Lawyers, Globalization, and Transnational Governance Regimes

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Annu. Rev. Law Soc. Sci. 2016. 12:133–52

First published online as a Review in Advance on July 29, 2016

The *Annual Review of Law and Social Science* is online at lawsocsci.annualreviews.org

This article's doi:
10.1146/annurev-lawsocsci-110413-030617

Keywords

globalization, transnational governance, global law firm, business and human rights

Abstract

The global law firm has become a significant actor in the provision of legal services in multiple countries. Although this reflects a response to increasing demand for these services by transnational companies, lawyers in these firms also help further the process of globalization that fuels such demand. One arena in which this occurs is the construction of transnational governance regimes that harmonize standards and expectations with respect to a variety of business activities. These regimes may be based on two different visions of the globalization process. One vision is of markets increasingly unfettered by national regulation, while another is of widely accepted human rights that impose common constraints on business activities. This article surveys the literature on transnational governance regimes and the work of transnational corporate lawyers to illuminate these dynamics, and suggests that further research on this topic can provide insight into how lawyers contribute to the globalization process.

INTRODUCTION

Law practice has become increasingly globalized in recent decades (Flood & Lederer 2012, Henderson 2007, Spar 1997, Terry 2008). Faulconbridge et al. (2008) point to three developments that exemplify this trend. First is the substantial increase in international trade in legal services involving the United States and the United Kingdom. Second is a surge in foreign direct investment in legal services in the global economy, which reflects expenditures by firms outside their home countries. Third is the expansion of law firms into a larger number of countries, with a corresponding increase in the ability to advise on the laws of multiple jurisdictions. To these we might add the growing number of lawyers who must take account of laws beyond their own country (Terry 2008).

The global law firm is the organizational expression of the globalization of the profession, reflecting "a new era where Anglo-American transnational lawyering is central to the global economy" (Faulconbridge et al. 2008, p. 458). The rise of the global firm has generated significant scholarship in recent years. This has included discussion of its general features (Flood 1996), as well as of topics such as organizational structure (Faulconbridge et al. 2008, Jones 2007, Morgan & Quack 2006), knowledge creation and management (Beaverstock 2004, Faulconbridge 2007), understandings of professionalism (Faulconbridge & Muzio 2008, Flood 2008), firms based in different countries (Beaverstock et al. 1999, Galanter & Roberts 2008, Lace 2001, Liu 2008, Liu & Wu 2016, Morgan & Quack 2005), spatial patterns of growth (Beaverstock et al. 2000), the use of foreign lawyers (Silver 2000, 2005), expansion strategy (Flood 2013, Silver 2007), management (Empson 2007), the role of firms in furthering transnational business (Flood & Sosa 2008, Quack 2007), and an overview of scholarship on the global law firm (Sokol 2007).

Given the expanding geographical scope of its activities, the global law firm would seem to be the legal industry's version of the transnational corporation. Some scholarship, however, suggests that global firms remain primarily national in their orientation, rather than adopting a genuinely transnational perspective that accommodates different national perspectives as appropriate to further the organization's mission (Morgan 2006). Furthermore, it is not clear what has spurred law firm globalization. Have firms been simply responding to the needs of companies that increasingly operate across borders? Flood & Lederer (2012, p. 2513), for instance, suggest, "As a whole, the legal profession has come to globalization gradually, led there by client demand rather than an inherent desire to supply global legal services." Compared with accounting and management firms that work with transnational companies, the global expansion of law firms has been far less significant (Flood 2007). On this view, as their clients have demanded more transnational legal services, law firms have expanded globally to provide it. However, Dezalay & Garth (2012c, p. 2328) caution that "transnational law is not a product that simply arises to respond to a demand or need." Rather, "[l]awyer-brokers play a key role in building and legitimating the market for their services and expertise."

Have law firms become global by mimicking transnational corporations in stimulating demand for their services by aggressively marketing them abroad? In other words, does their emergence reflect the type of "demand creation" in which Abel (2012) suggests professionals engage?

There may be truth in both accounts. This article suggests that we can gain insight into the globalization of law firm practice by linking the study of global law firms to the literature on what I call transnational legal regimes. Such regimes are emerging as responses to the difficulties of coordinating transnational business activities in the absence of a global sovereign. Appreciating the nature of these regimes and the roles that corporate lawyers may play in constructing them can help illuminate the ways in which lawyers contribute to economic globalization. This in turn can clarify how lawyers in global firms both respond to and create demand for their

services, and how they therefore serve as an important engine of the globalization of the legal profession.

Focusing on the role that corporate lawyers play in constructing transnational governance regimes also may offer insights about prospects for the role of law in furthering global justice. Delazay & Garth (2012b, p. 277) suggest that transnational law has developed unevenly, with the rule of law producing a set of common expectations that tend more to further business than social interests. They argue that

> [t]he ultimate fate of transnational justice probably depends on the ability of legal entrepreneurs to make the case that the globalisation of law is not just about allowing multinational corporations to profit globally according to transnational rules of the game—deploying transnational law, in other words, to overcome more restrictive policies promoted by individual states.

They argue that the challenge is to build a credible case for the claim that transnational law also can "prevent corporations from using their global reach to enhance profits by abusing individuals and harming the environment" (Dezalay & Garth 2012c, p. 2325).

As this article describes, transnational governance regimes may harmonize divergent national law both by easing the movement of capital and by imposing common limits on business conduct. The literature on these regimes for the most part has not focused in detail on the roles that corporate lawyers play in constructing them. As I suggest, however, it does provide considerable material from which we can infer that lawyers likely do participate in this process. If we complement this analysis with insights from studies of the work of transnational corporate lawyers, a picture begins to emerge that suggests that these lawyers may be in a position to help set standards for transnational commerce that reflect concerns for both efficiency and justice. Exploring this possibility in more detail would be a fruitful agenda for research on globalization and the legal profession.

GLOBALIZATION AS PROCESS

Globalization can be regarded in general terms as an "intensification of economic, political, social and cultural relations across borders" (Holm & Sorensen 1995, p. 1). This process has advanced especially rapidly in the economic sphere over the last two to three decades (Halliday & Osinsky 2006). A growing number of companies now operate in multiple countries and compete in global markets (Bartlett & Ghosal 2002, Lundan 2015, Morgan et al. 2001, Picciotto 2011). A large percentage of transactions now are between affiliates of corporate families rather than between completely unrelated companies (Picciotto 2011, Ruggie 2013). Recent globalization is marked not so much by a quantitative increase in flows of commerce as it is by the increased potential for such flows with the reduction of national trade barriers, privatization, and the liberalization of regulation over the past few decades (Chorev 2007, Ocampo & Stiglitz 2008, Prasad 2006, Rodrik 2012, Schneiderman 2008).

The elimination of formal impediments to cross-border trade and investment has not, however, resulted in a frictionless transnational market. Differences in the regulation of labor conditions, environmental impacts, property rights, consumer protection, and other matters persist among countries, reflecting variations in values, politics, and social and economic conditions (Baldwin 2000, Büthe & Mattli 2011, Picciotti 2011).

These conditions underscore the complex relationship between law and globalization (Berkowitz et al. 2003; Braithwaite & Drahos 2000; Dezalay & Garth 2002a,b). As Halliday & Carruthers (2009) suggest,

> [T]he globalization of markets contrasts with the strong local connections of law. Insofar as law is institutionalized by national sovereign authorities, its development is embedded in local cultural, social, and political relations and therefore is less responsive to extraterritorial trends. Insofar as markets are structured and supported by legal systems, one accelerator of globalization appears to be joined to a brake of localism.

For this reason, "[e]conomic globalization cannot be understood apart from global business regulation and the legal construction of the markets on which it increasingly depends" (Halliday & Osinsky 2006, p. 447). This implies that at any moment there is a spectrum along which there are varying degrees of convergence and divergence among standards with respect to different economic sectors and activities. Furthermore, formal standards tell only part of the story. How law is interpreted and implemented serves as another influence on the ease with which cross-border business operations can occur.

The common image of globalization progressively advancing in accordance with the invocation of universal norms thus is at odds with the contingent and reversible character of the process (Caporaso & Madeira 2002, de Sousa Santos 2002, de Sousa Santos & Rodrıguez-Garavito 2005, Fiss & Hirsch 2005, Martin et al. 2006, Mittelman 2000, Rodrik 2012, Stiglitz 2002). As Halliday & Carruthers (2009) emphasize, "The shape of the 'global' varies from one to another domain of law, and its contours have to be discerned inductively." Law can serve as an instrument of either resistance or integration in this process, with the absence of a global sovereign to reconcile divergent national legal systems accentuating its fluidity, dynamism, and unpredictability. Globalization thus is a negotiated provisional outcome with respect to particular domains, and is always a matter of degree.

This state of affairs creates challenges for companies that attempt to operate as integrated global enterprises. National laws can serve as points of friction in efforts to move investment easily and rapidly among different jurisdictions, with inconsistent or conflicting requirements imposing costs that slow the movement of capital (Mattli & Woods 2009, Milhaupt 2003). Companies thus often seek transnational harmonization of regulatory requirements to make legal demands more predictable and to create stable expectations among counterparties. Such initiatives assert the rhetoric of the universal over the local by drawing on the vision of an integrated global market in which capital is free to migrate to its highest return for the benefit of everyone. To the extent this vision prevails, it furthers the process of globalization.

Another impetus for harmonization, however, comes from a different quarter and invokes a different universal rhetoric. Developing countries, their residents, and nongovernmental organizations increasingly call attention to the ability of transnational companies to engage in regulatory arbitrage and impose externalities on vulnerable populations. From this perspective, universal norms of conduct need to supersede lax local regulation, placing a common limit on the ability of business to inflict harm. This movement in recent years has begun to rely on the discourse of international human rights to articulate its claims. Progress on this front has been uneven, but has been gaining momentum. A growing number of companies are giving at least some attention to these concerns, aware that resistance, social unrest, and negative publicity may serve as obstacles to operating across borders. This vision of the universal thus also has the potential to further the process of globalization by ensuring that companies have a local "social license" to operate that minimizes obstacles to doing business in multiple countries (Kagan & Gunningham 2003, Morrison 2014).

The relationship between law and globalization suggests that corporate lawyers may play an important role in influencing the pace and scope of economic globalization. By corporate lawyers involved in this process, I mean mainly law firm lawyers who advise clients on transactional and

regulatory issues, although litigators also sometimes may play a role. I review work that describes the emergence of transnational business governance regimes that aim to stabilize expectations and enhance predictability among parties involved in cross-border transactions. Such parties may include not only commercial partners but also regulators and members of civil society in countries affected by these transactions. These regimes differ from conventional regulation in that they are the product of interaction among both public and private parties, often do not involve enforcement by public authorities, and have features that resemble networks more than hierarchical systems. I then discuss roles that corporate lawyers may play in constructing these regimes, and how their work helps create the demand to which these firms' services are a response.

TRANSNATIONAL GOVERNANCE

The term transnational is meant to denote a realm in which, unlike the international arena, the actors are not nation-states but a variety of public and private parties across multiple countries (Calliess 2012; Cotterell 2008, 2012; Glenn 2002; Hannerz 1996; Levitt & Khagram 2008; Morgan 2001, 2006). Cross-border economic activity takes place in this conceptual space because it extends beyond the reach of national governments, whose authority generally is geographically confined.

Ordering Behavior Through Governance

The absence of a single public regulatory authority to govern transnational economic activity has prompted efforts to devise mechanisms that can provide predictability and generate common expectations among actors. These initiatives are characterized as forms of governance, to distinguish them from formal governmental regulation. Rhodes (1996) describes four characteristics of governance that distinguish it from formal regulation. The first is interdependence among public and private actors. The second is continuing interaction among such actors, based on the need to obtain resources from one another and negotiate shared understandings of their goals. The third is relationships based on trust created by the acceptance of rules that the participants themselves establish. The final characteristic is independence from the state, which may attempt to channel behavior but cannot compel it.

Transnational governance thus involves a movement away from hierarchical instruments of control administrated by governmental bodies toward decentralized modes of ordering that place importance on participation by technical experts and negotiated common expectations (Auld 2014, Calliess & Zumbansen 2010, Carroll & Carson 2003, Dingwerth 2007, Djelic & Quack 2003, Djelic & Sahlin-Andersson 2006, Dobusch et al. 2013, Drahozal 2005, Graz & Nolke 2008, Hale & Held 2011, Hartnell 2007, Head et al. 2012, Kalderimis 2010, Pollack & Shaffer 2001, Shaffer 2013).

The system of rules, standards, and codes that emerges from such efforts on the transnational level is one of "networked governance" (Fenwick et al. 2014, Shaffer 2003). "Dense webs of influence are needed to pull off an accomplishment as difficult as establishing a global regulatory regime that secures the compliance of relevant actors in business and the state. Such webs are dense in the sense of involving many types of actors mobilizing many types of mechanisms" (Braithwaite & Drahos 2000, Kindle ed., section Micro-Macro Method for the Anthropology of Global Cultures). Power in such networks involves eliciting the cooperation of others rather than imposing a solution.

Shaffer (2003) suggests that these networks reflect resource dependencies among public and private actors, because none of them have the resources to govern without cooperation from others. Many business enterprises have moved from large-scale vertically integrated operations

to decentralized networks of relationships with suppliers, joint venture partners, and subsidiaries that have considerable operational discretion subject to general profitability goals (Picciotti 2011). Furthermore, government privatization and outsourcing have delegated many functions to parties less subject to direct public control, resulting in a blurring of the public and private spheres.

Norms and rules can circulate through different nodes in this network, with various actors in different domains incorporating them into their own practices in ways that can reinforce their influence. The result is a decentralized and emergent form of regulation. Thus, for instance, the International Chamber of Commerce issues rules regarding letters of credit, which banks in turn incorporate into their contracts. Courts may then enforce these contract terms, which means that many parties adopt them in their credit facility agreements. As a critical mass of parties incorporate the terms, they may attain the status of customary practice that informs the interpretation of national statutes dealing with this subject, which has the effect of embedding them in the formal public legal order (Halliday & Shaffer 2015b).

Halliday & Shaffer (2015b) maintain that this system of decentralized networked governance is composed to a significant, although not exclusive, degree of the existence of multiple transnational legal orders (TLOs) that purport to shape behavior with respect to various activities. They define a TLO as "a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions" (Halliday & Shaffer 2015b, p. 5). These actors seek to enlist international and transnational organizations to legitimize the norms they create in a process of persuasion and negotiation.

Any given TLO is transnational to the extent that it purports to order social relationships that transcend national boundaries with respect to an activity or issue that the relevant parties have construed as a problem. The legal feature of a TLO means that its form is produced in connection with a transnational body or network and is designed to influence national legal bodies. Thus, a set of norms will not constitute a TLO "until some evidence can be adduced that the transnational norms are reflected in national legal norms and that national legal norms place their imprint on local legal norms, and there is some degree of normative concordance among these several levels" (Halliday & Shaffer 2015b, p. 22). This emphasis on formalization thus excludes what is commonly regarded as soft law, although soft law norms may generate common expectations that eventually are codified in legally binding rules.

A distinctive feature of TLOs is their recursivity. The recursive process involves ongoing exchange, contestation, negotiation, and revision of norms at the international, national, and local level (Halliday 2009, Halliday & Carruthers 2009, Halliday & Shaffer 2015b). One important impetus for recursivity is the need to translate "law on the books" into "law in action" (Halliday & Carruthers 2009). The concept of recursivity thus "replaces a global-centric, top-down concept of norms traveling from the center to the periphery with a dynamic, recursive process of exchange and negotiation between transnational, national, and even local norms" (Halliday & Shaffer 2015b, p. 25).

Transnational Governance Regimes

TLOs represent the most mature form of transnational governance, but other forms exist that combine hard and soft law features. The former represent provisions enforceable through traditional legal processes, while the latter rely on market forces, reputational concerns, and access to resources to create incentives for compliance (Abbott & Snidal 2000, Abbott et al. 2015, Moth 2005, Shaffer & Pollack 2010). These combine in what we may call governance regimes. Such regimes have arisen with respect to a variety of issues: cross-border trade (A. Lang 2013, S. Lang 2013, Reich 1996, Shaffer 2003), environmental impacts (Bartley 2007, Bodansky 1999,

Bulkeley et al. 2014, Canan & Reichman 2002, Green 2014), labor conditions (Bartley 2007, Fransen 2012, Locke 2013), intellectual property (Godoy 2013, Helfer 2015, Hestermeyer 2008, Ho 2011, Rodriguez-Franco 2012), product standards (Büthe & Mattli 2011), insolvency (Halliday & Carruthers 2009), antitrust and competition (Devuyst 2001, Morgan 2006), financial markets (Brummer 2015, Helleiner 2015, McKeen-Edwards & Porter 2013), commercial transactions (Frankel 1998, Macdonald 2015), dispute resolution (Dezalay & Garth 1996, Keohane et al. 2000, Lehmkuhl 2003, Whytock 2009), and investment agreements (Salacuse 2010). Furthermore, recent years have seen the emergence of transnational regimes focused on business responsibility to respect human rights (Amao 2011, Bieri 2010, Blecher et al. 2014, Cernic & Van Ho 2015, Deva 2012, Deva & Bilchitz 2013, Fortun 2001, Ho 2011, Joseph 2004, Mohan & Morel 2015, Morrison 2014, Quayson & Arhin 2012, Regan & Hall 2016, Ruggie 2013, Sinha 2013, Tsutsui & Lim 2015, United Nations 2011, Voiculescu & Yanacopulos 2011, Walker-Said & Kelly 2015, Wellstein 2009, Zerk 2006). Participants in the construction of such regimes include transnational companies (Fransen 2012, Green 2014), private standard-setting bodies (Büthe & Mattli 2011), international organizations (Alvarez 2005), subnational regulators (Slaughter 2004), NGOs (A. Lang 2013, S. Lang 2013), and professional associations (Halliday & Carruthers 2009).

A more detailed discussion of three examples helps illuminate the dynamics of these regimes and the roles that lawyers may play within them. The first two, dealing with trade and insolvency, reflect efforts to overcome commercial obstacles to transnational business activities. The third, relating to extractive company operations, involves initiatives prompted by human rights concerns and recognition of the importance of social licenses for transnational commerce.

The discussion of the roles that lawyers may play in governance regimes is not meant to suggest that they are indispensable to such regimes, nor to deny that their influence may vary depending on the type of issues involved. It also does not assume that the distinctive Anglo-American legal perspective that global business lawyers bring to the task is inevitably desirable, or that it is welcomed by all who are affected by globalization. There nonetheless is reason to believe that lawyers may be important participants in the construction of transnational governance regimes. A deeper appreciation of their involvement may help clarify both the benefits and limitations of the ways in which lawyers help shape the processes of globalization.

Trade

International trade features a governance regime that aims to temper the influence of national and local interests on cross-border commerce in furtherance of ostensibly universal norms. The main regime in this field involves a set of negotiations between and among countries that aim to enhance commerce across national borders by reducing obstacles to the creation of international markets in goods and services. The World Trade Organization (WTO) serves as the central body that adjudicates complaints by countries that other countries are violating their obligations under these rules. The WTO is authorized to impose the withdrawal of trade concessions by other countries as a sanction for violation. As Shaffer (2003) describes, "[a]ll states, even the most powerful ones, have responded to WTO judgments by modifying domestic regulations and practices, or, in the few cases where domestic politics blocked modification, have accepted the sanctions."

This apparent paradigm of international public law, however, is shaped in significant ways by the actions of private parties. The government trade representatives who decide which cases to pursue tend to be short-staffed and overburdened and must rely on private parties for the facts of complex and detailed potential claims. In the United States in particular, the result is that the government heavily relies on companies who can make a strong legal case and present a detailed factual submission. Furthermore, private lawyers may now plead cases on behalf of countries

before the WTO. The result, as Shaffer (2003, Kindle ed., chapter 3) suggests, is that "[t]he dialogue over trade barriers . . . becomes more than an intergovernmental one. It involves private firms debating factual and legal issues with representatives of multiple U.S. agencies and foreign government officials. To further complicate the process, foreign firms often hire Washington lawyers to present their version of events." In this way, lawyers' control over litigation effectively constitutes influence over governance. Some have even suggested further private control over the process by conceptualizing the international trade regime as a system of private rights that companies should be able to vindicate by directly bringing actions before the WTO.

Shaffer suggests that lawyers exercise considerable influence in the development of international trade law. He notes that the regime under the General Agreement on Tariffs and Trade originally served as a process for negotiation among countries in which conflicts could be settled by rebalancing trade concessions. By contrast, the influence of private parties in the current system leads to a focus on vindicating legal rights and providing redress for violations. The process thus is less an occasion for diplomacy and more a venue for litigation. The result, as some observers maintain, is that "'a lawyer culture' dominates U.S. trade policy" (Shaffer 2003, Kindle ed., chapter 7). The construction of the trade arena in these terms provides a competitive advantage for the United States in light of its well-developed legal profession, which is accustomed to framing private claims before public bodies. As a result, "[i]ndividual WTO cases function not only to resolve particular disputes but also to interpret and shape WTO law in the absence of an international legislative or executive check" (Shaffer 2003, Kindle ed., chapter 7).

Insolvency

The push for an international regime to govern corporate insolvencies represents another effort to enhance transnational business operations by providing predictable procedures to respond to business failures. As Halliday & Carruthers (2009, p. 43) observe, the premise of this initiative has been that "[c]oordination would replace chaos. Capable of application in all jurisdictions everywhere, this globalizing vision rested on core premises of lawyers' epistemology."

The series of campaigns to achieve this goal reflected competition among different international organizations to secure the agreement of countries to adhere to their proposed standards. Halliday & Carruthers suggest that this competition involved parties' assessment of the legitimacy of each of the organizations to serve as the authoritative source of standards. The UN Commission on International Trade Law (UNCITRAL) ultimately emerged as the organization that was able to forge an agreement on insolvency procedures. Its success rested on the inclusion of a broader range of participants than any competing entity, who both were broadly representative and possessed specialized expertise.

The process also was successful because it culminated in a set of principles designed to provide guidance to national actors, rather than a binding set of uniform requirements. UNCITRAL concluded that the best approach was to produce a stand-alone guide in the form of principles, with suggested recommendations. The purpose of this guide was to "assist Governments and legislative bodies in reviewing the adequacy of laws, regulations, decrees and similar legislative texts" (Halliday & Carruthers 2009, p. 156) in the field. Recommendations ranged from specific terms to broader statements of norms that should guide the formulation of rules.

Halliday & Carruthers's (2009) study of the creation of an international insolvency regime also offers an extended analysis of the ways in which lawyers and other professionals sought to establish greater uniformity among countries while simultaneously framing the problem and its solution in terms that reinforced their own influence. For instance, the International Association of Restructuring, Insolvency & Bankruptcy Professionals reflected the approach of English financial

professionals that emphasized swift action to preserve lender assets. By contrast, the International Bar Association (IBA) argued that traditional legal principles of fairness and equity would provide more predictability and focused on insolvency as a vehicle for corporate reorganization. UNCITRAL ultimately tilted toward the lawyers' perspective; as Halliday & Carruthers (2009, p. 61) observe, its Model Law was "[c]rafted almost entirely by lawyers." Thus, for instance, it recommends that debtor management remain in place to provide continuity of company operations as it seeks to restructure its finances—with the help of experienced bankruptcy lawyers. This process reflects the ways in which the creation of transnational governance in various fields serves as an occasion for contest between professional groups in diagnosing problems and proposing solutions.

Mobilization of the legal profession through the participation of the IBA is an example of Quack's (2007) observation that international law associations can serve as an important vehicle for transnational lawmaking. Such organizations provide opportunities for lawyers to discuss and make sense of new developments in various fields, and they furnish expertise to international organizations and intergovernmental bodies through the participation of experienced members in specific practice areas. Halliday & Carruthers's (2009, p. 63) detailed analysis of the development of an international insolvency regime thus illustrates that "the success of creating the new insolvency field represents much more than 'an idea whose time has come.' The designers of this legal field were challenged to discover or invent precisely what combination of technologies and enabling powers would deliver legal and market certainty and predictability." Lawyers played a key role in this process.

Extractive Industries

One significant impetus for transnational governance in the last few decades has been the activity of extractive companies engaged in mining and in oil and gas exploration, production, and refinement. These companies also began to expand the scope of their operations in the last decades of the twentieth century. In the 1990s, they were operating in many remote areas of Africa and Latin America that were inhabited by indigenous peoples, and in countries marked by civil war and social unrest. In some cases, their operations triggered allegations of forced displacement of local communities; the use of slave labor; environmental contamination; and torture, rape, and murder by forces providing security services for the projects (Hum. Rights Watch 1999, Ruggie 2013). There also were claims that some companies provided facilities and equipment that assisted host states in inflicting massive violence, and even genocide, on civilian populations, especially in areas torn by civil conflict (Simmons & Macklin 2014). In addition, critics have claimed that many projects are plagued by corruption, with large amounts of revenues siphoned off to host country officials at the expense of residents.

Abuses by forces providing security for business operations in zones of conflict and weak governance prompted the creation of the Voluntary Principles on Security and Human Rights (the Principles) for the extractive industry (Simmons & Macklin 2014). Companies signing on to the Principles commit to obey the laws of the host state and to promote observance of UN standards on the use of force. The Principles provide guidance for them with respect to risk assessments of doing business in weak governance or conflict zones, as well as contractual relationships with public and private security forces. Companies are encouraged to incorporate the Principles into their contracts with private security forces, and to provide for contractual authority to terminate services upon credible evidence of unlawful or abusive behavior by private security personnel.

The Principles do not create legally binding standards, but a complaint mechanism permits a participant or an observer organization to raise concern that another participant has failed to meet the participation criteria or has insufficiently demonstrated commitment to implement

the Principles. The more significant enforcement mechanism, however, is the widespread social expectation that an extractive company will adopt and enforce the Principles with the security forces with which it contracts.

The Extractive Industries Transparency Initiative (EITI) represents an effort to reduce corruption in the industry (Simmons & Macklin 2014). It consists of a set of reporting standards published by a coalition of companies, governments, and NGOs. EITI requires companies to disclose payments to governments and governments to disclose the amounts that they receive from these sources.

Adoption of the EITI standard is discretionary, and implementation is the responsibility of individual countries that agree to subscribe to it. The EITI disclosure requirements must be adopted into individual country law so that extractive companies that operate within the country are subject to it. For a country to be regarded as compliant with the EITI, it must issue a clear public statement of its intention to implement the Initiative. Over the next two-and-a-half years, it must complete the EITI validation process, complying with reporting and governance requirements that are reviewed and confirmed by an independent source appointed by the EITI. The laws or regulations and the independent auditing process are independently validated by the EITI before the country is deemed to be EITI compliant, and countries must maintain adherence to all the EITI rules to retain their compliant status.

Lawyers for extractive companies have played an important role in helping develop the Principles and in advising their clients on incorporating provisions in contracts with security companies that further responsible practices (Regan & Hall 2016). A US law firm serves as the Secretariat for the Principles, helping monitor and refine their application. Corporate lawyers have also played a role in the development of the EITI and in ensuring compliance with its disclosure requirements. This suggests that such lawyers can help devise transnational governance regimes that ensure that clients have social licenses to operate.

More generally, there is increasing attention to the role of business lawyers in advising transnational clients on how to meet their duty to respect human rights under the UN Guiding Principles on Business and Human Rights (Regan & Hall 2016). The IBA, for instance, has issued guidance that says "The codes of a number of bar associations are already strongly aligned with the UNGPs" (Int. Bar Assoc. 2015, p. 13). In addition, 11 bar associations adopted a joint resolution in June 2015 in which they pledged to promote "the realization of human rights in the business context" and to educate lawyers about the relevance of the UN Guiding Principles to "legal practice and counseling" (Am. Bar Assoc. et al. 2015, p. 1). Furthermore, some major law firms have now established practice groups to advise clients on business and human rights. There is thus reason to think that global corporate lawyers may be in a position to play as prominent a role in constructing transnational human rights regimes as they have in creating more commercially focused transnational regimes.

There are thus reasons to believe that global lawyers may contribute to globalization by helping construct transnational governance regimes that harmonize both commercial and human rights standards. Most of the work on such regimes, however, does not focus on the role of lawyers. The next section discusses scholarship on the work of transnational lawyers to suggest that the functions that these lawyers perform indicate that they are likely to be active in helping devise these regimes.

GLOBAL LAWYERS AND TRANSNATIONAL GOVERNANCE REGIMES

Sigrid Quack (2007) provides a useful analysis of the ways in which the daily work of lawyers can constitute lawmaking with respect to transnational business operations. She suggests that "in the

face of weak or 'loose' government at the international level, the development of transnational legal norms follows a pattern of dispersed rule-setting that is manifested in the common law system and led by legal practitioners in large law firms and an internationalized legal profession" (Quack 2007, p. 644). From this perspective, transnational lawmaking in this domain is a process "driven mainly by practical problem-solving and sense-making by legal practitioners in contexts where there is high regulatory ambiguity and distributed agency" (p. 644).

Quack (2007, p. 652) suggests three different ways in which lawyers' work can constitute transnational lawmaking: "contractual innovation, legal standardization, and legal normalization." In the first instance, "they act predominantly as advisers and draftspersons producing contract-based legal innovations for their clients" (p. 652). In the second, they "function as intermediaries and 'proselytizers' to promote the dissemination of such contractual legal innovations. This may result in the emergence of model contracts and other legal standards (often referred to as 'soft law')" (p. 652). In the third activity, lawyers

> act as public experts in hearings or as lobbyists in negotiations when strategically pushing for a rule to become legally binding in form or effect, or for existing law to be amended. This usually requires recognition by a national sovereign authority or, increasingly, by a transnational authority. The process may stop at any level, and the phases may run parallel or interconnect. (Quack 2007, p. 652)

In each instance, they produce law in the sense that they help construct arrangements that serve to channel behavior into more predictable patterns that create common expectations about the future.

Contractual innovation is likely to occur "(*a*) when attempting to stretch and bend existing law; (*b*) when constructing contractual solutions in a regulatory void; or (*c*) when coordinating expectations of different actors across jurisdictional boundaries. All three conditions are more prevalent in transnational contexts than in national contexts" (Quack 2007, p. 653). Such conditions create uncertainty both for clients and for other parties involved in transactions with them, because, as John Flood (2007, p. 55) puts it, "the normative order is plural and fragmented, and likely to remain so." Lawyers work to reduce such uncertainty by devising structures that accommodate the multiple legal systems that may touch a transaction in ways that allow clients to meet their commercial, tax, regulatory, and other objectives. In addition, Flood suggests, major global law firms help ease anxiety about uncertainty by relying on their reputations to vouch for the legitimacy of novel transactional structures. This form of personal assurance can help substitute for the assurance that in more familiar circumstances comes from a well-established body of legal precedent that affirms the validity of transactional arrangements.

Efforts at legal standardization involve the generation of nonbinding norms followed by lawyers and their clients. In some cases, this involves lawyers developing innovations such as new transactional documents, which they then disseminate in the hope that others will use the forms. This increases predictability by harmonizing expectations, and enhances the likelihood that agreements will be enforced if disputes arise. In other instances, this entails lawyers working with international business associations to develop model contracts for use in various types of transactions, such as those involving swaps and derivatives.

Flood & Sosa (2008, p. 513) note that standardized documentation in transactions may be the product of either a particular firm or an organization that promotes standardization, such as the European Loan Market Association or the International Swaps and Derivatives Association. The former focuses on syndicated loan agreements and includes parties such as banks, investors, law firms, and rating agencies. The latter has 820 institutional members that include corporations, government bodies, and professional service firms who adhere to standard documentation that

the Association produces. Global law firms are closely involved in helping to draft some of these documents. As Flood (2012, p. 183) observes, "In this regard the law firms' own intellectual capital is crucial to delivering multi-jurisdictional transactions." Such involvement serves to bolster the dominance of Anglo-American commercial practices, which in turn provides competitive advantage for UK and US global firms.

Finally, in the process of legal normalization, lawyers attempt to make legally binding the informal standards that they help create in the first two types of activities. The effort to elevate model contracts, master agreements, and the like to the status of binding rules requires that lawyers persuade transnational authorities and the wider public of the advantages of such rules, and that they mobilize constituencies in support of this project. The key activities in this process "consist of diagnosing problems, framing issues, negotiating solutions, and mobilizing policy networks" (Quack 2007, p. 655). The main decision-making bodies are international intergovernmental organizations, such as the WTO and various UN entities, and semipublic standard-setting bodies whose standards can become influential if courts recognize and apply them, such as the International Chamber of Commerce, the International Institute for the Unification of Private Law, and the Commission on European Contract Law.

We can conceptualize normalization even more broadly to include initiatives that involve a range of actors who may be the source of rules, standards, or norms designed to channel behavior into predictable patterns. Such actors can include corporations, international organizations, governments, nongovernmental organizations, technical experts, consumers, workers, industry groups, and informal intergovernmental organizations composed of national agencies in specific regulatory fields. In the absence of an authoritative sovereign to govern transnational activities, there may be competition among these actors to establish who will be regarded as a legitimate authority with respect to a given domain. The result is that different domains will reflect different degrees of transnational integration and harmonization.

There may be reason to think that lawyers may constitute an especially important epistemic community in the general project of attempting to construct transnational governance regimes. My suggestions here are tentative, because one of the points that I emphasize in this article is that to the extent that there is a realm of transnational governance, it is composed of a variety of diverse and complex fields with their own histories and dynamics. Nonetheless, there may be some features that many of these fields share that can provide the basis for identifying some commonalities among them.

Work on international cooperation defines an epistemic community as "a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area" (Haas 1992, p. 3). Haas suggests that such a community is united by a shared set of normative beliefs; shared causal beliefs, which provide the basis for identifying courses of action that will lead to desired outcomes; common criteria for adjudicating knowledge claims within the field; and a set of common practices conceived as responses to particular problems. Dezalay & Garth (2012d, pp. 4–5) warn that the concept can assume more of a consensus than is warranted, leading us to overlook competition among professionals and experts. If we keep this point in mind, however, it can help identify groups with common outlooks that may exert influence.

With respect to transnational governance in particular, Shaffer (2012, p. 254) argues that epistemic communities serve as "[i]ntermediaries . . . the carriers, conduits, and points of entry for the circulation of transnational legal norms . . . They help to diagnose national situations, monitor national developments and responses, and translate, adapt and appropriate global norms for local contexts." Lawyers thus may be members of at least two epistemic communities. One is a general community constituted by common training and intensive socialization into a particular mode

of analysis and discourse. The other is a community united by shared expertise with respect to particular technical knowledge (Van Waarden & Drahos 2002). Even as they participate in their second communities, lawyers likely bring a distinctive perspective to the analysis and diagnosis of problems based on their especially strong preference for the use of law and legal principles as mechanisms to order social life.

The use of law as an ordering mechanism may have particular appeal in a transnational realm that lacks a single recognized political authority and conventional institutions, procedures, and modes of regularizing behavior that serve as a basis for legitimacy on the national level. This set of conditions creates considerable uncertainty about sources of authority, appropriate recipients of trust, and how to harmonize various potentially competing interests. Such fluidity creates opportunities for a range of actors to acquire de facto authority if they can convince others of their legitimacy in creating conditions that stabilize expectations. As Luhmann (2014) has observed, this is an essential function of law. This suggests that lawyers may be in a position to play an especially important role in helping construct transnational regimes that enhance the predictability that furthers globalization.

Antoine Vauchez's (2012, 2015) analysis of the role of lawyers in constructing the European Union illustrates this point. As he notes, "the historical permanence of its 'names' and symbols (e.g., rights, laws, courts) only makes us perceive it as a reassuring backdrop or as some sort of institution unchanged in its forms and equal in its effects" (Vauchez 2012, p. 221). Vauchez (2012, p. 220) argues that the efforts of lawyers in various roles and fields have operated to place law "at the crossroads of European construction, a critical position in a political system deprived of a state capable of organising stable relationships and hierarchies between groups and institutions."

Lawyers therefore may seem to be natural actors to play a leading role in constructing fields of transnational governance that seek to reduce impediments to cross-border operations by creating legal systems that are independent of local interests. In doing so, they are able to invoke traditional liberal legal principles, such as predictability, uniform treatment of similar activities, and protection of property interests against arbitrary invasion.

Lawyers also are likely to be influential in transnational governance initiatives because those who represent multinational companies in many instances have helped these clients exploit differences in national regulation to enhance their financial returns. Through such activity, these lawyers have acquired an in-depth knowledge of the patchwork of national laws that potentially affect businesses that operate across borders. One aspect of this knowledge is awareness of how local customs and practices affect the way that the law on the books is applied. This gives lawyers a sophisticated understanding of precisely how laws across countries differ in practice, as well as their actual effects on transnational companies. Such understanding is an important source of professional capital that can enable lawyers to define the problem that diverse regulations create in any given field, and to prescribe responses to address it.

Halliday & Osinsky's (2006) identification of a discursive dimension to globalization also suggests that lawyers may be in a position to exercise influence in transnational governance efforts. They argue that globalization has both structural and discursive elements. The former are material changes, such as increased flows of people, goods, services, and capital, along with responses to these events by institutions on the local, national, and international levels. Discursive changes reflect revisions in the meanings attached to these structural developments. The extent to which a particular domain can be regarded as globalized is a function of the degree to which its structural changes are regarded as legitimate instances of universal rational principles. Discursive strategies that can frame structural changes in these terms thus help further globalization in a given domain.

An emphasis on such strategies is consistent with Braithwaite & Drahos's (2000) suggestion that globalization can be understood as "a contest of principles" that bestows symbolic meaning

on material events. They argue that transnational governance regimes usually emerge in the form of a set of principles, because creating a new regime by focusing on more specific rules usually is very difficult. Principles thus serve as the instruments that actors use in seeking legitimacy for their proposals, a crucial requirement in polycentric regulatory arenas (Black 2008, Halliday et al. 2010).

To the extent that potential structural increases in the flow of goods and services require congruence with certain discursive representations, globalization thus is an arena of argumentation rather than simply a set of material processes. The discursive task requires describing and justifying structural changes as functional and legitimate in accordance with general principles that transcend national and local interests. This is an especially salient task with respect to the establishment of transnational governance regimes that limit national and local authority.

Lawyers are trained to engage in a public reason-giving process that aims to present private client interests as consistent with more universal principles. As Picciotto (2011, Kindle ed., preface) observes, lawyers "work at the interface of the public and private in mediating social action and conflict," and "their techniques and practices of formulating and interpreting concepts and norms which are inherently malleable and indeterminate provide the flexibility to manage these complex interactions." One particularly potent discursive strategy is to invoke the rule of law, which is seen as expressing universal values such as protection of rights, transparency, and nondiscrimination. Thus, as Vauchez (2012, p. 231) puts it, "lawyers shared a common legal habitus characterised by a proclivity to defend contradicting social interests and to deal with competing social allegiances in the name of law." This potentially affords them the opportunity to exercise significant influence in efforts to construct transnational governance regimes in various fields.

Such activity also helps lawyers frame problems in terms that require their assistance in solving them. As Halliday & Carruthers (1998, p. 51) argue, "professions try to frame the legal environment in ways that favor their knowledge and expertise. To maintain control over jurisdiction, professionals must convince others that they offer the most authoritative interpretation of their problem." One example of this may be the tendency in recent years to frame concerns about corporate behavior in human rights terms, in contrast to a longer tradition of focusing on social responsibility or sustainability. The latter perspective draws on the expertise of professionals in fields such as engineering, community relations, and marketing, whereas the former of course frames the problem in terms that call for legal expertise. Evidence is very preliminary at this point, but there is some indication that the result may be to place corporate general counsel in the role of coordinating efforts among offices that previously reported directly to the executive suite (Regan & Hall 2016). This in turn may prompt the creation of more law firm practice groups to advise on business and human rights.

To return to the issue posed at the beginning of this article, all this suggests that the work of global lawyers on transnational governance regimes can stimulate the demand for services to which their firms are a response. They are especially well-situated to help invoke the universal norms that spur globalization, whether those norms emphasize free markets or human rights (Dezalay & Garth 2011). They are also in a position to help mediate between those norms in a way that may help redress the asymmetry in favor of business interests that Dezalay & Garth (2012b, p. 292) claim characterizes the transnational legal system. They suggest that as "transnational environmental law, indigenous rights and codes of conduct with respect to labor practices, for example" are incorporated into corporate practice, "the greater the likelihood that they will become more routinised through relationships and activities that blend the world of NGOs and that of corporate practice." It would be a tall order, but the result could be a more robust system of transnational justice.

CONCLUSION

This article has focused on the globalization of the legal profession through the lens of business lawyers' involvement in constructing governance regimes to coordinate and regulate transnational business activity. Lawyers help construct this regime through activities in various domains with the aim of fostering greater flows of goods, services, and capital across national borders. In addition, the emergence of a focus on the human rights impacts of transnational business operations may be creating opportunities for lawyers to work on initiatives to ensure that companies have the necessary social licenses to operate in multiple jurisdictions. By enhancing the ability of companies to operate across national borders, these initiatives have in turn created greater need for law firms to provide services in several jurisdictions around the world. In this respect, lawyers are both the agents and beneficiaries of globalization. More research focused specifically on the role that business lawyers play in helping fashion transnational governance regimes would enhance our understanding of this process.

DISCLOSURE STATEMENT

The author is not aware of any affiliations, memberships, funding, or financial holdings that might be perceived as affecting the objectivity of this review.

ACKNOWLEDGMENTS

My thanks to Carole Silver and Kath Hall for helpful discussions during the preparation of this article, and to Carole Silver for useful comments on an earlier draft.

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