

WHAT OF LITIGATION? DOMESTIC COURTS AND LAWMAKING PROCESSES IN TRANSNATIONAL LAW

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ABSTRACT

Since its origins, the field of transnational law has been particularly captivated by three processes of lawmaking: transnational private rulemaking, the harmonization of national legislation through the spread of model laws, and the development of international treaties and conventions. This article argues that this particular focus has outrun its utility as transnational legal mobilizations increasingly turn to litigation before domestic courts in order to transform legal systems and the manner in which they are enforced. Drawing on illustrations from strategic environmental litigation, this article articulates a necessary shift in focus in order to account for the growth in transnational cases and strategies of environmental and climate litigation. Domestic litigation has become an important process of transnational lawmaking in so far that litigation is used to hold international business actors to account for the social and environmental harms associated with their corporate families and global value chains. The article also articulates how common transnational strategies of domestic litigation are developed around harmonized or convergent aspects of national law and supranational legal norms. The rising importance of domestic litigation also brings into question transnational law's historical characterization as a field developed around 'the commonsense of capitalism,' as the cases and strategies now brought into focus seek to challenge and limit the power of international business actors.

Keywords: transnational law, lawmaking, litigation, courts, legal mobilization.

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I.	INTRODUCTION.....	42
II.	PHILIP JESSUP AND THE FORMATION OF A FIELD.....	44
III.	TRANSNATIONAL LAW AS THE ‘COMMON SENSE’ OF TRANSNATIONAL CAPITALISM.....	48
	<i>A. Private Rulemaking in Transnational Law</i>	52
	<i>B. Harmonizing National Law With Model and Transplanted Legislation</i>	56
	<i>C. Unusual Participants In International Convention and Treaty Writing</i>	59
IV.	TRANSNATIONAL LAWMAKING THROUGH THE STATE.....	64
	<i>A. From Private Rulemaking to Accountability For GVCs Before Domestic Courts</i>	65
	<i>B. From Harmonizing With Model Laws To Transnational Strategies In Harmonized Law</i>	68
	<i>C. From Private Actors In Treaty-making To The Strategic Use Of Supranational Law and Adjudicative Procedures</i>	71
	<i>D. A Renewal Of The Sociology Of Transnational Legal Practice</i>	73
V.	CONCLUSION	75

I. INTRODUCTION

Climate litigation hubs and accelerators,¹ legal mobilizations spanning jurisdictions that aim to protect indigenous peoples’ lands from development by multinational enterprises (MNEs),² transnational human rights litigation against MNEs for harm caused by their extractive activities abroad,³ there is an evident rise in the political and societal attention for litigation and its transnational dimensions. This rising attention to public interest and strategic

1. Examples include CLX – the Climate Litigation Accelerator – launched by New York University’s Law School and the Climate Litigation Network hosted by the Urgenda Foundation. The Climate Litigation Accelerator, <https://clxtoolkit.com/> (last accessed Mar. 6, 2023); Urgenda Foundation, ‘The Climate Litigation Network,’ <https://www.urgenda.nl/en/themas/climate-case/global-climate-litigation/> (last accessed Mar. 6, 2023).

2. For example, the litigation initiated by the Zapotec community in Unión Hidalgo, Oaxaca, against the French corporation Électricité de France (EDF). The case was filed in October 2020 in Paris (Tribunal Judiciaire de Paris), having been brought under the French Corporate Duty of Vigilance Law of 2017. For background on the pending case, see European Center for Constitutional and Human Rights, ‘Case Report: Wind Farm in Mexico: French energy firm EDF disregards indigenous rights,’ (Nov. 2020), https://www.ecchr.eu/fileadmin/Fallbeschreibungen/CASE_RESPORT_EDF_MEXICO_NOV2020.pdf (last accessed Mar. 6, 2023).

3. For example, the parallel lawsuits in the Dutch and English courts against Shell for harms associated with the oil spills in its operations in the Niger Delta region. Hof ‘s-Gravenshage 29 januari 2021, ECLI:NL:GHDHA:2021:132 (Oruma/Royal Dutch Shell Plc) (Neth.), ECLI:NL:GHDHA:2021:133 (Goi/ Royal Dutch Shell Plc) (Neth.) and ECLI:NL:GHDHA:2021:134 (Ikot Ada Udo/ Royal Dutch Shell Plc) (Neth.).

litigation at the intersection of human rights and environmental protection, including climate change, concerns both cases involving harm or activities in a jurisdiction other than the jurisdiction where the litigation is carried out (hereafter ‘transnational cases’), as well as collaborative professional networks and expertise centers that develop litigation strategies and expertise for potential litigants located across numerous jurisdictions (hereafter ‘transnational strategies’). Additionally, this growing field of litigation involves diverse types of courts, including both domestic courts and various types of supranational forums, such as regional human rights courts (e.g. the Inter-American Court of Human Rights (IACHR) and the European Court of Human Rights (ECHR)), the United Nations Human Rights Council (UNHCR), and other trans- or supra-national complaint mechanisms, such as the Organisation for Economic Co-operation and Development (OECD), National Contact Points (NCPs), and the World Bank’s Inspection Panel.

The rise of transnational cases and strategies begs the conceptual question as to how the field of transnational law accounts for litigation in its characterizations of lawmaking processes. How has the field characterized courts, in particular domestic courts, and the litigation that occurs before them, as sites and processes of lawmaking? Differing from general litigation, strategic or public interest litigation is often aimed at obtaining innovative interpretations of legislative frameworks or doctrine, reviewing the executive branch’s weighing of interests affect in policy decisions, or enforcing laws which are otherwise structurally unenforced.⁴ As such it potentially poses as an influential process of lawmaking and normative change in legal systems.⁵ The aim of this study is to identify the dynamics of lawmaking that featured in transnational legal scholarship since its origins in the 1950s and, in particular, to account for the position – if any – given to litigation in domestic courts.

In this discussion of lawmaking, we find that the field of transnational law has largely ignored domestic litigation as a relevant process of lawmaking, and thus also domestic courts as relevant sites. Instead, transnational legal studies have focused on three principal processes of lawmaking: first, the use of private law tools to create transnational private rulemaking; second, the deployment of model legislation to harmonize differences in national legislative frameworks; and third, treaty-making processes, with a particular

4. Ann Southworth provides a comprehensive discussion of the many complimentary and competing projects, definitions and ideologies of ‘public interest litigation’ and out strategic uses of litigation for the social or public interest in Ann Southworth, *What is Public Interest Law: Empirical Perspectives on an Old Question*, 62 DEPAUL L. REV. 493, 496-502 (2013).

5. John Denvir, *Towards a Political Theory of Public Interest Litigation*, 54 N.C. L. REV. 1133, 1135 (1976).

attention to the role of unusual actors (e.g. actors that are not state delegates) in the treaty drafting process, such as civil society organizations and legal scholars. Drawing from these accounts of lawmaking, this article identifies biases in the field of transnational law in order to account for why it has largely overlooked the importance of domestic litigation, and how the rise of transnational cases and transnational strategies before domestic courts stands to affect the field. In particular, it is contended here that the newfound emphasis on strategic litigation has come about, in part, as a result of the successfulness of transnational private regulatory frameworks and the governance that they offer MNEs of their increasingly complex and globalized supply chains.

Section II of this article traces the formation of transnational law as a field of legal inquiry by returning to Philip Jessup's influential essays. It demonstrates how Jessup's early depiction of transnational law already intimated three processes of lawmaking that would come to captivate future research: transnational private rulemaking, the harmonization of national laws through model legislation, and the formation of international treaties. Section III then describes how these three processes of lawmaking were subsequently amplified as the field of transnational law evolved, with a particular emphasis on the role of private actors in these three processes. It argues that the accounts of transnational lawmaking were connected to an understanding of the field as closely related to the facilitation of global capitalism and international business transactions. Finally, Section IV argues that the recent eruption in transnational litigation before domestic courts demands a shift in how the field of transnational law accounts for lawmaking processes. It articulates three possible shifts in analytic focus for the field: first, to the use of domestic litigation in holding MNEs accountable for the harms of their business partners and supply chains; second, to the development of common strategies of litigation around harmonized or convergent areas of national law (such as environmental impact assessments); and finally, to the coordinated formation of common interpretations of supranational legal norms in litigation before domestic courts. Shifting to this new account of transnational lawmaking thus requires a renewed sociology of the transnational networks and communities that carry out transnational litigation before domestic courts.

II. PHILIP JESSUP AND THE FORMATION OF A FIELD

The origin of transnational law as a field of legal inquiry is frequently attributed to Philip Jessup's 1956 Storrs Lectures on Jurisprudence at Yale Law School, which were subsequently

published as a monograph.⁶ The monograph's role in the field's formation has been well documented in a 2020 edited volume dedicated to the text.⁷ Here, we return to Jessup's text to identify how he understood the sources of law and lawmaking for the emergent field and, in particular, the position of domestic courts and litigation in the text. In doing so, we find that Jessup's early definition of transnational law set in place an emphasis on three types of lawmaking that continued to define the field through the first decades of the twenty-first century: private rulemaking, the adoption of model legislation across national jurisdictions, and the negotiation of treaties and international conventions.

Drawing on his experience as a diplomat and judge before the International Court of Justice, Jessup's 'Transnational Law' offers three essays which draw on functional and methodologically pragmatic approaches to addressing 'transnational problems,' the 'action or events that transcend national frontiers,' to which various areas of law may apply, including public international law, private international law, and domestic law with transnational or extraterritorial effects.⁸ 'Transnational law,' then, is the term Jessup offers to encompass this diverse collection of legal rules that offer 'solutions' to the transnational problems arising from 'conflicts of interest, real or imagined' and whose existence are a universal characteristic of social life, according to Jessup.⁹

In the first essay, titled 'The Universality of Human Problems,' Jessup demonstrates a methodology for identifying solutions to transnational problems, in which he largely works from analogy across domestic and international levels.¹⁰ Using the language of 'problems' and 'solutions,' this first essay shows the functionalism in Jessup's analysis as he seeks to simplify conflicts at the international level through comparison to more familiar domestic parallels. He compares the desire of Morocco to secede from France to a divorce, and the diminutive participatory role of Serbia, Bulgaria and Montenegro at the 1878 Congress of Berlin with the plight of small shareholders prevented from speaking during an Annual General Meeting by

6. Philip Jessup, *TRANSNATIONAL LAW* (Yale University Press. 1956). The novelty of the field is captured by one commentator's reaction: 'Why should such an author thus dignify the ill-descriptive and graceless word "transnational"?' Once past this minotaur, however, we find much wit and wisdom.' William G. Rice, *Review: Transnational Law*, By Philip C. Jessup, 10 J. LEGAL EDUC. 122, 122 (1957).

7. PEER ZUMBANSEN, *INTRODUCTION: TRANSNATIONAL LAW, WITH AND BEYOND JESSUP* (Peer Zumbansen ed., Cambridge UP 2020).

8. JESSUP, *supra* note 6, at 2.

9. *Id.* at 11.

10. *Id.* at 16. Jessup asks, rhetorically, 'In spite of the vast organizational and procedural differences between the national and the international stage, if we find there are common elements in the domestic and the international dramas, may not the greater experience with the solution of the former aid in the solution of the latter?'

majority shareholders.¹¹ Throughout these examples, Jessup's judicial experience is on full display as he creatively draws analogies across domestic and international frames of reference in order to ascertain the possible solutions to seemingly novel transnational conflicts.

In the second essay, 'The Power to Deal with Problems,' Jessup's methodological pragmatism is exhibited in his discussion of jurisdiction and (extra-)territoriality as he examines conflicts that arise at the intersection of territorial and personal notions of jurisdiction, particularly in criminal law.¹² Following Lauterpacht, Jessup describes a court's assertion of jurisdiction as an essentially pragmatic concern, a 'rule of convenience,' thus opening up the possibility of extraterritorial jurisdiction, such as when a court asserts jurisdiction over criminal actions conducted in another state's territory on the basis of the alleged perpetrator's nationality.¹³ His pragmatic approach to questions of jurisdiction and territoriality in this second essay seem to welcome the expanding use of international criminal jurisdiction following the Second World War and the novel possibility of submitting individual appeals to the European Commission of Human Rights, as illustrated in his summarizing statement: 'It would be the function of transnational law to reshuffle the cases and to deal out jurisdiction in the manner most conducive to the needs and convenience of all members of the international community.'¹⁴

In the third and final essay, 'The Choice of Law Governing Problems,' Jessup engages with diverse types of disputes that help characterize the field of transnational law, including international maritime disputes, domestic antitrust proceedings against foreign companies, and contractual disputes of employees of the United Nations handled by its Administrative Tribunal. Throughout his engagement with these cases, Jessup routinely draws on the decisions of domestic and international courts as they come to solutions for these 'transnational problems.' However, his recourse to litigation and adjudication is not so much to identify developments or normative frameworks within private international law or conflicts of law, the field of rules at the heart of the discussion in this essay. Instead, Jessup draws on these cases as illustrations of the pragmatic method of transnational legal analysis, summarized in three points:

11. *Id.* at 16-21.

12. *Id.* at 35.

13. Jessup quotes Lauterpacht's formulation: 'Territoriality of jurisdiction is a rule of convenience in the sphere of evidence. It is not a requirement of justice or even a necessary postulate of the sovereignty of the State.' *Id.* at 44. The original text is found in Hersch Lauterpacht, *Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens*, 9 CAMBRIDGE L. J. 330, 348 n. 61 (1947).

14. Jessup, *supra* note 6, at 52, 71.

1. There is nothing in the character of the parties which precludes the application of one or the other bodies of law into which the legal field is traditionally divided. ... 2. There is nothing in the character of the forum which precludes it from applying one or the other of these bodies of law. ... 3. There is no distinction between civil and criminal law in terms of its applicability to individuals, corporations or states, again allowing for prescriptions laid down by the appropriate authority regarding the competence of a particular tribunal.¹⁵

As such, this final essay consolidates the thoroughly methodological focus of transnational law as an emergent field, one which is not so much concerned with accounting for particular sources of law and lawmaking, but rather one which seeks to creatively guide and inspire judges, lawmakers and attorneys to think across doctrinal frames and formalist limitations in their encounters with transnational problems.¹⁶

Importantly, in the closing pages of 'Transnational Law,' Jessup breaks from this methodological focus in his commentary on maritime law, which he claims has functioned as a transnational field of law since the Phoenicians of the fourteenth century B.C.¹⁷ Here, in this final example of the monograph, he identifies three sources of lawmaking for the field. First, he notes that the law of general average in maritime law was formed by 'device of voluntary private agreement' via the voluntary incorporation of the York-Antwerp rules, decided upon by diverse public and private actors at nongovernmental maritime conferences, in the contractual agreements of lading and charter parties.¹⁸ Second, Jessop identifies the process of harmonizing 'rules of the road at sea' which was achieved through 'the adoption of identical legislation in many maritime states.'¹⁹ And finally, Jessup indicates the importance of 'the negotiation of international conventions' for the development of maritime law, including the Brussels conventions of 1910 which sought to unify rules related to collisions at sea, assistance and salvage.²⁰

In those closing paragraphs of the monograph, Jessup provides his sole general description of sources of law and lawmaking processes in the text. Diverging from the text's thoroughly methodological

15. *Id.* at 102-3.

16. Jessup summarizes the methodological ethos of transnational law towards the end of this essay in posing that, 'Where the law-making authority is national, the procedural problem of making new rules better suited to the regulation of transnational situations, that is, the creation of new transnational law, presents no difficulty. The difficulty lies – as the UNESCO Charter says of wars – in the minds of men.' *Id.* at 108.

17. *Id.* at 109.

18. *Id.* at 110.

19. *Id.*

20. *Id.* at 111.

emphasis, Jessup identified three processes of lawmaking which inadvertently captivated the field of transnational legal studies for the coming decades: private rulemaking, the drafting of model national legislation, and treaty and convention making. Notably, at the outset of the field, domestic courts and litigation do not feature as a source of lawmaking in Jessup's account but instead serve as examples of the application of transnational law methods. In the subsequent section we will trace how these three forms of lawmaking subsequently influenced the field as it developed through other scholars.

III. TRANSNATIONAL LAW AS THE 'COMMON SENSE' OF TRANSNATIONAL CAPITALISM

Following the publication of Jessup's 1956 Storrs Lectures, the field of transnational law took some decades to gather steam. Journals were founded in the 1960s, such as the *Columbia Journal of Transnational Law* in 1961²¹ and the *Vanderbilt Journal of Transnational Law* in 1967,²² though the subject matter of their early volumes is difficult to distinguish from their public international law and private international law counterparts. Yet, slowly, the field began to emerge around the study of how diverse legal frameworks are deployed to facilitate and restrain the increasingly prominent activities of Multinational Enterprises (MNEs) and the institution of transnational or global capitalism with which their activities are associated. Between 1956 and the end of the century, Jessup's methodological project evolved to focus on the challenges that MNEs posed to conventional legal distinctions – between public and private law, domestic and international law²³ – becoming the study of 'the common sense of transnational capitalism,' and how the law 'legitimizes and, indeed, fetishizes private corporate power and the subordination of local and national societies and political economies to the disciplines of private, foreign capital.'²⁴ Through this evolution of focus, however, the three sources of lawmaking in Jessup's essay remained prevalent as legal scholars sought to understand how the actors of global capitalism engaged in private rulemaking, pulled at

21. *History*, Columbia Journal of Transnational Law, <https://www.jtl.columbia.edu/history> (last accessed Mar. 8, 2023).

22. *Home*, Vanderbilt Journal of Transnational Law, <https://www.transnat.org/> (last accessed Mar. 8, 2023).

23. This framing of transnational law as a methodology for analyzing the boundary-crossing use of law was later emphasized in Peer Zumbansen, *Neither 'Public' nor 'Private', 'National' nor 'International': Transnational Corporate Governance from a Legal Pluralist Perspective*, 38 J. L. AND SOC'Y 50, 52 (2011).

24. A. Claire Cutler, LOCATING PRIVATE TRANSNATIONAL AUTHORITY IN THE GLOBAL POLITICAL ECONOMY 343 (Peer Zumbansen ed., 2020). Zumbansen describes this critical evaluation as '[t]he lingering concern that transnational law is just another name for the autonomous law of a global capitalist merchant elite.' Peer Zumbansen, *supra* note 7, at 43.

the levers of national legislative bodies with model legislative texts, and became involved as unlikely participants in treaty and convention drafting, a procedure of lawmaking traditionally reserved for state actors.

An early illustration of the turn from Jessup's methodological focus towards the role of law in global capitalism comes in Detlev Vagts' 1970 essay 'The Multinational Enterprise: A New Challenge for Transnational Law.'²⁵ Vagts inquires as to how the rise of MNEs, particularly those headquartered in the United States of America (US) and the United Kingdom (UK), may require legal innovations in the regulatory frameworks of corporations and international trade. While largely accepting a liberal economic narrative of the MNE as an efficient market actor which does not pose a 'malevolent influence' in its host states, Vagts concludes that the challenge of regulating their activities goes beyond the capacity of any individual states, and thus requires coordinated regulatory actions among states, and the creation of 'international political institutions as remote and centralized as the MNE itself.'²⁶ As such, the prospect of an emergent transnational law to match the innovative character of MNEs is presupposed to flow from the international lawmaking process of treaty and convention writing.

It was the fall of the Cold War and the proclaimed 'End of History'²⁷ that amplified the field of transnational law and settled its focus as the common sense of global capitalism. Legal sociologists documenting the transnationalization of the western law firms were among the first to describe the consolidation of transnational legal practices. Thomas Friedman, for example, situates his sociology of transnational lawyering amid the expansion of the US firms Kellogg Company and Coca-Cola into Latvia and Albania, remarking that '[i]n the background of these two momentous events, there must have been an army of lawyers jetting about the world, writing contracts, negotiating, dealing.'²⁸ Likewise, Richard Abel's sociological account of

25. Detlev F. Vagts, *The Multinational Enterprise: A New Challenge for Transnational Law*, 83 HARV. L. REV. 739 (1970).

26. *Id.* at 792. In retrospect, Vagts may be underestimating the economic and political power associated with the MNE: 'After protracted contemplation of the MNE, I cannot find in it the malevolent influence, discernible by some observers, which leads us into interventions all over the world and drags down less developed countries into economic vassalage while sustaining the economic stability of Nigeria and South Africa. Its political power does not seem particularly formidable, and there is a good case for the proposition that it pays its way in host countries - to the point where one might argue that, particularly in its tendency to diffuse technology with great speed, it relatively disadvantages the home country. If the MNE in fact poses a threat to human freedom it is because of its peculiar effectiveness. Its capacity to pursue a centralized and coordinated strategy removes decision-making power far from the reach of people intimately affected by it.' *Id.* at 791.

27. Francis Fukuyama, *The End of History?*, THE NATIONAL INTEREST 3 (1989).

28. Lawrence M. Friedman, *Borders: On the Emerging Sociology of Transnational Law*, 32 STAN. J. OF INT'L L. 65, 65 (1996).

transnational legal practice focuses on the innovative legal services of corporate law firms, particularly American, British, Dutch and French firms, as they expanded abroad.²⁹ Notably, Abel depicts an emerging field of transnational legal practice as almost entirely composed by transactional work, rather than ‘advocacy’ or litigation services.³⁰ His explanation for this is based on the finding that foreign lawyers working in transnational settings are rarely admitted to local professional organizations (i.e. the ‘Bar’) and are therefore formally prohibited from appearing in court on behalf of their clients.³¹ This was not necessarily experienced as an obstacle for transnational law firms, however, as they instead sought the high-volume, repeat clients in transactional services, often with a just a few clients consisting of the majority of their office’s revenue.³² As Abel describes it, ‘they increasingly resemble their competitors in offices of house counsel and accounting firms, as well as their predecessors – lawyers before the emergence of strong professional associations.’³³ With this characterization, we see that the emergence of transnational law firms is closely linked to transactional work such as contractual, commercial, and corporate legal services necessary for the functioning of MNEs and their commercial trade networks, with little attention or interest in litigation. As we will see in the next section, it is this proliferation of transnational private legal practice that feeds into an interest in the capacity of transnational private actors (e.g. MNEs) to achieve governance of themselves and their broader supply chains and industries through private rulemaking.

Friedman contextualizes the rise of transnational legal practice with a corresponding increase in transnational norms, both those ‘imposed’ by transcendent or hierarchical normative structures (e.g. the norms of the European Union vis-à-vis its member states), as well as ‘parallel transnational norms’ which appear in multiple jurisdictions but without the mandate of a transcendent authority.³⁴ Although ‘[n]obody imposes them, and nobody can force them on an entity if it chooses not to go along with the trend,’ Friedman suggest that, ‘when two or more countries (or states or provinces within a federal system) adopt the same statute, or text, or doctrine, we can honestly refer to these norms as “transnational,” even though they lack what we have called transcendence.’³⁵ Furthermore, these parallel transnational norms can develop through either planned,

29. Richard L. Abel, *Transnational Law Practice*, 44 CASE W. RES. L. REV. 737 (1994).

30. *Id.* at 743-44.

31. *Id.* at 750.

32. *Id.* at 749.

33. *Id.* at 750.

34. Friedman, *supra* note 28, 69-70.

35. *Id.* at 69.

‘harmonization’ processes, or through unplanned, diffuse processes of ‘convergence.’³⁶ For Friedman, the emergence of transnational legal practice is, thus, deeply intertwined with these processes of transnational lawmaking, through imposition, harmonization and convergence. Yet, both these forms of lawmaking and the evolving field of transnational law remain squarely a product of global capitalism in his account.³⁷

At the beginning of the 1990s, these sociological accounts of transnational legal practice reveal a field that is still very much at its infancy. Yet, already at this early stage, the notion of transnational law as the commonsense of global capitalism is crystallizing, as is the field’s focus on two particular forms of lawmaking – private rulemaking through the tools of private law (contracts and company law) and the use of harmonized national legislation. Friedman characterizes the imagined landscape of transnational law, and its inseparable ties to the corporate actors of global capitalism, at this early stage in the following excerpt:

In point of fact, there is little research that bears on the question, or on the transnational legal community at all. It would be interesting to study the scholars and experts who fly from meeting to meeting all about the world, talking about model laws and the like. It would, be especially interesting to learn more about the customs and living law of global businessmen and transnational lawyers. There may be important local dialects, so to speak, within some of these communities; there may be differences between the overseas Chinese and European business communities in their attitudes toward legal forms and norms, or between French and Finnish business communities, for that matter. It would be good to know more about the huge American law firms that have branches in foreign countries. How do they structure and shape the way business is done, the way contracts are drafted, the way disputes are settled in international markets? How do Japanese banks compare with British or French banks in financing international trade? But this is all largely unexplored territory.³⁸

Following the transnationalization of law firms as they seek the growing business of MNEs, the next sections will trace how

36. *Id.* at 71-72.

37. *Id.* at 77. Friedman contends that, ‘This global economy is the engine driving convergence, and is what stimulates jurists to draft model laws and to worry about harmonization. In fact, harmonization and model laws are, in an important sense, merely responses to processes that have already taken place.’

38. *Id.* at 77-78.

transnational legal scholarship further entrenched its fascination with the three modes of transnational lawmaking identified by Jessup and further emphasized by Vagts, Friedman and Abel – private rulemaking, harmonized national legislation and international treaty and convention writing – while the role of domestic courts in lawmaking continued to be largely ignored.³⁹

A. Private Rulemaking in Transnational Law

Working from Niklas Luhmann's systems theory framework, Gunther Teubner's writings on the role of private law instruments (contracts and associational rules in company law) in transnational private rulemaking is, for many, the quintessential subject matter of transnational legal studies.⁴⁰ In the 1997 edited volume 'Global Law Without a State', Teubner puts forward the first comprehensive account of transnationalization of law through private rulemaking, illustrating how civil society and the private sector act as the driving forces of globalization for law, rather than states.⁴¹ The volume collects examples of private governance in the forms of technical standard setting, the governance of MNEs, rulemaking for professional bodies, contracting, and arbitration, among others, to demonstrate how transnational law 'breaks a double taboo about the necessary connections between law and state.'⁴² First, drawing influence from Eugene Ehrlich's account of legal pluralism and societal processes of law formation, Teubner argues that the authority of private law instruments (e.g. contracts and the associational documents governing the internal activities of private associations and companies) constitute valid legal norms independent of their authorization by a state.⁴³ Second, he argues that the validity of these

39. It should be noted that Friedman does discuss the role of human rights litigation extensively in his 1996 article, noting the similarity in social movements making use of the courts and human rights to achieve social change in the US, Germany, the UK and through the European Court of Human Rights. However, Friedman also repeats the findings of Macaulay and Toharia in stating that business communities largely seek to avoid litigation and use legal services in manners to facilitate that avoidance. The linkage of transnational legal practice and the rise of MNEs and global capitalism thus results in the diminished position of litigation as a lawmaking process for this emerging field. *See id.* at 81-82; Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIO. REV. (1963); JOSÉ-JUAN TOHARIA, CAMBIO SOCIAL Y VIDA JURÍDICA EN ESPAÑA (1974).

40. Niklaus Luhmann, *SOCIAL SYSTEMS* (John Bednarz, Jr. & Dirk Baecker trans., 1995); Niklas Luhmann, *LAW AS A SOCIAL SYSTEM* (Fatima Kastner et al. ed., Klaus A. Ziegert trans., 2004); Gunther Teubner, *LAW AS AN AUTOPOIETIC SYSTEM* (Zenon Bankowski ed., Anne Bankowska & Ruth Adler trans., 1993).

41. Gunther Teubner, *GLOBAL LAW WITHOUT A STATE* (1997).

42. *Id.* at 10.

43. See Ehrlich's notion of the 'living law of Bukowina' in: EUGEN EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* (Walter L. Moll trans., 1936); TEUBNER, *supra* note 41.

norms extends beyond the territorial confines of states and outside of the relational confines of international relations, applying directly to the transnational entities and activities of MNEs and global capitalism.⁴⁴ In other words, he depicts transnational law as ‘breaking frames’ with modern law, shifting from the hierarchical normative structures of states to the heterarchy of transnational private ordering amid economic globalization. This transformation occurs through transnational contracting, the resolution of conflicts through private arbitration rather than domestic or international courts, and the ‘quasi’ or private legislating of civil society actors like the International Chamber of Commerce.⁴⁵

Accounts of private rulemaking in transnational law frequently compare this emergent phenomenon of private rulemaking to the *lex mercatoria* (or the ‘law merchant’), an historical institution of commercial law used throughout Medieval Europe as a legal system, distinct from those of territorial political entities (e.g. city-states, republics, kingdoms), to govern commercial transactions.⁴⁶ This historical comparison emphasizes the contingency of the state as the primary institution of lawmaking, and thus illustrates how transnational commerce had relied on its own legal processes before the rise of the Westphalian state in similar ways to the use of transnational private rulemaking in contemporary global capitalism. The new *lex mercatoria* is then shown to effectively govern a diverse range of actors and interactions in global markets, including the internet domain name registrations,⁴⁷ international commercial arbitration,⁴⁸ securities markets,⁴⁹ business to consumer ecommerce

44. Teubner, *supra* note 41.

45. *Id.* at 164. Teubner describes the tension which results as the frames state law and transnational law (*lex mercatoria*) come into conflict: ‘Either the rigid frames of private international law are breaking transnational phenomena into a shattered multitude of national laws, or the dynamics of the global market are breaking the narrow frames of national law and pushing for the recognition of a global law without the state.’ *Id.* at 149. Calliess similarly describes this situation of heterarchy as a ‘global legal discourse without a single validity test’ which is instead ‘decomposed by a plurality of organized decision making systems.’ Gralf-Peter Calliess, *Reflexive Transnational Law: The Privatisation of Civil Law and the Civilization of Private Law*, 23 ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE 185, 215-6 (2002). See Ralf Michaels & Nils Jansen, *Private Law beyond the State? Europeanization, Globalization, Privatization*, 54 AM. J. COMPAR. L. 843 (2006).

46. Examples of such comparisons include: Gunther Teubner, *Breaking Frames: Economic Globalization and the Emergence of Lex Mercatoria*, 5 EUR. J. SOC. THEORY 199 (2002); A. Claire Cutler, *PRIVATE POWER AND GLOBAL AUTHORITY: TRANSNATIONAL MERCHANT LAW IN THE GLOBAL POLITICAL ECONOMY* (2003); Calliess, *supra* note 45; Ralf Michaels, *The True Lex Mercatoria: Law Beyond the State*, 14 IND. J. GLOB. LEGAL STUD. 447 (2007); Alec Stone Sweet, *The new Lex Mercatoria and transnational governance*, 13 J. EUR. PUB. POL’Y 627 (2006); Fabrizio Cafaggi, *New Foundations of Transnational Private Regulation*, 38 J. L. SOC’Y 20 (2011).

47. Calliess, *supra* note 45.

48. Teubner, *supra* note 42.

49. David V. Snyder, *Private Lawmaking*, 64 Ohio St. L.J. 371 (2003). Annelise Riles, *The Anti- Network: Private Global Governance, Legal Knowledge, and the Legitimacy of the State*, 56 AM. J. Comp. L. 605 (2008).

disputes and corporate governance.⁵⁰ More recently, accounts of transnational law as private lawmaking have been used to analyze the modes of governance for Global Value Chains (GVCs). These accounts include an emphasis on the role of corporate law in the vertical linking of complex corporate families, the role of contract law in linking third-party supplier-purchaser relationships, and the use of diverse codes of conduct and standardized best practices to integrate external interests – labor and environmental – in the governance of GVCs.⁵¹

With these examples of private rulemaking, it is easy to imagine the services that the law firms described by Abel and Friedman offer to their clients, drafting model contracts, managing collateral in securities transactions, and representing clients in private arbitration procedures, all at a distance from states and their courts. Images come to mind of the lawyers drafting collateral documents for the global swaps markets in Tokyo, as Annelise Riles describes in ‘The Anti-Network,’ or the lawyers jockeying for positions in international arbitration proceedings and panels in Yves Dezalay and Bryant Garth’s *Dealing in Virtue*.⁵² Notably, the governance effects of private rulemaking in these examples arise out of their horizontal application across wide categories of actors – commercial and individual – rather than being limited in a conventional two-party contract. As Snyder describes, ‘[t]he private lawmaking that is put in place through contracts involves mass contracting in which uniform rules are incorporated across countless transactions, binding millions of parties, a tiny fraction of whom have any practical or moral responsibility for the making of those rules.’⁵³ It is precisely this wide effect that Snyder points to as justification for considering rulemaking in the form of (model) contracts and associational rules as lawmaking, albeit without the state.⁵⁴

50. Graft-Peter Calliess & Peer Zumbansen, *Rough Consensus And Running Code* (Hart 2010) Chps 3 & 4.

51. See Kevin B. Sobel-Read, *Global Value Chains: A Framework for Analysis*, 5 TRANSNATIONAL LEGAL THEORY 364 (2014). Anna Beckers, ENFORCING CORPORATE SOCIAL RESPONSIBILITY CODES: ON GLOBAL SELF-REGULATION AND NATIONAL PRIVATE LAW (Hart, 2015). Phillip Paiement, TRANSNATIONAL SUSTAINABILITY LAWS (Cambridge University Press, 2017). Tomaso Ferrando, *Private Legal Transplant: Multinational Enterprises as Proxies of Legal Homogenisation*, 5 TRANSNATIONAL LEGAL THEORY 20 (2014).

52. Riles, *supra* note 49. Yves Dezalay & Bryant G. Garth, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* (University of Chicago Press, 1996).

53. Snyder, *supra* note 49, at 446.

54. Snyder’s argument about the nomenclature of ‘lawmaking’ is alternative way of describing what Cafaggi and his co-authors in the Transnational Private Regulation project label the ‘regulatory’ effect of private rulemaking. See, e.g.: Cafaggi, *supra* note 46. Fabrizio Cafaggi, *A comparative analysis of transnational private regulation: legitimacy, quality, effectiveness and enforcement* (EUI Law Working Paper 2014/15). Colin Scott, et al., *The Conceptual and*

The state does not completely leave the analytic focus of transnational legal studies. Instead, questions about the remaining relevance of the state in the context of private rulemaking turn on how states and the international system have helped facilitate the ‘liftoff’ of transnational private rulemaking through reforms of private international law,⁵⁵ indirectly enabling private governance, using membership in private codes of conduct as proxies to compliance with state legal frameworks,⁵⁶ serving as ‘meta-regulators’ of transnational private regulation,⁵⁷ and offering ‘touchdown’ moments, for example in the form of transnational tort litigation, where conflicts arising from MNEs governance through private rulemaking can be adjudicated.⁵⁸ Nonetheless, states in these accounts play largely background roles as private actors engage in rulemaking to organize, and govern the activities of global capitalism.⁵⁹

Constitutional Challenge of Transnational Private Regulation, 38 JOURNAL OF LAW AND SOCIETY 1 (2011).

55. Robert Wai, *Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization*, 40 COLUM. J. TRANSNAT’L L. 209, 215 (2002).

56. Phillip Paiement, *Transnational Delegation, Accountability and the Administrative Governance of Biofuel Standards*, in TRANSNATIONAL BUSINESS GOVERNANCE INTERACTIONS: ENHANCING REGULATORY CAPACITY, RATCHETING UP STANDARDS AND EMPOWERING MARGINALIZED ACTORS (Stepan Wood, et al. eds., 2019); Philip Schleifer, *Orchestrating sustainability: The case of European Union biofuel governance*, 7 REGULATION & GOVERNANCE 533 (2013).

57. Jacco Bomhoff & Anne Meuwese, *The Meta-regulation of Transnational Private Regulation*, 38 JOURNAL OF LAW AND SOCIETY 138 (2011). Colin Scott, *Self-Regulation and the Meta-Regulatory State*, in REFRAMING SELF-REGULATION IN EUROPEAN PRIVATE LAW (Fabrizio Cafaggi ed., Kluwer Law International, 2006). Notably, transnational private actors are equally capable of developing mega-regulatory structures to govern transnational private rulemaking. See, for instance, to role of ISEAL Alliance as a meta-regulator of corporate codes of conduct: Allison Loconto & Eve Fueilleux, *Politics of Private Regulation: ISEAL and the shaping of transnational sustainability governance*, 8 REGULATION & GOVERNANCE 166 (2014). Phillip Paiement, *ISEAL Alliance and the Administrative Governance of Transnational Sustainability Standards*, 21 TILBERG L. REV. 144 (2016).

58. Wai, *supra* note 55. Robert Wai, *Transnational Private Law and Private Ordering in a Contested Global Society*, 46 HARV. INT’L L. J. 471 (2005).

59. Riles further emphasizes the methodological similarities between state law and global private law: ‘We have then a condition in which the state is not so much challenged as mirrored, reflected, and deflected in new technical forms.’ Riles, *supra* note 49 at 630.

B. Harmonizing National Law With Model and Transplanted Legislation

In his recital of sources of law in transnational maritime law, Jessup noted widespread adoption of national legislation around uniform 'rules of the road at sea.'⁶⁰ The intimation that the transnational harmonization of law through the implementation of model laws and legal transplants in national legislation would constitute an important form of lawmaking for the field of transnational law proved correct. Here, we review some of the predominant accounts of model laws, transplants and harmonization processes that target national legislatures. We aim to identify the actors and organizations that facilitate such processes of lawmaking, and how they relate to the characterization of transnational law as the commonsense of global capitalism. As such, we are not so interested in the more common avenues of investigation about the effectiveness or successes of legal transplants, but rather questions about who seeks to facilitate them and what their aim is in doing so.⁶¹

Transnational legal scholarship becomes interested in the harmonization of national legislation in moments when national law and the aforementioned transnational private rulemaking enter states of conflict or friction. This may, for example, arise out of a friction between the imperative rules of contract law in a national jurisdiction and private actors' desired (dispositive) norms in private rulemaking. In her case study of the International Swaps and Derivatives Association (ISDA), Riles offers a helpful illustration of the turn to model legislation amid such conflict with private rulemaking.⁶² As a private association composed of nearly one thousand members – derivatives dealers, banks, securities firms – around the world, the ISDA and its legal team engaged in extensive private rulemaking, developing a model contract (the 'Master Agreement') and other standardized legal documents to facilitate swaps and collateral transactions. Riles notes that the ISDA's legal staff were acutely aware of points of conflict between these private rules and national private law frameworks, and sought to iron out inconsistencies and conflicts through the favorable harmonization of national law:

For example, where the terms in ISDA's standardized

60. Jessup, *supra* note 6, at 110.

61. For overview of the lengthy discussions in transnational and comparative law about the success or effectiveness of legal transplants, see David Nelken, *The meaning of success in transnational legal transfers*, 19 WINDSOR YEARBOOK OF ACCESS TO JUSTICE 349 (2001). Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences*, 61 MOD. L. REV. 11 (1998).

62. Riles, *supra* note 49.

documents conflict with the norms enshrined in national statutory or judge-made law, ISDA actively works to supplant or change the latter so that it conforms to the former. ISDA hires local lawyers to investigate discrepancies between the terms of ISDA documents and national law, and where necessary, to lobby national governments to change national law to either conform to the terms of the Master Agreement or explicitly declare the ISDA documents enforceable.⁶³

The ISDA has achieved notable success on this front, such as the EU's Directive on Financial Collateral Arrangements, which was developed in part due to its lobbying on the issue. Riles notes how these instances of 'touchdown points' – where transnational private rulemaking re-engages, often due to necessity, with state legal systems – are not so much experienced as limitations or restrictions on private rulemaking, but rather as 'projects, problems that demanded creative work, political mobilization, technical skill, and considerable devotion.'⁶⁴ These problems generate working relationships between the lawyers of transnational private rulemaking actors (e.g. ISDA), national legislators, regulatory officers and judges as these lawyers sought to influence whether and how 'touchdown' might occur.

Other organizations that develop model laws and seek to drive harmonization of national legislation include the International Institute for the Unification of Private Law (UNIDROIT) and the United Nations Commission on International Trade Law (UNCITRAL).⁶⁵ UNIDROIT is an intergovernmental organization, initially created under the League of Nations, which has the explicit organization goal of pursuing harmonization of national private and commercial laws among its sixty-three member nations.⁶⁶ Some of UNIDROIT's work consists of drafting model legislative texts which could be adopted, with relative ease, by national legislative bodies in a harmonized fashion. Examples of such model texts include the: Model Franchise Disclosure Law (2002), Model Law on Leasing (2008), Model Law on Factoring (a draft of which is currently available for consultation by stakeholders), and the Model Law on State Ownership of Undiscovered Cultural Objects (2011).⁶⁷ However, the more prominent work towards national harmonization comes in the

63. *Id.* at 614-15.

64. *Id.* at 616. Emphasis is in the original text.

65. On the prominent role of UNIDROIT and UNCITRAL in transnational law, see Shahla Ali, *Transnational Law and Global Dispute Resolution*, in *THE MANY LIVES OF TRANSNATIONAL LAW: CRITICAL ENGAGEMENTS WITH JESSUP'S BOLD PROPOSAL* (Peer Zumbansen ed. 2020).

66. UNIDROIT, *Purpose*, <https://www.unidroit.org/about-unidroit/overview/> (Last accessed Feb. 8, 2023).

67. Notably, the Cultural Ownership and Factoring model laws were developed upon request by UNESCO and the World Bank, respectively.

form of the UNIDROIT Principles of International Commercial Contracts. The UNIDROIT Principles do not seek the status of hard norms under international law (in other words, they are not written with the purpose of eventually achieving the status of an international convention), nor are they written in a model law format, intended for harmonized implementation at the national level. Instead, they serve as a kind of ‘global background law,’ described by Ralf Michaels, whereby ‘they come to shape [national] adjudication and legislation, while, as non-binding law, always remaining hierarchically subordinate to them.’⁶⁸ Their harmonizing effect is sought not in a holistic or codification manner, but rather through influencing judicial interpretation and reasoning as ‘supplemental materials’ at awkward or conflictual touchdown points of transnational private rulemaking.⁶⁹ Legal scholars play a prominent role in the development of both the Principles and UNIDROIT Model Laws, directly drafting and amending the texts in a manner that would be considered unusual for most intergovernmental organizations.

UNCITRAL was established by the United Nations General Assembly (UNGA) in 1966 under the conviction that ‘divergencies arising from the laws of different States in matters relating to international trade constitute one of the obstacles to the development of world trade’ and thus sought ‘the progressive harmonization and unification of the law of international trade by promoting the adoption of international conventions, uniform laws, standard contract provisions, general conditions of sale, standard trade terms and other measures.’⁷⁰ Unlike UNIDROIT, UNCITRAL’s model laws – on topics such as international commercial arbitration, secured transactions, and cross-border insolvency – are formally adopted through UNGA resolutions, and thus read as the product of transgovernmental negotiations rather than expertise-driven documents drafted by legal scholars and practitioners.⁷¹ Nonetheless, they serve as an influential process of lawmaking which is driven by the ethos of facilitating of cross-border trade and transactions.⁷²

In summary, model law drafting serves as an important process of lawmaking for transnational law in so far that it acts as a

68. Ralf Michaels, *The UNIDROIT Principles as global background law*, 19 UNIF. LAW REV. 643, 668 (2014).

69. Ralf Michaels, *The UNIDROIT Principles as Reference for the Interpretation of U.S. Law*, 66 AM. J. COMP. L. 31 (2018).

70. G.A. Res. 2205(XXI), Establishment of the United Nations Commission on International Trade Law, recital (Dec. 17th, 1966).

71. Scott discusses the importance of transgovernmental networks in the formation of soft law, such as model laws, and their eventual diffusion as national legislation in Craig Scott, “*Transnational Law*” as *Proto-Concept: Three Conceptions*, 10 GERMAN L. J. 859, 867 (2009).

72. Ali emphasizes, for example, the influence of UNCITRAL’s Model Law on International Commercial Arbitration in Ali, *supra* note 65.

harmonization mechanism for national legislative frameworks. Notably, these processes of harmonization are directly linked to the facilitation of the trade and transactions of global capitalism. It is also apparent how model laws compliment transnational private rulemaking by ironing out incongruencies and conflicts between national laws, on the one hand, and standardized or model contracts and other commonly utilized transnational rules, on the other hand. Here, the agents of transnational lawmaking shift to include legal scholars and various national representatives in these two intergovernmental organizations, also though the legal counsels of private actors continue to play a role, as seen in the ISDA example.⁷³

C. Unusual Participants In International Convention and Treaty Writing

Susan Block-Lieb and Terence Halliday begin their sociology of various committees in UNCITRAL with a vivid depiction of the participants involved in these processes of ‘global lawmaking’ as they work towards the construction of a Legislative Guide on corporate insolvency and a multilateral convention seeking to reform The Hague Rules of 1924 on Bills of Lading and Protocols of Signature:

‘Hundreds of attendees from around the world circulated through the UN chamber during the working group’s deliberations on corporate insolvency law. Many delegates were experts on corporate insolvency law: judges from France, Denmark, Thailand, and the US; practicing lawyers from North America, Latin America, and throughout Europe; government regulators and civil servants with expertise with the regulation of financial services, the drafting of corporate insolvency laws or the administration of national insolvency systems, whether from Poland, Canada, Croatia, China, Australia, Colombia, or Israel. Other delegates were not so much experts on insolvency law, as experts on the political processes of the UN...’⁷⁴

Their description of attendees immediately contradicts conventional

73. Affolder provides another account of legal transplants as a prominent source of transnational lawmaking, focusing on the widespread transplantation of Environmental Impact Assessments (EIA) in national environmental law. Her account of model laws and legal transplants differs from those addressed above in two notable respects. First, the EIA transplant is not directly tied to the facilitation of cross-border trade and transactions (although one might well make the argument that MNEs would stand to benefit from harmonized EIA laws). Second, the actors involved in these transplants are nebulous and diffuse rather than institutional and identifiable. Natasha Affolder, *Contagious Environmental Lawmaking*, 31 J. OF ENV’T L. 187, 190-5 (2019).

74. SUSAN BLOCK-LIEB & TERENCE C. HALLIDAY, *GLOBAL LAWMAKERS: INTERNATIONAL ORGANIZATIONS AND THE CRAFTING OF WORLD MARKETS 3* (Cambridge University Press. 2017).

understandings of lawmaking by intergovernmental organizations, which we are told are should be driven by the diplomatic corps representing member states.⁷⁵ While the findings of their rich ethnography of global lawmaking apply equally to the construction of model laws by intergovernmental organizations (e.g. UNCITRAL), discussed in the previous section, we focus here on their account of the types of delegates involved in convention writing. Their study of UNCITRAL's convention drafting process is exemplary of an analytic turn toward the plurality of actors in the formation of public international law instruments. The expansion of who is integrally involved in the development of conventions and treaties in international law is the third account of lawmaking emphasized in transnational law scholarship. This body of literature largely seeks to de-mystify the "blackbox" of global lawmaking⁷⁶ – the often lengthy and bureaucratic procedures of convention drafting – and to understand how 'unusual participants,' including legal practitioners, scholars and judges, operate alongside diplomatic representatives of nation states in the formation of conventions.

Working from a social ecology framework adapted to the study of global lawmaking, Block-Lieb and Halliday's ethnography takes an explicitly wide-angled approach to explaining why and how different actors, state and non-state, become engaged in UNCITRAL lawmaking processes.⁷⁷ They trace strategic decisions made by UNCITRAL working groups – such as securing commitment by at least one wealthy private organization to help provide infrastructure and resources for meetings and associated travel⁷⁸ – that help secure the position of UNCITRAL *as the site* for global lawmaking on a given issue within the organization's mandate. As they write,

"The private associations of transportation industry actors, insurers, and maritime lawyers, bankruptcy lawyers and insolvency practitioners, and finance specialists all recognized

75. Klabber's offers an illustration of a conventional account of the 'people of flesh and blood' who have the capacity to conclude treaties, beginning first with heads of state and heads of government, and also include those who have received 'full powers,' 'documents emanating from the competent domestic authorities (typically the foreign ministry), specifying that the person concerned is empowered by his home state to participate in various acts relating to the conclusion of treaties. Sometimes the full powers may include authority to sign; in other cases it may be limited to negotiating – this depends on the degree of confidence the local authorities have in the person concerned, and on what their domestic law says about treat-making.' Through his description it is evident that the conventional approach to treaty drafting is that it is to be conducted by representatives or delegates of states, rather than non-state actors. In so far that civil society or other non-state actors are involved in the creation of international norms and standards, they are limited to the category of 'non-binding' commitments in Klabbers' account. JAN KLABBERS, *INTERNATIONAL LAW* 48-50 (Cambridge University Press. 2017).

76. BLOCK-LIEB & HALLIDAY, *supra* note 74, at 4.

77. For background on their adaptation of social ecology, see *id.* at ch. 1.

78. *Id.* at 156.

that their power in global markets turned on partnerships with a supra-state organization that had international authority and the capacity to develop and promulgate norms in a manner that was considered legitimate around the globe.⁷⁹

UNCITRAL's procedural openness to diverse actors (industry, judiciaries, legal professionals, legal scholars, in addition to state representatives) also leads to conflicts about influence, 'the lawmaking of lawmaking,' as they trace in Chapter 8 when discussing a proposal from French state representatives to limit the role of nonstate actors and the prevalence of English as a working language in informal settings outside of the formal meetings held simultaneously in the six official UN languages.⁸⁰ The French concern over the growing influence of nonstate actors was not entirely divorced from inter-state politics, as the dispute was interpreted by UNCITRAL participants as an indirect critique of growing US influence via non-state US participants: 'France clearly observed what was apparent to most other delegations in the working groups: the US saw UNCITRAL as a vehicle to advance US law, US lawyers, and US trade competitiveness.'⁸¹ According to the analysis, France hoped to curtail this growing influence in part by limiting the procedural opportunities of nonstate participants. Throughout their analysis one is confronted with the thoroughly transnational character of lawmaking at UNCITRAL, with oscillating accounts of public and private actors and national and international interests in this formally intergovernmental body as it drafts conventions related to international trade and commerce.

Block-Lieb and Halliday's work resonates with the 'transnational legal orders' (TLOs) framework developed by Halliday and Shaffer to explain how the 'normative settlement' and 'alignment' of TLOs – 'formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions' – shape their institutionalization.⁸² Their framework emphasizes the multi-directional shaping of TLOs – from local up and from transnational back down – as well as mechanisms of recursivity, including diagnostic struggle, actor mismatch, ideological and institutional contradiction, and legal indeterminacy.⁸³ The

79. *Id.* at 156.

80. *Id.* at ch. 8.

81. *Id.* at 353.

82. TERENCE C. HALLIDAY & GREGORY SHAFFER, TRANSNATIONAL LEGAL ORDERS, IN TRANSNATIONAL LEGAL ORDERS 5 (Terence C. Halliday & Gregory Shaffer eds., Cambridge UP, 2015).

83. *Id.* at 37-42. See Terence C. Halliday & Bruce G. Carruthers, *The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes*, 112 AM. J. OF SOCIO. 1135 (2007).

framework accounts for normative settling through diverse texts, extending beyond just conventions and treaties to also include best practice setting, model laws and legislative guides, and international court and arbitration decisions as sites of settling.⁸⁴ Yet, the public international law influence on the development of the framework is clear, with its focus on regimes and the embedded role of the state, which significantly distinguishes this framework from the more private law-driven frameworks of transnational lawmaking discussed above (including the work of Teubner, Snyder, Wai, Riles and Zumbansen). Overall, the TLO framework provides a helpful shift in thinking about the positions of diverse actors in the formation (or settling) of transnational law, including ‘the key role in TLOs of private actors, such as business representatives, professional lawyers and accountants, and representatives of non-governmental organizations.’⁸⁵ Taking for example the formation of a climate change TLO, Bodansky notes the role of IOs, such as the World Bank and International Maritime Organization, as well as substate actors (e.g. cities) and nonstate actors, including the Verified Carbon Standard and the Greenhouse Gas Protocol.⁸⁶ The framework offers a methodological shift in understanding the actors and processes of international public law, one which broadens the scope of relevant actors involved in the formation, or settling, of international law.⁸⁷

Transnational legal scholars also trace the influence of nonstate actors in the development of treaties and conventions in a more historic perspective. Drawing on the travaux préparatoires of the New York Convention (on foreign arbitral awards), Florian Griesel, for example, identifies the influential role of the International Chamber of Commerce (ICC), a Paris-based private organization, in coordinating a transnational network of private interest groups seeking influence in the drafting process.⁸⁸ In the 1930s and 1940s, having first worked

84. HALLIDAY & SHAFFER, *supra* note 82, at 43.

85. *Id.* at 23.

86. DANIEL BODANSKY, Climate Change: Transnational Legal Order Or Disorder? In *Transnational Legal Orders* 288 (Terence C. Halliday & Gregory Shaffer eds., Cambridge UP, 2015).

87. It is important to note that the TLO framework is not silent with respect to courts and litigation. As Halliday and Shaffer write, ‘Regional and international courts and arbitration tribunals, as well as national ones, produce rulings in legal disputes that interpret, clarify, develop, and apply legal norms, whether this involves the interpretation of treaties, customary international law, or commercial contracts or the assessment of the compliance of national, local, or business law and practice with them.’ Yet, across the case studies in their edited volume, the analytic emphasis on normative settling and institutionalization appears to amplify deliberative or legislative processes of lawmaking, including convention writing, whereas litigation and judicial decisions receive limited attention and are situated as just one of an impressive range of factors involved in the formation and alignment of TLOs. Halliday & Shaffer, *supra* note 82, at 16.

88. Florian Griesel, *Treaty-Making between Public Authority and Private Interests: The*

towards the creation of a Model Law ‘to create uniform conditions for the enforcement of arbitral awards’, the ICC realized that the amount of national laws requiring modification were so numerous that they might better pursue an international agreement, resulting in a resolution during a June 1951 Lisbon Conference of its members calling on states to replace the outdated Geneva Convention.⁸⁹ Drawing on the expertise of prominent members of its Court of Arbitration, the ICC commissioned a draft convention on foreign arbitral awards, which it sent to the United Nations Economic and Social Council (ECOSOC) in 1953.⁹⁰ This initiated a series of international meetings hosted by ECOSOC which ultimately resulted in the New York Convention of 1959. Grisel summarizes the success of the ICCs arbitration experts in crafting the convention, ‘the transnational network of experts united around the ICC in the 1950s efficiently served the needs of international commercial arbitration (and those of the ICC) by promoting a new legal instrument that later became its cornerstone.’⁹¹

In summary, if transnational law functions as the ‘commonsense of capitalism,’ it is in part due to its focus on three particular sources of lawmaking: transnational private rulemaking, harmonization of national legislation and international conventions and treaties. Through these forms of lawmaking, the fascination of transnational legal scholarship follows the practices through which private actors use tools of domestic private law (contracts, associational rules) to construct transnational rules detached from state oversight, and in turn seek to iron out incongruencies in national legal systems that complicate their rulemaking and private arbitration, relying on model laws to harmonize national legislation and engaging as unusual participants in the drafting of international law. Amid this fascination with the creative lawmaking of private actors, the field of transnational law has overlooked the important role of domestic courts, and the litigation before them, as sites of transnational lawmaking. Shifting the field’s awareness of lawmaking processes to include domestic litigation is essential if the field is to appreciate the emergent role of transnational cases and transnational strategies in shaping legal norms. Likewise, this shift in lawmaking processes will help open the field of transnational law to legal processes and actors

Genealogy of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 28 EUR. J. OF INT’L L. 73, 75 (2017). FLORIAN GRISEL, TRANSNATIONAL LAW IN CONTEXT: THE RELEVANCE OF JESUP’S ANALYSIS FOR THE STUDY OF ‘INTERNATIONAL’ ARBITRATION, IN THE MANY LIVES OF TRANSNATIONAL LAW: CRITICAL ENGAGEMENTS WITH JESSUP’S BOLD PROPOSAL (Peer Zumbansen ed. 2020).

89. Grisel, *Treaty-Making between Public Authority and Private Interests*, *supra* note 88, at 77-78.

90. *Id.* at 79.

91. *Id.* at 87.

that seek to challenge and restrain the actors and institutions of capitalism that are more often situated in the spotlight.

IV. TRANSNATIONAL LAWMAKING THROUGH THE STATE

Amid transnational law's overwhelming focus on the processes of lawmaking that amount to the commonsense of capitalism, this is not the first intervention to advocate for a shift in focus and emphasis towards the role of domestic litigation and courts as sites of transnational lawmaking. Robert Wai's influential essay on lift-offs and touch-downs in transnational law offers an account of how the transnational rulemaking of MNEs must 'touchdown' in domestic courts to access legal consequences that are otherwise inaccessible, such as the enforcement of contracts or property rights.⁹² As such, Wai suggests that transnational legal scholars ought to focus more attention on how these moments and sites of touchdown could offer opportunities to regulate transnational private rulemaking. As he states, 'It is particularly important to use "touchdown" points as locations to protect the interests of third parties who are affected by the goods, production, or other conduct of transnational actors,' and further cites national tort (or delict) law as 'a significant tool for parties who are not necessarily parties to contract to seek effective control and redress for the harmful impact of international activity.'⁹³ Practically speaking, Wai suggests that domestic courts should offer special consideration as to how they determine their jurisdiction when hearing claims brought forward by transnational civil society organizations – human rights groups, labor unions and environmental NGOs – which seek compensation for harm incurred as a result of international business activities abroad.⁹⁴

Despite Wai's insistence on re-emphasizing the role of national courts in transnational law, the emphasis appears limited to the subsidiary, yet necessary, role of domestic courts as potential guard rails and limit setters for transnational private rulemaking and private arbitration. In Wai's account they are positioned in relation to transnational private rulemaking as liftoff and touchdown sites, facilitators and regulators, of the primary phenomena of transnational lawmaking. Likewise, Wai's account does not reflect the strategies that private actors themselves use to influence how states organize touch-down moments, as illustrated in Riles' study of the ISDA discussed above. Thus, the present argument diverges from Wai's

92. Wai, *supra* note 55, at 265-56.

93. *Id.* at 266.

94. *Id.* at 272. Wai also elaborates on the regulatory role of private international law in Wai, *Transnational Private Law and Private Ordering in a Contested Global Society*, *supra* note 58, 478.

account and instead outlines a methodological re-orientation for transnational law that positions domestic courts and litigation as primary sites and processes of lawmaking. The argument here is not so much that the role of domestic courts has been missing from transnational law for the entire lifetime of the field, but rather that the successes of private actors in rulemaking and harmonizing national law through model contracts and international conventions is logically connected to a re-emergence of domestic courts as important sites of transnational lawmaking. In the following sections we follow how three shifts in analysis might better focus attention of the position of domestic courts and litigation in transnational legal studies: the shift from model contracts to the accountability of led firms in global value chains (GVCs) and corporate families of MNEs; the shift from model laws to the mobilization of legal strategies around common interpretations of similar national laws; and finally, a shift from the role of private actors in shaping international law to the coordinated interpretations of international law instruments in domestic proceedings and the strategic procedural use of supranational adjudicative institutions.

A. From Private Rulemaking to Accountability For GVCs Before Domestic Courts

The structuring and governance of GVCs through private rulemaking has been an influential area of transnational law across the past decades.⁹⁵ Here, we suggest that an emphasis on the role of domestic courts and litigation would entail an analytic shift toward the legal mobilizations that seek to hold parent companies and led firms accountable for harm to laborers and other third parties in GVCs. This point is the closest to Wai's argument about the role of domestic courts as sites for the touchdown of transnational private rulemaking.⁹⁶ Importantly, the shift reflects the success of transnational rulemaking. As lead firms and parent companies have expanded their use of private rulemaking to govern and direct the activities of their subsidiaries and suppliers, we see increasing

95. The literature on this topic is far too extensive to review here, but important examples include: Gunther Teubner, *Corporate Codes in Varieties of Capitalism: How Their Enforcement Depends on the Differences Among Production Regimes*, 24 IND. J. OF GLOB. LEGAL STUD. 81 (2017); BECKERS, *supra* note 51; Tim Bartley, *Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions*, 113 AM. J. OF SOCIOLOGY (2007); Klaas Hendrik Eller, *Private governance of global value chains from within: lessons from and for transnational law*, 8 TRANSNAT'L LEGAL THEORY (2017); PAIEMENT, *Transnational Sustainability Laws*, *supra* note 51; Genevieve LeBaron & Andreas Rühmkorf, *Steering CSR Through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance*, 8 GLOB. POL'Y 15 (2017).

96. Wai, *supra* note 55.

litigation of tort and human rights claims about the responsibility of those actors for harms committed by their partners and subsidiaries abroad. Examples include: a Dutch case, brought by four Nigerian individuals from Oruma and Goi and Milieudefensie, which held Royal Dutch Shell (RDS) Plc jointly liable for the damage caused by oil spills in the pipelines operated by its Nigerian subsidiary;⁹⁷ claims filed in the United Kingdom (UK) by hundreds of individuals from the Koh Kong Province in Cambodia against Tate & Lyle Plc which articulates the latter's liability under the tort of conversion for purchasing sugar cane produced on land whose lawful ownership is contested by the plaintiffs;⁹⁸ and the unsuccessful litigation brought by a survivor and three family members of the deceased in the Ali Enterprises textile factory fire (Karachi, Pakistan 2012) against KiK Textil before the Regional Court of Dortmund for violating its duty of care to the employees of the factory, which Kik had been using as a supplier at the time of the fire.⁹⁹

In part, the expansion of domestic litigation aimed at holding lead firms accountable for harms caused within their GVCs has been facilitated by expanding legislative frameworks that imposed novel obligations on lead firms to monitor their GVCs for the risk of human rights violations and environmental damage. Examples of new legislation in this category include the 2010 US Dodd-Frank Wall Street Reform and Consumer Protection Act¹⁰⁰, the 2015 UK Modern Slavery Act¹⁰¹, the 2017 French loi de vigilance¹⁰², and the 2023 German Lieferkettengesetz.¹⁰³ Each of these examples of domestic legislation hold in common the explicit goal of creating extraterritorial

97. Hof 's-Gravenshage 29 januari 2021, ECLI:NL:GHDHA:2021:132 (Oruma/Royal Dutch Shell Plc) (Neth.), ECLI:NL:GHDHA:2021:133 (Goi/ Royal Dutch Shell Plc) (Neth.) and ECLI:NL:GHDHA:2021:134 (Ikot Ada Udo/ Royal Dutch Shell Plc) (Neth.). For an extensive commentary on the case, see: Daniel Bertram, *Transnational Experts Wanted: Nigerian Oil Spills before the Dutch Courts*, 33 J. OF ENV'T L. 423 (2021). Lucas Roorda, *Broken English: a critique of the Dutch Court of Appeal decision in Four Nigerian Farmers and Milieudefensie v Shell*, 12 TANSNAT'L LEGAL THEORY 144 (2021).

98. Song Mao (& Others) v Tate & Lyle Sugar Industries and T & L Sugars Limited, EWHC (QB) Claim No. 2013 Folio 451. The pending case, which has never proceeded to trial due to (heretofore failed) settlement negotiations, is discussed in detail in Tomaso Ferrando, *Land Rights at the Time of Global Production: Leveraging Multi-Spatiality and 'Legal Chokeholds'*, 2 BUS. AND HUM. RIGHTS J. 275, 280-5 (2017).

99. LG Dortmund 10 Jan. 2019, No. 7 O 95/15 Jabir and others v. KiK Textilien und Non-Food GmbH (Ger.). This mobilization and others that were launched in the aftermath of the Ali Enterprises fire, which killed 258 individuals, are extensively discussed in TRANSNATIONAL LEGAL ACTIVISM IN GLOBAL VALUE CHAINS: THE ALI ENTERPRISES FACTORY FIRE AND THE STRUGGLE FOR JUSTICE (Miriam Saage-Maaß *et al* eds., Springer 2021).

100. US Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, § 1502.

101. Modern Slavery Act 2015 c. 30.

102. Loi de Vigilance, No. 2017-339 of 2017.

103. Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten ('Lieferkettensorgfaltspflichtengesetz' (LkSG)) of 16 Juli 2021, Bundesgesetzblatt Jahrgang 2021 Teil I Nr. 46, 2959.

obligations for companies headquartered (or sometimes simply operating in considerably volume) in each respective country.¹⁰⁴ In doing so, they further drive both the uptake of transnational private rulemaking (as techniques and instruments of GVC governance) as well as the potential liability of lead and parent companies for human rights violations and environmental harm caused by other parties in their GVCs.

We suggest that there is an analytic utility in viewing domestic litigation of this nature as a process of transnational lawmaking, rather than simply isolated attempts to test and apply domestic law to the complex challenges of isolating responsibility in GVCs. Throughout these ‘transnational cases’ one finds a common characteristic of narrativizing the role of lead and parent companies in overseeing the actions of their subsidiaries and supply partners. While they play out in dozens of national jurisdictions around the world, they can also be understood as a common legal mobilization that seeks to articulate duties of care – under tort law and third-party considerations of contract law – which connect the economic actors earning the largest profits and the individuals, communities and ecosystems facing the greatest risks of harm. Throughout the world, common questions are posed to judiciaries about the appropriate duties of corporations headquartered in their jurisdiction vis-à-vis foreign communities. The justification for reading these domestic cases as sites of transnational lawmaking lies in this common problematic of developing MNEs’ accountabilities that they had evaded as a result of the outsourcing and offshoring processes that characterize economic globalization.¹⁰⁵

104. For further background on this ‘transnational state legislation’ see: Phillip Paiement, *Transnational Sustainability Governance and the Law*, in THE OXFORD HANDBOOK OF TRANSNATIONAL LAW (Peer Zumbansen ed. 2021) 838-840. LeBaron & Rühmkorf, *supra* note 95. Enrico Partiti & Steffen van der Velde, *Curbing supply-chain human rights violations through trade and due diligence: Possible WTO concerns raised by the EU conflict minerals Regulation*, 51 J. OF WORLD TRADE 1043 (2017). Sara L. Seck, *Home State Responsibility and Local Communities: The Case of Global Mining*, 11 YALE HUM. RIGHTS AND DEV. L. J. 177 (2008). Galit A. Sarfaty, *Shining Light on Global Supply Chains*, 56 HARV. INT’L L. J. 419 (2015).

105. It is important to note that such attempts to secure accountability are very often unsuccessful. The challenges of securing ‘corporate social liability’ through litigation is closely accounted for by Anna Aseeva, who also presents cases of this nature as a common, transnational legal challenge rather than isolated domestic legal questions. See ANNA ASEEEVA, FROM CORPORATE SOCIAL RESPONSIBILITY TO CORPORATE SOCIAL LIABILITY: A SOCIO-LEGAL STUDY OF CORPORATE LIABILITY IN GLOBAL VALUE CHAINS (Hart, 2021).

*B. From Harmonizing With Model Laws To Transnational
Strategies In Harmonized Law*

The second shift in analytic focus suggested here is from private actors' (from the international business sector) use of model laws to pursue harmonization of national legislation towards the mobilization of common legal strategies around harmonized national law frameworks, referred to here as 'transnational strategies.' The process of legal harmonization has long capture the attention of comparativists, and in the context of transnational law, Friedman remarked on the importance of such similar legal frameworks resulting from unplanned evolutionary processes of convergence across national legal systems.¹⁰⁶ However, transnational legal research has yet to account for the development of transnational strategies of public interest litigation that are premised on procedural opportunities or types of claims which are relatively similar across national jurisdictions. While the focus remains on the comparative similarities of national legal frameworks, and the implications this has on transnational processes, there is a shift in emphasis on the use of harmonization for the facilitation of international business transactions towards the development of legal mobilization strategies seeking to hold states and private actors to account for the externalities of global capitalism.

Examples of legal mobilizations around comparatively similar national legal frameworks are increasingly easy to find. Consider, for example, the ground breaking climate litigation case in *Lliuya v RWE AG*, currently being heard by the Higher Regional Court of Hamm in Germany, which argues that RWE – the largest energy producer in Germany – is contributing to a risk of flash flooding on the plaintiff's property through its emissions of greenhouse gases and is thus holds a contributory share of responsibility for the costs of modifications that seek to reduce this risk of flooding.¹⁰⁷ The claim pursues a novel interpretation of property interference liability in the German Civil Code. In the meantime, property nuisance claims related to the effects of climate change have been used in ongoing cases brought by a collection of cities and counties in the State of California against US-based Carbon Majors¹⁰⁸ and will likely serve as the foundation of

106. Mads Andenas, et al., *Towards a Theory of Harmonisation*, in *THEORY AND PRAC. OF HARMONISATION* (Mads Andenas et al. eds., 2012). Friedman, *supra* note 28, 73-74.

107. § 1004 of the German Civil Code states: 'If the ownership is interfered with by means other than removal or retention of possession, the owner may require the disturber to remove the interference. If further interferences are to be feared, the owner may seek a prohibitory injunction.'

108. Note that these cases are premised on numerous civil claims, including private nuisance.

further cases targeting responsibility of private companies in loss and damage and climate adaptation scenarios.¹⁰⁹

Other climate cases have revolved around common frameworks concerning the tort of negligence. The Urgenda case from the Netherlands, one of the first successful climate cases against a public authority, was developed around an innovative interpretation of the ‘unwritten standard of due care’ in Dutch tort law which allowed Urgenda to articulate the State’s duty of care to reduce climate emissions through a collective reading of the Paris Agreement, EU and national climate laws and policies, international and European human rights law, and scientific accounts of the consequences of various climate scenarios.¹¹⁰ Subsequently, cases have been launched with similar uses of tort law in other national jurisdictions, including in New Zealand,¹¹¹ Belgium,¹¹² and a subsequent case in the Netherlands but against the oil and gas corporation Royal Dutch Shell.¹¹³ Roda Verheyen, a prominent climate law expert and litigator in the *Lliuya v. RWE AG* case, along with co-author Johannes Franke implicitly describe the transnationality of these private law strategies of climate litigation, premised upon similar national legal frameworks, with reference to the notion of ‘transferability’:

The judgement from Shell is particularly demonstrative that simple tort and nuisance principles already existent in many countries can be applied to oblige private actors to minimise the climate-related risks created by their business operations and thus impose requirements to reduce their emissions. This is now possible primarily because the issue of fault in the past is no longer relevant as the standard of care now sought is forward- looking. Given how little time is left for the global community to address climate change and given how a duty of care is and has always been a social construct developed by courts on a case-by-case basis, we find the arguments in the

109. See e.g., the recently announced lawsuit by a group of Indonesian individuals against the Swiss cement producer Holcim. Although the details of the claims raised in this case have yet to be released, it is expected that they will rely on either private nuisance or tort of negligence claims, or both.

110. Hoge Raad 20 december 2019, ECLI:NL:HR:2019:2006 (Der Staat der Nederlanden/Stichting Urgenda) (Neth.).

111. Smith v. Fronterra Co-Operative Group Limited et al SC 149/2021 [2022] NZSC 35. The case is currently pending a decision from the Supreme Court of New Zealand which is reviewing the Court of Appeals decision to dismiss the plaintiff’s appeal following dismissal of the case from the court of first instance.

112. ASBL Klimaatzaak et al c. L’Etat Belge, Bruxelles (4th ch.) Jun. 17, 2021, 2015/4584/A.

113. Rechtbank Den Haag 26 mei 2021, ECLI:NL:RBDHA:2021:5337 (Vereniging Milieudefensie et al/Royal Dutch Shell Plc) (Neth.).

Shell judgment transferrable to other jurisdictions.¹¹⁴

This transferability of litigation strategy across national jurisdictions offers an important dynamic of legal mobilization and lawmaking for transnational legal studies.¹¹⁵

The focus on transnational strategies of legal mobilizations across comparably similar national legal frameworks follows upon Natasha Affolder's framing of (environmental) law harmonization as 'contagious lawmaking.'¹¹⁶ In particular, Affolder's analysis takes the example of the global diffusion of Environmental Impact Assessments (EIAs) as exemplary of contagious lawmaking, with the EIA going from relatively novel to global ubiquity in the course of just half a century. EIAs have been equally influential as a platform for mobilizing climate activism. The Sierra Club campaign to Beyond Coal campaign frequently challenges decisions to renew coal-fired electricity plants throughout the US, bringing into question whether the 'environmental impact' of an electricity plant ought to include the climate consequences of emissions from burning coal, or whether it is limited in scope to just the consequences the facility poses to the immediately surrounding environment. This tactic of incorporating climate science to challenge policies and administrative decisions related to climate change has since been replicated in many other jurisdictions. In other words, if climate change is understood as 'legally disruptive,' then the ubiquity of EIAs and other products of contagious environmental lawmaking can serve as pivot points for transnational strategies of (environmental) legal mobilizations.¹¹⁷

114. Roda Verheyen & Johannes Franke, *Climate Change Litigation: A Reference Area for Liability*, in *Corporate Liability for Transboundary Environmental Harm: An International and TRANSNATIONAL PERSPECTIVE* (Peter Gailhofer, et al. eds., Springer International, 2023) 413-14.

115. See e.g., the transnational narrative building character of climate litigation in: Phillip Paiement, *Urgent Agenda: How climate litigation builds transnational narratives*, 11 TRANSNATIONAL LEGAL THEORY 121, 127- 30 (2020). Chris Hilson, *Law, courts and populism: climate change litigation and the narrative turn*, in RESEARCH HANDBOOK ON LAW AND COURTS (Susan M. Sterett & Lee Demetrius Walker eds., Edward Elgar, 2019). Chris Hilson, *Framing Time in Climate Change Litigation*, OÑATI SOCIO-LEGAL SERIES 1 (2018). NICOLE ROGERS, LAW, FICTION AND ACTIVISM IN A TIME OF CLIMATE CHANGE (Routledge, 2020) chp 1.

116. Affolder, *supra* note 73.

117. Elizabeth Fisher, et al., *The Legally Disruptive Nature of Climate Change*, 80 MOD. L. REV. 173 (2017).

*C. From Private Actors In Treatymaking To The Strategic Use Of
Supranational Law and Adjudicative Procedures*

Finally, the third shift in analysis suggested here is the shift from accounting for private actors' influences in treaty and convention making towards a focus on the strategic use of supranational law in domestic litigation, as well as the strategic use of supranational adjudicative procedures, both outright and as avenues to further pursue cases after domestic litigation has failed to achieve a satisfactory outcome. In other words, the role of supranational law in transnational accounts of lawmaking remains, but the emphasis should shift to its incorporation in domestic and international litigation.¹¹⁸ Many of the examples of climate and environmental litigation discussed in earlier sections feature transversal legal arguments, reading national law through the lens of international obligations. Two entire fields of climate litigation have developed around climate-based readings of the human rights in the European Convention of Human Rights (ECHR)¹¹⁹ and the Inter-American Convention of Human Rights (IACHR).¹²⁰ In the case of the former, following successful claims before national courts (*Urgenda*, *Irish Friends of the Environment*, *Neubauer*, and *Milieudefensie*) a series of unsuccessful claims have now been brought on the European Court of Human Rights' (ECtHR) docket, offering the first opportunity for the ECtHR to offer an authoritative proclamation of whether and how Art. 2 and 8 may be affected by climate change.¹²¹

While the ECHR and ECtHR have already proven helpful supranational tools for domestic litigation touching upon human rights, the role of EU courts in transnational legal mobilizations have been less well understood, in part because of the limited access afforded to civil society organizations under the Plaumann test of EU standing.¹²² Nonetheless, EU law researchers in environmental and migration law are increasingly aware of the inter-relationships between national legal mobilizations and the strategic use of EU

118. See Karen Knop, *Here and There: International Law in Domestic Courts*, 32 N.Y.U. J. INT'L L. & POL. 501 (1999).

119. There are more than a dozen climate cases before national courts that incorporate arguments premised on the risk that climate change poses to the protection of Art. 2 and 8 rights under the ECHR.

120. Juan Auz, 'So, This Is Permanence': *The Inter-American Human Rights System as a Liminal Space for Climate Justice*, 22 MELBOURNE J. INT'L L. 187 (2021).

121. Helen Keller & Corina Heri, *The Future is Now: Climate Cases Before the ECtHR*, 40 NORDIC J. HUM. RTS. 153, 163-34 (2022).

122. On *Plaumann* in the context of climate litigation before the CJEU, see Gerd Winter, Armando Carvalho and Others v. EU: *Invoking Human Rights and the Paris Agreement for Better Climate Protection Legislation*, 9 TRANSNAT'L ENV'T L. 137, 157-59 (2020); Case 25/62, *Plaumann & Co. v. Comm'n of the Eur. Econ. Comty.* [1963] E.C.R. 95.

courts, directly and through preliminary reference procedures. Mario Pagano extensively evaluates the argumentative strategies used by environmental civil society organizations in their effort to overcome Plaumann limitations and establish a possibility of standing in environmental cases.¹²³ Of particular note are their arguments that the EU's standing rules are not in compliance with the access to justice requirements of the Aarhus Convention. This argument demonstrates the importance of multi-level, multi-jurisdictional arguments and litigation for transnational legal mobilizations, as they seek to leverage the expansive procedural rights in the Aarhus Convention in order to open standing restrictions before the EU courts, which in turn might facilitate the use of EU law to drive environmental protection within national courts. In the context of migration law, Virginia Passalacqua's empirical analysis of preliminary reference procedures per state identifies three nationally- or locally-defined factors of consequence: the presence of civil society actors willing to take initiative for launching litigation on behalf of migrants; the presence of local practitioners with EU law expertise; and a national court system that is open to sending references to the EU courts.¹²⁴ These examples illustrate how legal mobilizations seek to move between national, EU and international courts and the recursive influence of each individual context on the others in determining opportunities for litigation.

The decision to strategically leverage regional or supranational law or adjudicative forums does not come in a vacuum, however. In addition to procedural or doctrinal restrictions, international law and courts come with their own institutional legacies and values. Working in the context of the Inter-American Court of Human Rights (IACtHR), Juan Auz describes the Court as a "liminal space" caught between the emancipatory promises of human rights discourses and the limitations of colonial and liberal ideologies that preclude the possibility of rising fully to the challenges of climate justice.¹²⁵ As such, Auz's critique raises important questions for what can be achieved by climate activists seeking recourse to the IACtHR in order to compel national governments to take action on climate change. Throughout each of these examples, we see the importance of analyzing the intricate interrelationships between international and national legal frameworks and courts. The diverse forms of transnational strategies that seek to make use of the multi-level court systems demand a more fulfilling account of transnational lawmaking.

123. Mario Pagano, *Overcoming Plaumann in EU environmental litigation: an analysis of NGOs legal arguments in actions for annulment*, 2019 DIRITTO E PROCESSO: DERECHO Y PROCESO - RIGHT & REMEDIES 311 (2019).

124. *Id.* at 338-48.

125. Auz, *supra* note 120.

D. A Renewal Of The Sociology Of Transnational Legal Practice

Shifting focus towards the role of domestic courts and litigation as sites of transnational lawmaking processes evokes the third category of transnational legal norms in Friedman's early sociology of the field, the "convergent" norms across jurisdictions which are largely similar, but not due to the imposition of supranational norms or due to intentional processes of harmonization.¹²⁶ Instead, these convergent norms develop out of the "tendency of legal systems, or parts of legal systems, to evolve in parallel directions" given they are embedded in common or overlapping social, cultural and economic contexts.¹²⁷ Upon first glance, this characterization appears to disguise convergence processes as a natural or inexplicable phenomena beyond the explanatory reaches of legal sociology. Affolder discusses similar invisibilities in transnational lawmaking practices as "black boxes," including the processes that give rise to legal transplants and the transnational professional networks through which judges exchange with each other.¹²⁸ Yet, Friedman warns against such an approach, insisting that the biological metaphor of "evolution" associated with convergence processes, the "naturalization" of the "unseen" processes of transnational lawmaking, should not be taken as absolute, but rather as a challenge for the sociology of transnational legal practice:

Of course, it is somewhat of an exaggeration to claim that there is a common language of norms or a common legal code. But without some minimum of shared understanding, a common substrate, the global economy could not function. This is, of course, the essence of the convergence process, and it is taking place before our very eyes. Much of the process is still quite obscure. Research has been skimpy at best.¹²⁹

As such, this article suggests that the field of transnational law should turn towards the study of legal practice in the types of transnational cases and transnational strategies before domestic courts described above, for we postulate that these are essential sites of convergent transnational lawmaking.¹³⁰ Such a turn would entail approaching the transnational professional networks of strategic and public interest litigators as "carriers of convergent norms" as they seek to re-interpret and slowly re-shape legal frameworks in response to the unfolding

126. Friedman, *supra* note 28, at 72.

127. *Id.*

128. Natasha Affolder, *Transnational Law as Unseen Law*, in *THE MANY LIVES OF TRANSNATIONAL LAW: CRITICAL ENGAGEMENTS WITH JESSUP'S BOLD PROPOSAL* (Peer Zumbansen ed. 2021), at 377-85.

129. Friedman, *supra* note 28, at 76.

130. *Id.*

social and environmental crises of our time.¹³¹

The suggestion to shift focus to transnational networks of litigators is not the first appeal to prioritize the transnational networks and social movements as influential agents in sociological approaches to transnational law. Sally Engle Merry draws on new legal realism and political science accounts of transnational advocacy networks to propose the use of multi-sited ethnography for studying the role of lawyers as translators of human rights law in transnational social movements.¹³² According to Merry, this method allows one to “locate sites engaged in the production of knowledge and texts, as well as global patterns of circulation” with both a focus on how “transnational ideas affect local communities” as well as the “global sites of legal production.”¹³³ Her study then illustrates the influential role of lawyers within transnational social movements that are engaged in decision-making in international human rights bodies, national legislative reform processes, and the establishment of national human rights institutions such as human rights commissions.¹³⁴ In similar fashion, Nina Reiners’ study underscores the importance of “transnational lawmaking coalitions” that use general comment mechanisms in UN treaty bodies to influence the development of international human rights norms.¹³⁵ However, these examples from transnational lawmaking in the domain of human rights law remain focused on familiar processes of lawmaking, the harmonization of national legalization, and the role of non-state actors in the formation of international law, albeit without the emphasis on international business actors and “the commonsense of capitalism.”¹³⁶ Other studies of transnational legal communities have prioritized the role of legal elites in the shaping of institutions. Dezalay and Garth’s accounts of elite lawyers in the formation of international business arbitration institutions, and in the transplantation of neoliberal economic policy frameworks and international human rights law, using the lens of Bourdieu’s “social fields,” are illustrative of such a focus on legal elites.¹³⁷

Diverging from their accounts, the argument here is that

131. *Id.*

132. Sally Engle Merry, *New Legal Realism and the Ethnography of Transnational Law*, 31 L. & SOC. INQUIRY 975, 977-78 (2006); *see also* Margaret E. Keck & Kathryn Sikkink, *Transnational advocacy networks in international and regional politics*, 51 INT’L SOC. SCI. J. 89 (1999).

133. Merry, *supra* note 131, at 980.

134. *Id.* at 980-83.

135. NINA REINERS, *TRANSNATIONAL LAWMAKING COALITIONS FOR HUMAN RIGHTS* (Cambridge University Press, 2022).

136. *Id.*

137. DEZALAY & GARTH, *supra* note 52; *see also* YVES DEZALAY & BRYANT G. GARTH, *THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES* (University of Chicago Press, 2002).

transnational legal networks and communities ought to be studied for their role in developing and launching litigation before domestic courts, including both transnational cases and strategies.¹³⁸ Likewise, a focus should not be limited to elite legal professionals, as is the case in Dezalay and Garth's work. As De Sousa Santos and Rodriguez-Garavito critique, "missing from this [Dezalay and Garth's] top-down picture are the myriad local, non-English-speaking actors—from grassroots organizations to community leaders—who albeit often times working in alliance with transnational NGOs and progressive elites, mobilize popular resistance to neoliberal legality while remaining as local as ever."¹³⁹

Finally, the emphasis here on domestic courts as sites of transnational lawmaking should not be confused as a proposition about the "return of the state" amid legal globalization.¹⁴⁰ On the contrary, Saskia Sassen has thoroughly documented how states were essential to the rise of globalization, and earlier accounts of transnational law demonstrate the pivotal role that states serve as takeoff and touchdown points for enabling and enforcing transnational private rulemaking.¹⁴¹ Hence, instead of the "return of the state," the methodological focus on domestic litigation pursued here suggests the study of transnational litigation communities as they strike back against the normative structures of global capitalism through the state and its judicial institutions.

V. CONCLUSION

The field of transnational law has long been captivated by the influential roles of private actors in lawmaking processes, through their development of transnational private rules, their influence in the harmonization of national laws, and their involvement as unusual participants in treaty drafting processes. This article demonstrates how the field's understanding of lawmaking processes has been closely tied to a depiction of transnational law as the "commonsense of

138. For an example that focuses on transnational legal mobilizations before domestic courts within the context of human rights law, see Jeff Handmaker & Sanne Taekema, *O Lungo Drom: Legal Mobilization as Counterpower*, 15 J. HUM. RTS. PRAC. 6 (2023).

139. Boaventura de Sousa Santos & César A. Rodríguez-Garavito, *Law, Politics, and the Subaltern in Counter-Hegemonic Globalization*, in *LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY* (Boaventura de Sousa Santos & César A. Rodríguez-Garavito eds., Cambridge University Press, 2005); see also the critique raised in Frank Munger, *Globalization through the Lens of Palace Wars: What Elite Lawyers' Careers Can and Cannot Tell Us about Globalization of Law*, 37 L. & SOC. INQUIRY 476 (2012).

140. José E. Alvarez, *The Return of the State*, 20 MINN. J. INT'L L. 223 (2011); see also Clyde W. Barrow, *The Return of the State: Globalization, State Theory, and the New Imperialism*, 27 NEW POL. SCI. 123 (2005).

141. SASKIA SASSEN, *TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES* (Princeton University Press, 2006); see Wai, *supra* note 55.

capitalism,” with accounts of the various strategies that MNEs and other actors in international business transactions use to make and shape law according to their interests. The eruption of transnational litigation before domestic courts, both transnational cases and transnational strategies, forces transnational law scholars to rethink this settled understanding of lawmaking processes. This article argues for a new emphasis on domestic courts and litigation as important sites where public interest litigation; leverages the transnational private rulemaking in GVCs in order to hold MNEs accountable for the harmful actions of their business partners; deploys common strategies of litigation premised around harmonized or convergent legal frameworks, such as environmental impact assessments; and finally, develop multi-jurisdictional domestic litigation strategies premised upon common supranational legal norms. Approached with this new emphasis in mind, the phenomena of lawmaking in transnational law begs for a renewed sociology of the field, one which interrogates the “black boxes” of transnational networks and communities through which legal mobilizations are conceived, developed and supported, and subsequently transform the normative frameworks of domestic and international law.