory order on human trafficking can suppress the export of crime from the Ukraine to the Netherlands or from Belarus to Germany.

The appeal to transnational legal norms can also allow one nation-state to act as a moral or economic monitor of another by appealing to transnational or global legal norms. The United States, for example, issues an annual report on human rights in China, appealing not to the U.S. constitution or U.S. practices as its normative standard but to the long-acknowledged transcendent norms of the United Nations. The United States also monitors and issues reports on foreign trade practices affecting U.S.

products, services, and intellectual property but no longer predominantly under its own determinations of fair treatment; now it is focused on WTO and other international trade rules.

Bilateral conflicts between nation-states can be moved to a multilateral plane where the norms transcend both the particularities of a local situation and the intensities of neighborhood disputes. Multilateral dispute settlement processes facilitate the resolution of border disputes by creating new focal points to determine the sovereign boundaries of nation-states, including both land and maritime boundaries. They also affect the handling of each other's traded goods and the treatment of each other's citizens, including as refugees and asylum seekers.

## 4. Of One TLO on Other (Prospective) TLOs

Once a TLO is institutionalized, it has a direct or indirect impact on other TLOs, whether they are nascent, emergent or established. First, a well-established TLO can *pre-empt formation of alternative TLOs*. Construction of a TLO is a formidable challenge. To create transnational legal norms alone presents a major hurdle. The difficulty of adopting those norms in national laws,,getting those norms to penetrate into the practices and mentalities of local legal actors, ensuring that those norms are fairly concordant at all three levels, and making those norms both settled and clearly aligned with an underlying problem all indicate why the full institutionalization of a TLO in an issue area is a relatively rare phenomenon. For the presiders over an extant TLO, the "startup" costs of a rival are substantial indeed. If an extant TLO has an adaptive capacity to meet changing circumstances or to respond to a crisis, then it has a far higher probability of maintaining its own stature while pre-empting the formation of another.

But pre-emption can also occur when it becomes clear that an arthritic TLO must go and rivals rush to replace it. In the case of carriage of goods by sea, it became apparent to powerful shippers and carriers that the old order no longer could be maintained. If there were to be a new order, what would it look like? With several potential TLO proponents on the world stage (UNCTAD, UNCITRAL, the United States, and regional TLOs), several nations and the International Maritime Association moved swiftly to nominate UNCITRAL as their international organization of choice over UNCTAD or the United States as a shadow progenitor of global legal norms.

Second, an institutionalized TLO will *alter the contours of TLO competition*. Imagine a TLO already in existence and relatively institutionalized. To compete with such a TLO requires that proponents of an insurgent TLO must adapt its insurgency to minimize the strengths and capitalize from the weaknesses of the more institutionalized TLO. In other words, the more institutionalized TLO indirectly sets the terms of competition for the emergence of competitors, just as it may also drain an insurgency of resources or threaten an insurgency with whatever powers it has accrued to itself.

The proponents of the Biosafety Protocol on genetically modified organisms were thus pressed to create provisions within it to align its legal norms with those of the WTO, resulting in compromise through linking language (Shaffer & Pollack 2010). When the World Bank Governance Indicators to assimilate rule of law into its diagnostic instrument, its designers chose not to replicate all the elements of the entrenched UNDHRs TLO but to jettison some of the content of those rights and emphasize heavily a particular element of those rights – property rights. To compete with a more institutionalized global TLO on the intellectual property rights that protect pharmaceutical patents, the proponents of an alternative access to medicines TLO had to reframe the underlying problem and look to alternative allies to mobilize effectively against proponents of the IP TLO. Their actions created a new kind of politics engaging TLOs.

Third, an institutionalized TLO can *induce change in other TLOs*. If there already exists more than one TLO addressing an issue area, perhaps because they have partitioned the problem into several non-competing TLOs, then the vagaries of coexistence over time inevitably will require negotiation and renegotiation of normative frontiers between TLOs. To strengthen a negotiating position or meet a challenge from a neighboring TLO, it can be expected that proponents of either TLO will try to induce the other to change the form of its norms (e.g., a hardening of soft law, a softening of hard law), to alter the reach of its normative aspirations (e.g., geographically or legally), to modify its bases of legitimation or inclusiveness in representation, or to seek new or renegotiated coalitional partners. For example, the WTO's creation enhanced the normmaking power of some international standard-setting institutions, such as Codex Alimentarius (Büthe, Chapter 7), resulting in the hardening of what had previously been soft-law norms. Similarly, the gradual institutionalization of transnational environmental legal norms has placed pressure on nation-states, the WTO secretariat, and the WTO Appellate Body to adapt WTO legal norms and their interpretation to recognize environmental and sustainable development concerns. Part of the recursivity dynamic therefore becomes a periodic cycle of initiatives and responses of one adjacent TLO to another.

## 5. Of Transnational *Legal* Ordering on Alternative Forms of Ordering

In Section I, we showed that transnational *legal* ordering is only one species of social ordering. Just as TLOs may compete with each other, so, too, may a transnational *legal* order impinge or encroach on religious, customary, political, and market forms of social ordering.

With respect to *religious or customary orders*, proponents and supporters of the emerging global TLO on female circumcision or female genital mutilation confront resistance from some traditional or Islamic groups at the national and particularly local levels. The TLO directly corrodes traditional authority in the village, threatens established practices, weakens a basis of gender hierarchies, and undermines customary law. Hence, a politics of encroachment and resistance can emerge from the

penetration of this TLO into localities, particularly in North Africa. One likewise sees clashes between supporters of transnational legal norms regarding child marriage and customary norms in villages in India (Goodwin 2013) and between transnational norms regarding equality or non-discrimination and customary norms under the Hindu caste system. Clashes also occur between advocates of global legal norms regarding women's rights and the religious norms of the Roman Catholic Church, which resists assimilation into a legal order that does not conform to its theological values, such as regards access to abortion and contraception.

With respect to the rule of law TLO as a potential meta-TLO implicating multiple substantive TLOs (Rajah, Chapter 10), its variant represented by the UNDHR confronts authoritarian *political orders*. Were the UNDHR to be adhered to fully, it would require authoritarian rulers to permit an open civil society, freedom of speech, voluntary organizations outside of nation-state control, and political opposition (at least in the public square), and it would restrain those rulers from arbitrary use of executive power. The rule of law TLO and other TLOs that are nested within it (e.g., those on the accountability of political leaders) effectively encroach on the discretion of arbitrary authoritarian leaders. To simultaneously acknowledge rule of law as a global norm and to reject its application in practice requires authoritarian leaders to practice radical symbolic compliance, decoupling of the transnational and national legal norms from local practice, and much defensive maneuvering (Rajah 2012). That is to say, even if the transnational legal norms in a TLO do not have a direct impact on local practice, they may nonetheless compel a government into sets of behaviors to protect a *political* order (i.e., authoritarianism) from a *legal* order (i.e., rule of law).

With respect to finance and the market, a TLO can place pressures on political leaders to conform informal *market norms* to global standards. Because the "black market," or informal market, in many countries represents a significant proportion of total economic activity, it effectively operates according to its own informal rules and is resistant to legal orders. The rapid rise of a global TLO on anti–money laundering and the financing of terrorism, driven by the Financial Action Task Force, G7, and G20, seeks to impose a regulatory regime on money that currently does not pass through financial institutions and cannot be monitored. A contest can be observed in many countries among market actors who are determined to maintain an economic order that does not rely on formal law in the face of heavy transnational pressures for the economic order to submit to a *legal* order.

## VII. Conclusion

Law can no longer be viewed through a purely national lens. This project on TLOs provides new theoretical tools to integrate transnational, national, and local lawmaking and practice into a coherent framework to capture the dynamic changes in legal ordering taking place today. The project has three aspects. First, it seeks to explain the origins, formation, and change of TLOs through different facilitating and precipitating

conditions and through the dynamic, recursive processes between law formation and implementation at the transnational, national, and subnational levels. Second, it aims to observe and theorize the development of different configurations of TLOs in terms of the settlement of transnational legal norms and variations in the alignment of one or more TLOs with an issue. Third, it aims to understand the variable impacts of different TLOs on international organizations and nation-states, national policy-makers and officials, private markets and occupations, civil society, and individuals.

Legal ordering can be viewed transnationally from multiple angles. TLOs offer an index, in effect, of the intensification and extensification of economic and cultural globalization, so issues traditionally viewed as domestic increasingly have a transnational or global dimension. TLOs are facilitators of social change, because they ramify across virtually all spheres of social life to order them through law or to compel actors into defensive postures that keep law at bay. TLOs can also constrain change by curtailing the space available for social imagining. Behind every TLO is an ideological dimension that promotes some social imaginings and excludes others. Although often contested, once they are institutionalized, TLOs can discipline behavior in a deep sense.

These multi-faceted representations of TLOs contrast with the treatment of law in much social science, where law becomes something to be explained in particular disciplinary terms, thereby reducing it to politics, social forces, efficiency, and the like. Law is the *explanandum*, and other disciplines do the explaining. The result is an unequal, one-way relationship in which little to no account is taken of law as a normative enterprise that affects social meaning and social order (Goodhart 1997; Abbott & Snidal 2012a; Dunoff & Pollack 2012). The study of the legal should inform other disciplines, and also be informed by them.

The dynamic recursive model of TLO institutionalization and impact presented in this framework chapter repudiates a one-dimensional and desiccated concept of law. Based on and building from empirical evidence adduced in this book, this project shows that law is both determined by other forces and determines those forces; it initiates action and is shaped by action; it has its own distinctive logic that exists in tension with other logics of social order; its normative power brings it into confrontation with alternative and competing norms with which it must wrestle. The normative substance of law matters in interdisciplinary scholarship because it carries epistemological force that sets it apart from the epistemologies of economics, religion, or political science. Our interdisciplinary concept of law thereby elevates law's normativity to the prominence it warrants in a transnational world but refuses to remove it from the explanatory enterprises of the social sciences. As analysis moves from international law governing the relations among nation-states to TLOs that reflect, penetrate, and harness national law and legal institutions, the epistemology of law becomes of much greater salience for understanding the impact of the institutionalization of legal norms on social order. This project on TLOs aims to build a theory regarding why and how this institutionalization occurs.

The study of TLOs should not be unidirectional, as it tends to be in the

international law literature on compliance (Guzman 2007), transnational legal process (Koh 1996), and acculturation (Goodman & Jinks 2004). Although these literatures have a logic in their aims to explain international law's impact, they fail to engage the dynamic process of transnational legal normmaking in which international, national, and local processes interact recursively to establish the meaning and ordering power of legal norms.

By moving back and forth between the disciplines of law and the social sciences, the concept and theory of TLOs enables both an advance in scholarly understandings of law in a transnational world and a lens through which to comprehend practice and behavior as they are ordered through law within and beyond the nation-state.

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