

**“Allocating Power and Wealth in the Global Economy:
The Role of Private Law and Legal Agents”**

Edward S Cohen

CSGR Working Paper No. 101/02

July 2002

THE UNIVERSITY OF
WARWICK



Allocating Power and Wealth in the Global Economy: The Role of Private Law and Legal Agents

Edward S. Cohen

Westminster College, New Wilmington

CSGR Working Paper No. 101/02

July 2002

Abstract

Over the past few years, scholars of global governance have paid increasing attention to the role of law and legalization in shaping the governance of global economic activity, focusing primarily on public international law and the institutions that articulate and enforce this law. In this paper, I shift the focus to the arena of private international law, particularly the dimension that concerns the rules by which global economic activity is ordered. Drawing on the literatures on the role of non-state actors and the practice of inter-governmentalism, I argue that private legal agents – the large U.S. and British law firms and their Continental competitors, the international commercial arbitration community, and managers of the major multinationals – play an increasingly important role in determining the rules of the global economic system and the relationship between global markets and the activities of states.

The paper elaborates this argument in three sections. First, I describe and analyze the emergence of a transnational legal field in the context of the process of globalization, and offer an account of the institutions and actors – both public and private – that dominate this field. Second, I examine in detail the role of private legal agents in constructing and diffusing the norms that compete for influence in the transnational legal field. This section focuses on the role of private lawyers, and especially global corporate law firms, in the contemporary global political economy. Here, I argue that private lawyers should be seen as creative agents who have played an important role in articulating and disseminating neo-liberal norms throughout the transnational legal field. Third, I present sketches of two case studies of legal change in the transnational arena to illustrate the importance of private legal agents in the global political economy, and assess the importance of this process for future research on the legal and political dimensions of globalization. In these cases – the emergence of the GATS and TRIPS accords as part of the Uruguay Round of GATT negotiations, and the emergence of a semi-autonomous law of transnational commercial activity through the spread of private international arbitration – I look closely at the way legal norms are diffused through the interaction of national and transnational legal fields.

My overall conclusions are two-fold. The field of private international law is the site of an ongoing process of conflict and accommodation between different national conceptions of business law, structure, and practice – and thus between legal agents who advocate these conceptions – for dominance in shaping global business activity. The emerging doctrines in this field, which privilege the autonomy and authority of private corporate agents, have a significant impact in constraining the ability of public legal agents – domestically and globally – to challenge corporate priorities in shaping the global political economy.

Keywords: globalization, law, corporate law firms, lawyers, global governance, diffusion.

Address for correspondence

Edward S. Cohen

Associate Professor of Political Science

Westminster College

New Wilmington, PA 16172, USA

Email: cohenes@westminster.edu, Tel: 724-946-7304, Fax: 724-946-7256

Over the past decade, students of the global political economy have become increasingly interested in the substance and theory of international economic law. A variety of developments – the creation of the World Trade Organization (WTO), the growing importance of regional treaties and institutions such as the European Union (EU) and the North American Free Trade Agreement (NAFTA), increased attention to and conflicts surrounding regulatory “harmonization” or “coordination,” and the promotion of legal reform and the “rule of law” by the International Monetary Fund (IMF) and World Bank, to mention the most prominent – has pushed the study of the legal framework of global economic activity to the center of political economy. The leading approach to the role of law in contemporary global politics and society among political scientists, however, is too narrow and limited for this task.¹ Its focus on formal treaties and institutions, and indeed its preoccupation with legal formalization, ignores the variety and complexity of the ways in which legal institutions and actors shape the political economy, and thus constricts our ability to develop a comprehensive and adequate understanding of the role of law in the governance of the global political economy.

In this paper, I suggest an alternative approach to the problem. This approach focuses on the emergence of a transnational legal *field* as an increasingly important context in which the rules which shape the distribution of power and wealth in the global economy are created and contested. As a part of the system of governance in a globalizing world, this field is characterized by a plurality of legal institutions, principles, and actors – both public and private – and is constituted by a complex pattern of cooperation and conflict among these players. In particular, I emphasize the role of private agents, especially multinational corporations and corporate law firms, in shaping the field as a whole. Here, I draw on the work of sociologists, legal scholars and others who are paying increased attention to private agents in the arena of international economic law. As Iain Ramsay has recently noted,

...scholars are increasingly turning their attention to the political influence of private groups over the private lawmaking process in commercial law, and the consequences for both the form and substance of commercial law rules. The reasons for this resurgence of interest in private law-making may be related to the fact that business interests are

¹ The best single overview of this type of work is the collection of essays in the Summer, 2000 issue of the journal *International Organization*, (54) 3. A critique of this approach is presented in Finnemore and Toope, 2001.

investing greater resources in the production of national legal standards which compete for dominance in the global economy. Whatever the ultimate reasons for this development, if one surveys many contemporary issues in commercial law it seems that “politics is everywhere” and that commercial law is often implicated in social and political issues. (Ramsay, 2001: 566-67)

The examination of the role of private agents in shaping transnational economic law and governance, I suggest, is central for understanding the impact of globalization on the structure and operation of political power in the contemporary political economy.

The paper is organized into three major sections. First, I explore the emergence of a transnational field of law in the context of an increasingly globalized political economy, and outline its main features. Second, I analyze in more depth the role of private lawyers – especially those who work for global corporate law firms – in constituting, shaping, and manipulating this legal field. **My central thesis in this paper is that these lawyers, who are primarily “private” agents, play a central role in defining and diffusing the legal rules of the global economy, and thus in determining the distribution of power and wealth that results from this activity.** Third, I provide a more detailed empirical account of both the transnational legal field and the role of lawyers, *via* discussions of the construction of the contemporary multilateral trade regime, and of the role of arbitration in resolving commercial disputes. In these accounts, I hope to show how the study of the transnational legal field can provide crucial insights into some of the fundamental lines of conflict – the boundaries between private and public, domestic and global – that will shape the development of our increasingly globalized political economy. A conclusion sums up the arguments and suggests directions for further research.²

² This paper is part of a larger project of research into the role of law in the governance of the global political economy, as a way of understanding the changing role of the state and political power in the contemporary world. My aim is to outline the major questions of interest and the ways in which I propose to develop answers. Comments or suggestions are welcomed and encouraged.

A) Globalization and Transnational Law

The concept of, and debates surrounding, “globalization” provide an important meeting ground for students of political economy and of the role of law in the international economy. To be sure, scholars in both areas have only recently recognized these connections, and most such treatments have shared the widespread sense that globalization is primarily an economic phenomenon. In the following analysis, however, I argue that it is the changing structure and exercise of political power, the transformation of the state and the meaning of sovereignty, and the shifting boundaries between state and society – and between the “national” and the “international” – that constitute the driving forces and ultimate significance of globalization. The importance of the study of the legal context and structure of the global economy, in this approach, derives from the central place of law in shaping the relationship between state(s) and society. Classical social theory, and some corners of political economy, have long recognized the crucial role of the law, legal agents, and legal institutions in mediating between political and economic power. Because modern capitalist states are governed through complex legal orders, scholars in these traditions have shared a sense that the structure and content of the legal system is a crucial arena for constituting and allocating power and authority in modern political economy. In this section, I suggest some of the ways in which a study of the emerging transnational legal field can provide crucial insight into the ways globalization is transforming the structure and purposes of political power in the contemporary world.

1) Globalization and the Emergence of a Transnational Legal Field.

In the aftermath of the Second World War, the United States orchestrated the construction of a framework for the governance of the international economy.³ This framework, usually known as “Bretton Woods,” emphasized careful political control to ensure financial stability and steadily growing trade. In this context, there were two basic dimensions to the legal regulation of international economic activity. First, the General Agreement on Tariffs and Trade (GATT)

³ My discussion of globalization in this paper is generally focused on developments within and between the advanced capitalist states. This is primarily because much of the impetus for and leading actors in the globalization process are based in these states, and reflects my own area of expertise.

treaty and institution provided the main international framework of rules, focused primarily on trade. These rules were addressed to the economic policies of the member states; they did not directly treat the activities of private economic actors themselves, whose regulation would be left to individual states (and, in the case of the European Community (EC), regional arrangements). As a result, as Robert Hudec (1970) pointed out, the process for negotiating and resolving conflicts under GATT was more diplomatic than legal in structure and content.

Second, the governance of the international economic activity of private agents – primarily corporations – was left to domestic public and private law. As conflicts surrounding public law were governed by GATT, the key role was played by the traditional private law doctrines of “conflicts of laws” as interpreted and applied by national judiciaries. Although varying significantly in content and procedure across states, conflicts of laws analysis address the problem of which jurisdiction’s laws and courts are the proper venue for the resolution of conflicts over the interpretation and fulfillment of contracts and other business arrangements. In essence, then, courts would handle conflicts between economic actors from different states by finding and applying the appropriate state’s legal norms in any given case. As such, this system for governing the cross-border activities of private economic agents reinforced the general emphasis on the central role of national legal systems in governing the political economy of the era.

The transformation of the global political economy since the 1970’s, now discussed under the rubric of “globalization,” has led to a modification of the legal regulation of economic activity in fundamental ways. Instead of a relatively clear, limited, and state-centered set of rules and institutions, we now see the emergence of a transnational field of law and legal actors, characterized by the proliferation of legal rules to which global economic activity is subject, complex patterns of collaboration and competition between these systems of rules (and the institutions/actors which enforce them), and a growing importance of law as a venue in which the structure of power and wealth is constituted and modified. Before examining this legal field in more detail, however, we need to explore the ways globalization has transformed the political

economy and established the context for the changing role of law. For present purposes, the following five elements seem the most central:⁴

- A transformation in the relationship between state and society, involving the withdrawal of the state from the detailed management of many economic and social processes and its replacement by the privileging of market institutions and actors in these areas. The state does not disappear, but focuses now on the promotion and regulation of markets throughout society and the polity. Often analyzed in the context of “the new public management,” the bureaucratic hierarchy and discretion that had shaped the state’s relationship with market agents is replaced by more formal, distanced, and legally-structured relationships. (Kettl, 2000) Along with the phenomena of privatization, deregulation, and liberalization, these developments mean that market actors now have more autonomy and flexibility in pursuing their aims and in developing rules to regulate their own relationships.
- Following from this, a sustained reduction of barriers to the flow of capital and goods across national borders, such as capital controls, tariffs, and regulations discriminating against foreign investment. In addition to unilateral policy choices, these reductions are secured through the use of regional agreements and institutions (the European Union (EU) and North American Free Trade Agreement (NAFTA) are most prominent) and the broadening of the multilateral GATT agreements into new policy areas (such as services and intellectual property) and the creation of a World Trade Organization (WTO) to formalize inter-state dispute resolution. As in the domestic area, these policy changes result in more autonomy for market agents operating on the transnational level.
- But these regional and multilateral institutions are also active in developing regulatory frameworks for the supervision of global economic activity, paralleling the emerging role of national states. Indeed, states – both diplomatically and through the increasingly international role of key agencies - remain active in using their own policy instruments to shape international economic activity, leading to complex patterns of regulatory cooperation, harmonization, and competition, and a growth in the extra-territorial

⁴ The following discussion reflects my own sense of what “globalization” is about, and is based on Cohen, 2001 and the sources cited in that discussion.

application of national (or EU) law.⁵ Moreover, attempts by states to control new forms of global criminal activity, such as the drug trade, money laundering, and terrorism, have also been important in shaping the legal environment of global economic life. At the level of the global economy, it becomes harder to distinguish “domestic” and “international” politics and policy-making, as states compete and cooperate to promote policy goals that can not be attained by actions confined solely to either level.⁶

- The rapid internationalization (and, in some cases, globalization) of the operations of corporations and financial markets. Major players in the global economy transform their structures into complex global networks of supplies, production, sales, and capital movements. At the same time, as Sassen (2001) points out, these actors begin to develop more complex and sophisticated expertise in the management and control of their operations, particularly in the areas of accounting, capital investment, legal services, and employee control. In addition, these resources are necessary to help corporations and markets cope not only with the wider scope of autonomy they now have in organizing their activities, but also with the increasingly complex environment of regulation generated by the activities of national, regional, and multilateral authorities.
- Intertwined with all of these developments is the spreading influence of pro-market ideas and ideologies, which underpin and legitimize the changes in the roles and relationships of states and market actors. These ideas are spread and sustained by most of the major players in the global political economy, including the leading states (especially the U.S.), the regional and multilateral institutions they create, corporations and market agents that gain autonomy and power from their acceptance, and key communities of expertise – such as economists, accountants, and bankers – who play a growing role in managing this emerging system.

⁵ Though I will not explore them in this paper, these processes are increasingly important in shaping the regulatory context of global economic activity. Two recent compilations explore this process in U.S.-EU relationships; see Bermann, et al., 2000 and Pollack and Shaffer, 2001.

⁶ See Clark, 1999 for a detailed theoretical analysis of the interaction between the changing structures of states and economies in the global political economy, and its implications for the structure of “sovereignty” in the contemporary world. Clark presents the most persuasive case I know for understanding globalization as a process of mutual re-constitution of states and economies. For a similar theoretical approach, accompanied by more empirical analysis, see the work of Saskia Sassen, 1996, 2000.

Together, these developments have fundamentally reshaped the challenges facing the governance of global economic activity. The opening of borders for the flow of goods, capital, and investment has created a world where firms and markets are globally connected in unprecedented ways, while the withdrawal of many forms of state control over economic activity has left these firms and markets with much more autonomy and responsibility for organizing the way they do business, individually and with each other. A transnational economy is emerging in many areas, in which not only the trade of goods but capital flows, production lines, and service activities move swiftly across national borders. In this kind of context, where firms and markets are the central actors in shaping the global movement of economic activity, and in which it is increasingly difficult to divide this activity into separate phases with separate territorial locations, the Bretton Woods approach to the legal regulation of the economy is both too simple and clearly inadequate.

A more or less clear recognition of this problem, of course, has driven the construction of the emerging national, regional, and multilateral structures of economic governance already described. These emerging forms of governance of economic life share an emphasis on the elaboration of more or less detailed legal rules to guide both public policies and private action, and create specialized institutions (i.e. domestic regulatory agencies and courts, the European Commission and the European Court of Justice, the WTO and its dispute resolution procedures) to oversee the enforcement of these rules and the adjudication of disputes that arise under such rules. Often inspired by the U.S. model of independent regulatory agencies, these structures generate a similar result – the vast proliferation of legal rules to govern economic activity, and the legalization of the process of rule-making, rule-interpretation, and conflict resolution.⁷ When considered on the level of the global economy, however, this approach to governance has generated multiple, often overlapping, often conflicting, and rarely coordinated systems of rules. The combination of market and corporate self-regulation, and the emergence of multiple systems of formal law at different levels, creates a legal field of incredible complexity and unpredictability, but one increasingly central to the governing of the allocation of wealth and

⁷ My analysis of the regulatory approach to governance, and its links to the U.S. experience, relies heavily on the work of Giandomenico Majone. Many of his most important essays are collected in Majone, 1996.

power. In the following sections, I will take a closer look at this legal field and at the central role of lawyers and law firms in shaping the way it works.⁸

2) *The Contours of an Emerging Transnational Legal Field.*

I have characterized the growing role of legal rules, institutions, and processes in governing the global political economy as the emergence of a transnational legal field. The concept of a “legal field” refers to “...the ensemble of institutions and practices through which law is produced, interpreted, and incorporated into social decision-making.” (Trubek, et al., 1994: 411)⁹ As I use the term, it does not require that this “ensemble” be a unified, coherent whole. Indeed, the institutions and practices that I discuss often have conflicting origins and principles, and in such a field these conflicts are central in shaping the actions of the participants. In a similar vein, Christopher Arup (2000) has argued that the transnational legal context is an arena of “inter-legality,” and its major institutions/structures as the sites of the “interfaces” between different legal norms and practices. The idea of a “legal field” demarcates the various sets of legal systems, agents, and institutions among which is generated the legal rules applicable to a particular arena of social activity, and focuses attention on the ways key participants in the field go about making and applying these rules.

I refer to the legal field in question as “transnational,” because the focus of its rules and institutions is the activity of economic agents that systematically crosses the borders of states. Here, my approach is similar to Harold Hongju Koh’s description of the transnational legal process – “...the theory and practice of how public and private actors – nation-states, international organizations, multinational enterprises, non-governmental organizations, and

⁸ While emphasizing the role of law and legal processes, my account is not meant to deny or minimize the importance of other aspects of the governance of the contemporary global political economy – the role of coercion (economic or otherwise) and of financial institutions and authorities (financial markets, central bankers, and the IMF/World Bank complex) being the most central.

⁹ The concept of a “legal field” draws on the work of Pierre Bourdieu, and has been developed in most depth by Yves Dezalay (see especially Dezalay and Garth, 1996, particularly chapter 2). I use the definition developed in Trubek, et al., 1994 because it is nicely compact and formulated in a way especially helpful to my topic. However, Trubek’s application is to the idea of a national legal field, while Dezalay and Garth analyze only part (perhaps a “sub-field”) of what I am terming the transnational legal field; as a result, I use the term in a somewhat looser way, and don’t exactly follow either treatment.

private individuals – interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law.” (Koh, 1996: 183-84) In the following discussions, I analyze and evaluate the confluence of legal rules, institutions, and actors that operate in a setting in which issues, conflicts, networks, and power relations are themselves deeply linked across national boundaries.

However, while there is a transnational legal field, there is as of yet no clearly dominant transnational law, legal profession, or court system. Transnational political and economic activity takes place within a legal context that, while clearly focused on shaping cross-border relationships, is made up of national, regional, and international rules, institutions, and agents – both “public” and “private” – engaged in a complex web of cooperative and conflictual interactions. Indeed, as Saskia Sassen has emphasized, it is a mistake to equate “transnational” simply with that which exists “outside” of the borders of states. As her detailed studies of global cities illustrates, key sites of “transnational” activity are often closely linked with particular territorial and institutional places.¹⁰ It follows, then, that this activity is implicated in and engages a variety of legal orders at different “levels” of the global political economy. The manner in which the major players in this field, and especially their legal agents, negotiate these interactions provides the central source of dynamic change in the transnational legal field.¹¹

What are the major sources of the creation and enforcement of legal rules in the contemporary transnational field?¹² I have already noted some of the many “public” actors in this process and the variety of levels at which they operate. At the multi-lateral or international level, the GATT treaties and the WTO dominate the public law of international trade, intergovernmental

¹⁰ This idea or conceptualization is a central theme in all of Sassen’s recent work, beginning especially with *Losing Control?* (1996).

¹¹ Martin Shapiro’s (1993, 1998) important efforts to evaluate the notion of the “globalization of law” comes to similar conclusions. In essence, this point follows from my earlier discussion of globalization more generally; since globalization is not a simple process that moves towards political and economic uniformity, we should not expect the emergence of a uniform field of law. Sassen’s work makes this point most effectively, and its implications for law are also drawn out clearly by Jarrod Wiener, 1999.

¹² The following outline focuses on sources of law closely related to political economic questions. It is not meant to exhaust the whole transnational field. Koh’s work (1996, 1997) attempts to provide a more comprehensive overview.

organizations such as the Basle Committee of the Bank for International Settlements and the IMF play a crucial role in supervising the international financial system, while the U.N. and its related agencies – such as the United Nations Commission on International Trade Law (UNCITRAL) and the Hague Conference on Private International Law – provide forums for developing common principles of private trade law. At the regional level, the EU – including the European Commission and the European Court of Justice – is a major source of law and regulation of economic activity, while the NAFTA and its institutions for dispute settlement is emerging as a significant player. Finally, individual states – especially but not exclusively the U.S. – remain the most important sources of law and regulation, and use their power to shape the whole range of economic activity. Moreover, through a variety of means, from the extra-territorial application of laws to sustained efforts at legal harmonization and/or mutual recognition, states are increasingly active in applying domestic law to shape economic activity beyond their borders. The recurring conflicts over anti-trust policy, securities and financial market regulation, and public procurement policies provide ample evidence of this trend. The continuing and complex interactions between actors on all three levels provide a major dynamic in the evolution of the transnational legal field.

Since the early 1980's, developments at all of these “interfaces” have embodied and promoted the spread of the principles and practices associated with neo-liberal globalization. At the multilateral level, the completion of the Uruguay Round of GATT negotiations in 1994 widened and deepened the emphasis on reducing national barriers to trade, while creating the WTO as a more legalized mechanism for enforcing this principle on the legal orders of member states. A similar and growing emphasis on “neo-liberal” political and legal reform as a condition of financial and development assistance came to dominate the activities of the IMF and World Bank. The push to deepen the economic integration between states is central as well, though in different ways, to the Single Market project of the EU and the NAFTA regional trading order. Meanwhile, states throughout the world took major steps in transforming their legal systems to adopt rules and regimes conducive to greater autonomy for international economic activity and to the deeper immersion of their own societies in the global economic system. The result was a substantial – though not smooth, uniform, or without challenge – shift throughout the transnational legal field towards rules and practices that supported the spread of the globalization

process. In these developments, we can see quite clearly the ways in which legal action has been crucial in re-defining the relationship between the national and global dimensions of the political economy, and thus in changing the very nature and role of states in the global system. A re-ordering of the transnational legal field has been an essential part of the re-ordering of the boundaries and roles of states.

There is a substantial literature in international politics, international political economy, and among legal scholars which explores these developments in international public law, and these dominate most discussions of law and regulation in the global political economy.¹³ Increasingly, though, a recognition of the crucial role of “private” actors in shaping the rules of the global economy is spreading among scholars. In political science and political economy, there is much discussion of the increasing delegation of power and authority to non-state actors as a defining feature of the realignment of states and markets in a globalizing era.¹⁴ The liberalizing, deregulating, and market-creating thrust of policy-making since the late 1970’s has meant that private individuals, groups, and institutions are given more authority and responsibility for governing their own conduct, particularly in the economy. At the global level, scholars emphasize the role of private corporations and industrial associations as the main beneficiaries of this delegation, with non-governmental organizations (NGO’s) attempting to play a more prominent role. As a result, in the view of many scholars, “private law-making” and self-regulation are becoming increasingly central to the governance of the global economy.

Sociologists of law and legal scholars have noted similar developments. In these traditions, scholarship has focused on the growing importance of private arbitration in resolving international business disputes, the increasing role of the internal governance of firm in shaping the global economy, and new efforts by lawyers and legal scholars to clarify and articulate purely transnational rules of law, based on the dominant norms and practice of global businesses and

¹³ The essays and bibliography in *International Organization*, (54) 3 provide a solid overview.

¹⁴ For some of the best examples of this literature, see Cutler, et al., 1999, Greenwood and Jacek, 2000, Higgott, et al., 2000, Knill and Lehmkuhl, 2002, Ronit and Schneider, 1999, and Strange, 1996.

markets.¹⁵ Among European scholars in particular, these phenomena have stimulated a debate about the re-emergence of a *lex mercatoria*, a truly autonomous global legal order in which the rules of the game are created and enforced by private agents themselves.¹⁶ While the more extreme statements of this view are in the minority, and the debate has had much less impact in the U.S. (and other parts of the common law world), most scholars in these areas do agree that multinational corporations and other private global economic actors are much more active and important in defining and enforcing the rules of the global economy.

My focus in the rest of this paper is on the role of these private actors in governing the global political economy through the transnational legal process. In my view, however, the focus of these various scholarly debates on the role of multinational businesses and markets needs to incorporate the central role of private lawyers and law firms in the legal process. As students of the U.S. political economy are well aware, in a liberal, deregulated, and multi-layered legal order, lawyers play a central role in creating and interpreting rules, in developing strategies for market agents to use in navigating the legal context, and in resolving disputes.¹⁷ In the process, lawyers bring to their work specific understandings of the role of law, the distribution of wealth and power, and the role of the state. In the next section, I will provide an analysis of who these lawyers are in the transnational field, the ways in which they shape the rules of this field, and how their orientations shape the governance of the global political economy.

B) Private Legal Agents and the Globalizing Political Economy.

My discussion of the role of private legal agents is driven by my larger interest in the changing practices of state power and politics more generally in a globalizing world. To the degree that legal norms and institutions shape and articulate these practices, we need to understand how they are developed and diffused in the transnational legal field. There are two central dimensions to

¹⁵ For a sample of some of the different approaches in a huge literature, see Appelbaum, 2001, Braithwaite and Drahos, 2000, Dezalay and Garth, 1996, Picciotto, 1996/97, Roht-Arriaza, 1995, and Teubner, 1997.

¹⁶ A classic analysis is Berman and Kaufman, 1978; for more recent evaluations, see De Ly, 1992 and 2001.

¹⁷ The most systematic work in this area is historical, focusing on the turn of the 20th century; see Gewalt, 1984, Horwitz, 1992.

this general problem, around which the following discussion is organized. The first concerns the specific content of the legal norms shaping the transnational political economy. Here, I am particularly interested in the development of the set of norms and principles that have guided the construction of a “neo-liberal” pattern of globalization. As I have previously noted, these principles – often discussed in the form of “privatization,” “deregulation,” “free trade,” etc. – have been central in guiding the transformation of the role of states and their relationship to globalizing economic activity. In their emphasis on creating and spreading market relationships, encouraging greater autonomy on the part of corporations, and reducing national barriers to the activity of these markets and corporations, these norms have influenced developments in many crucial areas of transnational law, from trade through competition, intellectual property, and corporate governance. Here, I am interested in the private sources of these (and competing) principles in the transnational legal field.

The second dimension concerns the ways in which these norms have been diffused throughout the transnational field. Many different legal actors have been crucial in this process, but I am particularly interested in the role of private actors, which have been the subject of much less attention than public ones. In this sense, my analysis of private lawyers and law firms treats them as one of a number of transnational professional communities (Stone, 2002) who play a growing role in developing and diffusing the concepts and ideologies that shape the governance of the global political economy. Their role in “diffusing” norms is especially important in this context. Because the transnational legal field is made up of many different institutions, the development of some common norms or approaches requires the active involvement of a network of actors who can operate across the various “interfaces” that shape the field. I pay particular attention to the diffusion of concepts and norms between the global and national arenas. Given the still central role of states in setting the legal rules that shape transnational economic activity, a focus on states as both sources and recipients of legal influence seems necessary to understand the dynamics of the field of transnational law, and of the role of private lawyers in this field.

1) *Making Law in a Transnational Field: How Do Law Firms Make Law?*

A growing literature in political economy, the sociology of law, and among legal scholars is challenging the view, widespread in the social sciences, that lawyers are simply instruments of their clients interests and demands.¹⁸ The key to understanding the role of lawyers, from this perspective, is the notion of the *practice* of law; lawyers do not simply provide advice or clarify the law, but make and transform the law and its meaning in their central activity of working on legal problems for clients. As Doreen McBarnet has put it, "...lawyers are not simply means to the implementation of statutory or other ready-made rights, but creators of legal techniques, definitions, and devices." (1988: 118) In this approach, the law is a language full of symbols and strategies that gain meaning through the use that practitioners make of it. By using the language, lawyers are constantly interpreting its meaning, but are also and often changing its meaning. Moreover, because law is an intellectual discourse that is used consciously, the activity of making and changing law can and does become a more purposeful activity (as compared to the evolution of languages generally).¹⁹ Finally, because legal rules play a central role in shaping the distribution of rights and opportunities, the role of lawyers in making law is deeply implicated in the ways that power and wealth are distributed.

We can use this perspective to make sense of the special role corporate law firms play in shaping the law that governs economic life. These firms bring together hundreds of highly trained professionals whose work emphasizes the interpretation, use, and modification of legal rules and arguments to facilitate the aims of their actual and potential clients. As a collective group, these firms account for the overwhelming majority of lawyers engaged in the articulation and interpretation of commercial law in contemporary capitalist economies. Even more than government lawyers or in-house corporate legal departments, it is in the corporate law firm where we find the most innovative and advanced legal thinking regarding the ways in which law

¹⁸ The essays in Abel and Lewis, 1989 provide a survey of the literature in this tradition as it stood by the late 1980's. In the following discussion, I rely on a number of more recent stimulating essays: Flood, 1991, Nelson and Nielsen, 2000, Powell, 1993, and Suchman and Cahill, 1996.

¹⁹ In addition to McBarnet's work, the essays by Cain and Harrington in their co-edited volume (1996) provides an excellent explanation and exploration of this approach.

and economic practice are and can be related in the political economy.²⁰ As Powell suggests, the large corporate law firm is "...a repository of legal knowledge to which business corporations must make recourse in order to reduce the uncertainty of their legal environments." (1993: 452)

The law-making role of lawyers and law firms can be divided into two general areas, each with two sub-categories. (Powell, 1993) First, lawyers are crucial in shaping *public* law, through their prominent role in the state as legislators and regulators, and through their role as representatives of clients before legislative, administrative, and regulatory bodies.²¹ As Powell emphasizes, the role of lawyers is not necessarily purely reactive here, even in the latter case. Rather, law firms and legal institutes are often pro-active in developing model legislation and codes to advance what they understand as the general interests of the political economy, as well as their clients. The particular status of lawyers, simultaneously the agents of their clients and agents of a state-sanctioned legal order, places them at the nexus of the public and private worlds, giving them unique authority in the process of law-making.²²

Second, lawyers are crucial actors in the evolution of *private* law, both through their role in presenting interpretations of law before courts and thus shaping the way courts apply law, and by inventing new kinds of agreements, strategies, and structures for doing business. Again, lawyers are not only advocating client interests here, but may and do come up with general approaches to law that, especially when ratified by practice or the courts, reshape the distribution of rights and power in any legal field. In the existing literature, we have examples such as the role of law firms in shaping offensive and defensive legal strategies surrounding corporate takeover battles (Powell, 1993), developing the rules and norms that shape the role of venture capital in Silicon Valley (Suchman and Cahill, 1996), and in negotiating and enforcing norms of real estate "deal-

²⁰ Moreover, the constant movement of lawyers between these three areas, especially typical of common law systems, works to reinforce the importance of the corporate law firm.

²¹ But lawyers are not necessarily alone in occupying such a position. In the contemporary economy, for instance, accountants and even credit-rating agencies increasingly serve such a double role as well.

²² In the U.S. case, this is illustrated by the role of the American Law Institute in developing restatements of American law, and model codes of law in key areas, most prominently the Uniform Commercial Code (UCC). See Patchel, 1993. At the international level, the role of the International Institute for the Unification of Private Law (UNIDROIT) plays a similar, if less powerful role.

making” in the Chicago area (Flood, 1991) This kind of “legal innovation” is of special importance in the liberalized environment of the contemporary global economy, in which economic actors are looking for new opportunities as well as new rules to govern their activity. As Ronald Gilson (1984) has put it, lawyers can be seen as key “transaction-cost engineers” in the global political economy, developing rules and relationships that facilitate the steady expansion of global economic integration. The following sections will provide examples of the various ways law firms act in the areas of public and private law to promote the diffusion of norms in the transnational legal field.

In the context of analyzing the role of the private corporate law firm, though, there are certain constraints that shape the kind of law that lawyers will make. Most importantly, the global corporate law firm exists to pursue and promote the interests of a primary clientele, global corporations and market actors interested in expanding and protecting their autonomy and opportunities to make profits, control their internal affairs, and control markets. While these lawyers may take independent initiative in developing legal rules and strategies that enhance the interests of a variety of clients, there is every indication that they share their clients’ beliefs in the value of these goals, and in the need for a legal order that secures these goals. In the U.S., for instance, corporate law firms have worked systematically to support the reconstruction of the national legal field to support the liberalizing and de-regulating agendas favored by their clients since the 1970’s (Galanter and Palay, 1991). This has involved much independent work beyond the representation of specific clients, but nonetheless remains tied to the overall direction of thought and practice in the business community. Existing evidence, thin as it is, suggests that the same pattern is true among corporate law firms working in the transnational legal field. Indeed, as we have seen, the current transnational field governing economic activity can not be understood in the absence of the neo-liberal political economic projects and corporate and financial restructurings that created it. Global corporate law firms have succeeded by accepting and aggressively promoting the overall vision animating this global political economy.

2) *“Global Law Firms” and Transnational Legal Practice.*

Transnational legal practice is now a well-established and dynamic part of the legal profession in all of the important regions of the global economy, and especially in the “global cities.”²³ The major actors in this practice are the large corporate law firms in the United States and Europe, which are increasingly global in their operations, structure, and outlook. The practice of transnational law entails a number of kinds of activities – advising clients, most whom are major players in the global economy, on how to best promote their goals in the context of various legal environments (this includes counseling on strategy as well as representation in courts and formal dispute resolution bodies); working on behalf of one or a group of clients to shape the choices of states, regional organizations, and multilateral institutions regarding the making and interpretation of the rules governing global economic activity; advocating in national and multilateral settings on behalf of the interests of such public agents; helping clients resolve conflicts privately, through negotiations and arbitration, and advising them on the internal structure of their organizations; and supporting efforts – involving practicing lawyers and legal academics – to clarify and modify dominant norms and practices in the transnational legal environment. In addition, the large global corporate law firms must constantly attend to promoting their own firm’s business at the expense of competitors, work together to modify rules that limit their ability to practice in many states, and to respond to competitors who offer similar services to their clients, especially the global accounting giants.²⁴

Where did these “global” law firms come from? Although a few New York law firms established European offices in the early decades of the 20th century, these were small, focused on very specific clients, and often closed after a decade or two of operation. This should not be surprising. Legal communities around the world are notoriously difficult for non-nationals to penetrate – legal systems have very different traditions of both content and procedure, require intimate knowledge of these traditions and the language and social networks in which they are

²³ This development has only recently been a subject of scholarly analysis. My account relies primarily on the following sources: Abel, 1994, Appelbaum, et al., 2001, Beaverstock, et al., 1999 and 2000, Berger, 2001, Dezalay, 1990, Drolshammer and Pfeifer, 2001, Flood, 1995, Silver, 2000, and Spar, 1997. The work by Dezalay and Garth, 1996 and Trubek, et al., 1994 also provides substantial material on this issue.

²⁴ This problem is the major focus of the essays in Dezalay and Sugarman, 1995.

situated, and have long been protected by complex and well-enforced rules designed to control entry. Until recently, it made little sense for lawyers from other states to try to enter these markets, or for clients to try to rely upon non-national counsel. Beginning in the mid-1960's, however, new forces emerged that began to open up new opportunities for lawyers. The context was Western Europe, and the lawyers were American.

In this period, U.S. law firms were drawn to Europe by the needs of their largest clients. A new wave of American corporate investment in Europe, and the growing interest of these firms in mergers and acquisitions, led these firms to turn to law firms with which they had long standing relationships for advice and support. U.S. corporate law firms provided the kinds of contracting practices with which these corporations were comfortable, and had expertise in organizing acquisitions that European lawyers – in the absence of similar activity – had not developed. At the same time, the emergence of the Eurodollar (and the Eurocurrency) markets led to a sharp increase in the presence of the large U.S. banks and investment firms in Europe, particularly London. Again, these firms turned to their “own” corporate law firms to structure their activities in these new markets. Almost all of these law firms were based in New York, and the process of opening offices and developing relationships in key European cities began.

The 1970's brought new opportunities in Europe for American law firms, and these were tied to the fast expanding role of international arbitration, particularly in the International Chamber of Commerce's (ICC) International Court of Arbitration in Paris. From the conflicts over the nationalization of oil and other resource extraction operations, to the rise of OPEC and the further transformation of the oil industry, the more general spread of private arbitration, and negotiations surrounding the actions of the post-revolutionary government in Iran, there was an explosion of work for arbitrators and for lawyers who would represent clients involved in arbitration. Moreover, as Dezalay and Garth (1996) have shown, the very size of this activity coupled with the desire of nationalizing states and private firms for more aggressive representation, challenged the previously dominant role of European law professors in the arbitration community. Participants in these increasingly adversarial conflicts wanted a different style of lawyer and process, and found them in the kinds of advocacy offered by American firms. Once involved, in turn, U.S. lawyers and law firms worked to adapt the arbitration process to

make it look more like the adversarial negotiation and litigation contexts with which they were familiar.

The culmination of the growth of the global law firm came as a result of the neo-liberal wave of political economic restructuring of the 1980's and 1990's. The major features of this process are familiar - the de-regulation of capital markets, the emergence of globally-integrated systems of production and marketing, new waves of corporate mergers and acquisitions, legal reforms that further facilitated the movement of goods and services across borders, a loosening of barriers to the ability of foreigners to practice law (and other professions) in many states, the transformation of the EU following the single-market program, the expanding agenda of the GATT treaties and the creation of the WTO, and the emergence of the "newly-industrializing countries." All of these trends contributed to an explosion in demand for providers of legal services that could act simultaneously in different national and regional contexts, and that could help corporations manage their relationships with each other, with governments, and with multilateral institutions. On top of this, the wave of neo-liberal institutional reform in the former Soviet bloc and developing countries generated a demand for expertise in the design of legal codes and institutions necessary for establishing the foundations of market economies.²⁵

In the 1980's and early 1990's, U.S. corporate law firms (especially those based in New York) were the dominant and most dynamic players in the transnational field, for a number of reasons. On the one hand, this simply reflected the role and power of American business, which generally preferred to deal with these firms, in the global economy. But U.S. firms benefited from the fact that key developments in the legal arena operated in their favor. First, American-style forms of contracting and business organization were spreading in Europe and elsewhere, and U.S. lawyers began to gain business from foreign corporations looking for this kind of expertise.²⁶ In particular, U.S. firms were specialists in the kinds of "deal-making" that was necessary to sustain the spreading merger and acquisitions market in Europe. Second, New York law firms had played central roles in inventing and cultivating the growing international markets in securities,

²⁵ See de Lisle, 1999.

²⁶ On the spread of American styles of contracting, see Shapiro, 1998. For analyses of the more general impact of American law in Europe and beyond since 1945, see Wiegand, 1991 and 1998, and Braithwaite and Drahos, 2000.

derivatives, and other financial innovations; the deregulation and integration of capital markets in Europe and elsewhere generated tremendous demand for their expertise and services. Third, the leading U.S. firms had close ties to key policy-makers in Washington and in the major international economic institutions. The combination of this influence with the demonstrated expertise in lobbying these institutions – which remain central actors in transnational economic governance – made these firms seem particularly useful partners for businesses and markets all over the world. Finally, the “new” EU that would emerge out of Maastricht required European economic actors to learn habit of lobbying policy-makers, negotiating with regulators, and managing an ever more complex legal environment. For many, U.S. firms clearly outpaced European lawyers in the development of these skills. Moreover, these firms played a noticeable role in the creation of the new style of European law-making, particularly in the creation of the new framework for a European competition policy. In sum, U.S. law firms profited from a global political economy and legal field in which U.S. styles of rules and practices seemed increasingly important.

It is crucial to note how, in itself, this evolution illustrates a crucial dimension of the role of private lawyers in diffusing legal concepts, norms, and practices in the transnational field. As they become more active on the global level, U.S. corporate law firms brought with them a set of legal concepts and techniques deeply rooted in the particular context of the American legal and political system. By responding to and then creating demand for their services, these firms in turn became vehicles for the spread of this mixture of public and private practices and doctrines – i.e. forms of corporate organization, forms of contracting, a style of corporate mergers and acquisitions, a specific understanding and use of capital markets, a specific approach to litigation and arbitration, and an orientation towards the lobbying of policy makers. The primary manner in which these norms were spread, though, was through private law and practice. Through the influence of American lawyers, the legal norms surrounding economic life in Europe and elsewhere began to change without much public action directed towards specific legal reform. When efforts at legal change on the public/state level took off in the 1990’s, efforts often influenced by American legal models, U.S. lawyers and law firms were clearly involved. But their main influence had been in preparing the ground for the acceptance of American models *via* the transformation of practice in the world of business activity and regulation. In this arena of

transnational law, U.S. legal norms were diffused to Europe and other regions indirectly. Instead of directly providing models for the reform of commercial law, American lawyers and law firms worked primarily through the world of private law to create an economic culture out of which grew “indigenous” support for public legal change modeled on U.S. practice.²⁷ This experience, I suggest, provides one crucial example of why we need to understand the role of private legal agents in order to grasp the patterns of change in transnational law.

By the late 1990’s, however, these firms were no longer as dominant in the transnational field. They had two primary challengers. First, corporate law firms found themselves competing with the now “Big Five” global accounting firms, which were also primarily American in origin. Here was an industry with much more concentration and global presence than is common among law firms, had deep roots in transnational business life, and whose evaluation was crucial in shaping the reputation and credit-worthiness of corporations around the world. In the 1980’s, moreover, accounting firms became the largest transnational employers of lawyers (usually mixing global and local legal talent), and started offering legal services to global firms as part of their package of accounting and consulting services. And, because these were not law firms, they faced fewer obstacles in offering legal advice in multiple jurisdictions.

Even more striking, though, was the ability of many European lawyers and law firms to respond to the U.S. challenge. By the 1990’s, European firms had begun to develop capacities and size to match American firms, often by hiring local lawyers who had been trained by American firms (themselves required to employ nationals who were locally trained). The leaders here have been the quickly growing British corporate law firms, some of which – i.e. Freshfields and Clifford Chance – are among the ten largest law firms in the world.²⁸ These firms benefited from the continued (and perhaps growing) importance of London’s financial markets in the global economy, and the continued importance of English law and courts as the preferred venue for

²⁷ This process is explored most effectively in the essays by Shapiro (1993, 1996) and Wiegand (1991, 1996). For suggestions that a similar process may be more important than we realize in shaping legal reform in the former Soviet bloc and some developing states, see de Lisle, 1999 and Trubek, et al., 1994.

²⁸ The essay by Beaverstock, 1999 focuses on the role of London firms. According to a very recent survey of in-house counsel at large multinational companies, London firms are now considered the leading providers of global law services, more deeply globally-oriented and efficient than even their New York competitors. See Fred, 2002.

resolving contract disputes in key areas of transnational economic activity, such as insurance, shipping, and some areas of corporate finance. In the past few years, German lawyers have also joined the competition, with the creation of increasingly large corporate firms with a global presence, and a sharp growth in mergers or “alliances” between German and English firms.²⁹ As a result, there is now a core of globally-active corporate law firms, overwhelmingly U.S. and European in origin, who dominate transnational legal practice and whose activities are central to linking the various levels of transnational field, to activating the transnational legal process.

C) Case Studies: Shaping the Global Trading Regime and Private Arbitration

The following short case studies are designed to further illustrate the importance of private lawyers and law firms in shaping the transnational legal field, *via* their role in the creation and diffusion of key legal norms and principles. In the previous discussion, I pointed out one such path or route of diffusion, the spread of norms and practices in the world of business, which then become the basis of public legal reform. The case studies presented here trace two other prominent paths of diffusion. The first shows how private legal agents attempt to use powerful states to change the rules of public international economic law, which then itself becomes a source of pressure for legal reform in other states. The second case provides an example of a purely “private” process, in which legal agents attempt to shape the rules of private business dispute resolution, and through this the norms of business practice in the global economy. Together, these different strategies help us understand the complex way in which the transnational legal field works, and the opportunities it provides for private actors to shape the rules that govern the global political economy.³⁰

²⁹ For an account of this merger activity, see Fennell, 2000 and Tagliabue, 2000. German lawyers and legal firms received much benefit from the attempts and political and legal reform in Eastern Europe. While U.S. actors quickly jumped into this field, most of these states soon recognized that the continental civil law tradition was much better suited to their own political and legal structures and traditions. Given the long-standing influence of German models in most of these states, and Germany’s role as the leading EU actor in a context of states hoping to attain EU membership, German legal firms and academics soon became dominant forces in shaping these reform programs. (see de Lisle, 1999)

³⁰ These case studies, like the earlier discussion, are meant to be general and suggestive. I am currently working on more detailed examinations of each of these strategies of norm diffusion in the transnational legal field.

1) Private Lawyers and the Uruguay Round.

The completion of the Uruguay Round of GATT negotiations in 1994 marked a key step in the globalization of the contemporary political economy. It extended the scope of multilateral trading rules to “services,” reconfigured the discussion of intellectual property issues, and created the WTO with its distinctive dispute resolution system. (Arup, 2000) The global corporate law sector did not dominate this process by any means, but did play an important role in the development of these treaties, and promise to be major players in the resulting trade regime. A short review of their role will help provide a sense of how private legal actors negotiate between the public and private – and the global and national – realms in the contemporary political economy.

- The emergence of the General Agreement on Trade in Services (GATS) treaty reflected a recognition on the part of advanced capitalist states, and especially the U.S., of the growing role of services in the international economy and in shaping the economic power of these states. However, as Drake and Nicolaidis (1992) have emphasized, the notion of “trade in services” was a new one, and required a transformation in the way governments thought about the service industry. This reconceptualization was worked out in the 1970’s by corporate leaders in the service industry with the crucial aid of key professionals in the corporate world, primarily corporate lawyers (both in-house counsel and corporate firms), business economists, and consultants. During the 1980’s, these groups – with the aid of the wider academic communities to which they are linked – were successful in gaining support in the U.S. business, government, and trade policy communities (and eventually in states and policy communities beyond the U.S.) for the notion that protection for “trade in services” should be an essential part of the multilateral trade regime. They continued this lobbying campaign at the national and international levels during the Uruguay negotiations and then during the various national ratification debates. Thus, the corporate legal community, along with the world of legal academic trade specialists, were at the center of the effort to mediate between private business and public policy-making in the articulation of new multilateral (and ultimately national as well) rules for governing the increasingly global service industry.

- Corporate lawyers and law firms played a similar, and more fully researched, role in the creation of a new regime for the protection of intellectual property (IP).³¹ In the early 1980's, American producers of scientific, information, and entertainment "products" became increasingly frustrated by what they perceived as a lack of adequate protections for their patents and copyrights around the world, and the sense that the existing process for dealing with this problem (usually termed "piracy") – the World Intellectual Property Organization (WIPO) – was unwilling or unable to satisfy their concerns. Working through the Advisory Committee on Trade Negotiations (ACTN) – a group of industry representatives integrated into the U.S. Office of the Trade Representative – and the Intellectual Property Committee (IPC) – formed by leaders in the core intellectual property sectors, key industry executives and lawyers played a pivotal role in reshaping U.S. policy and then the Uruguay Round negotiations.

The formation of this coalition to promote tougher enforcement of IP laws coincided with a shift in domestic U.S. policies in the same direction in 1982. Industry representatives then pursued a three stage strategy to "globalize" this victory. First, they succeeded in persuading Congress in 1984 to include claims concerning violations of intellectual property protections abroad among the potential grounds for U.S. action under its "Section 301" provisions for trade retaliation. For the rest of the 1980's, the U.S. Trade Representative made IP protection a central element of unilateral U.S. efforts to reform legal systems abroad. Second, they were effective in making the reform of IP laws a central goal of U.S. policy in the Uruguay Round negotiations, and in gaining the support of key industrial leaders and interest groups in the other major GATT states to pressure their own governments to do the same. Finally, as Sell (1999: 186-189) shows, these same industry representatives (and especially the lawyers) played a crucial role in the actual negotiations and drafting of what became the TRIP's agreement in 1994.

This case illustrates especially clearly the importance of corporate lawyers in shaping the rules governing global business. Lawyers inside business firms and in the corporate law

³¹ The following account is based heavily on Susan Sell, 1999. A similar analysis, with particular emphasis on the lawyers involved in this process, presented in Braithwaite and Drahos, 2000, chapters 7 and 10.

community were central in drawing upon changing legal conceptions within the U.S. to articulate the notion of intellectual property rights and to provide the corporate community with the intellectual resources necessary to successfully translate their aims into concrete proposals for global legal reform.³² In addition, business lawyers were able to draw upon their connections to public sector lawyers in the U.S. and private lawyers abroad to help establish the public-private alliances behind these reforms, and to facilitate the direct, continuing voice of private corporations in the GATT negotiations. In this case, the diffusion of legal norms focused primarily on public institutions – U.S. law was reformed, American legal and political actors were able to embody these new norms and principles in public international law, and the adoption of this new regime began the process of legal reforms in other states modeled on American lines. Lawyers were not the only or the “dominant” actors, but they provided the expertise and analysis crucial to the translation of business and government priorities into a concrete project of legal reform, and thus to the transformation of the rules governing the global economy.

Each of these cases, and no doubt there are many others, will require more systematic research and analysis. But they do strongly suggest the variety of ways in which private corporate lawyers and law firms participate in shaping the emerging patterns of governance of the globalizing political economy. Given their ability to mediate between public and private actors, they are often decisive actors in the transnational legal process.³³

³² Indeed, Sell views this experience as indicative of the way that private business has access to superior legal talent and expertise than public sector or non-governmental agencies (1999: 174-75). In the case of IP reform, she contend, critics of these proposals were almost always on the defensive on legal grounds, though by the time of the final agreement they had made some inroads in modifying changing the original proposals of the corporate community.

³³ An emerging area of great interest in this context is the operation of the WTO’s dispute resolution system which, along with a related structure in the NAFTA regime, opens new paths for public and private actors to shape the direction of the transnational legal field. (see Hudec, 1999 and Jackson, 2000). Although it is too early to determine the significance of these systems, their analysis must be a part of any larger treatment of the evolution of this field.

2) *Arbitration and the Private Arena of Transnational Law.*

In previous sections, I have emphasized the increasing role of non-state actors in governing key areas of the globalizing political economy, and have noted the ways in which scholars of the legal system conceptualize the role of lawyers in “private” rule-making and enforcement in economic life. It follows that, in the transnational legal field, we should find examples of corporate lawyers and law firms deeply involved in making, interpreting, and enforcing privately-generated rules that govern corporate activity and resolve disputes. To date, the most studied and probably most important example of this kind of activity is the area of private international arbitration.³⁴ Although I have already touched on this practice, its importance warrants further discussion.³⁵

While its roots go back to the early 20th century, the importance of organized private international arbitration in the global economy was first recognized in the 1950’s and 1960’s. The revival and sustained growth of international trade in this period generated an increasing number of conflicts between actors from different states, and many began to turn to arbitration as a way of avoiding the cost, delays, and publicity of litigation, as well as the difficulties of working with established “conflicts of laws” rules. In arbitration, businesses decide to resolve problems of contract interpretation by allowing an impartial individual or panel of experts – usually law professors or experienced lawyers – to consider their case and by agreeing in advance to abide by their decisions. In many cases, contracts include specific provisions to this effect, often including guidelines concerning the kind of law that would be applied by the arbitrators (“arbitration,” “choice of law,” and “choice of forum” clauses). While the arbitrators can be chosen at the time of the dispute, contracts often specify that the parties will use the arbitration services provided by specific organizations, such as the ICC’s International Court of Arbitration.

³⁴ The study of these practices is just beginning; for discussions of other ways in which corporate lawyers shape business strategy at the global level, see McCarthy and Picciotto, 1995 and a number of the essays in Teubner, 1997.

³⁵ The following discussion is based primarily on Dezalay and Garth, 1996. Substantial and important discussions can also be found in Mattli, 2001 and Weiner, 1999.

The first general recognition of the importance of arbitration came in the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards, in which signatories agreed that their national court systems would recognize the legitimacy of, and enforce the results of, arbitrations in their territories³⁶. With more than 100 signatory states to date, this agreement opened the door to the spread of arbitration as a form of private dispute settlement. But the real growth of arbitration began in the 1970's. Initially, this was a result of large-scale disputes surrounding nationalizations and restructuring in the global oil industry, and arbitration remains a preferred method of dealing with contractual disputes involving states and foreign corporations. However, disputes between corporations in all types of industries and markets soon came to dominate private arbitrations, and by the 1990's private organizations around the world – especially the London Court of International Arbitration and the Arbitration Institute of the Stockholm Chamber of Commerce – were developing and offering arbitration services, and the community of international arbitrators grew quickly to match this demand. In addition, the scope of arbitration began to expand. Early on, most such cases involved issues specific to the contracts between the actors. By the 1980's, arbitrators were increasingly asked to solve disputes that impinged on areas of law – such as anti-trust and securities law claims – in which states had established policy priorities and claimed final authority. While still controversial, this practice was accepted by the U.S. Supreme Court in 1985, a decision which opened the door to the continuing expansion of this method of dispute resolution.³⁷

The key to understanding the significance of arbitration, though, is to recognize that its practice goes beyond “dispute resolution” in the narrow sense. In these negotiations, market actors and the arbitration community are defining, interpreting, and implementing the rules and norms of

³⁶ This Convention significantly preceded the explosion of arbitration in the 1970's, and indicates another way in which states can encourage and facilitate the growth of economic integration. Indeed, the notion that international trade would flourish more easily if economic agents could resolve disputes without recourse to national courts was an explicit reason behind this convention, and is often mentioned by national courts when – as they almost always do – upholding arbitration rulings against challenges.

³⁷ While there were some earlier precedents, *Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614 (1985) seems to be the most important of the Supreme Court decisions in this area, though there has been some backtracking by the Court in subsequent decisions, and active resistance to this approach in the rest of the advanced capitalist world. As McCounaughay, 2001, has emphasized, this practice opens the door for private economic actors to choose which, if any, national legal frameworks are properly adequate to govern particular areas of economic activity. This need not imply a “race to the bottom” in economic regulation, but does give private actors an unprecedentedly powerful role in shaping the rules and norms that govern global economic activity.

conduct to which they will be held and by which they will expect other actors to behave. The parties to the contract choose which legal rules they will accept and choose the forum in which these rules will be interpreted and applied. (In some areas of business, indeed, long practice has made certain legal regimes and fora the preferred choice – i.e. English law and London for insurance cases, Swedish law and Stockholm for disputes that occur in Eastern Europe and Russia.) The arbitrators, in turn, have significant leeway in applying the relevant law, and are at times given the right to use “generally accepted norms or practices” in a given industry in their deliberations. The establishment and success of the major arbitration centers, in turn, helps to reinforce and spread the kinds of legal approaches that have found wide acceptance in previous arbitrations. Indeed, the influence of the arbitration community was crucial to the development of model rules of arbitration by UNCITRAL, which are now often adopted in arbitration clauses. It is clear, then, that the prominence of arbitration in the global economy indicates the emergence of a source of law-making the content and direction of which is based in the norms and practices of the global business community itself.

The entry of American corporate law firms into the arbitration world in the 1970’s transformed the process. As in other areas of European law, American firms were drawn into arbitration by the growing demand of clients – attracted by the perceived aggressiveness and skill of U.S. firms and no longer willing to submit their disputes to established authorities – and their own recognition of a potential new market. Dezalay and Garth (1996) have documented some of the major results of this transformation – the incorporation of more adversarial U.S. styles of evidence discovery and litigation into the arbitration process, the spreading influence of U.S. style contracting and business organization in international business, and the adoption of American-style approaches to legal practice among European lawyers and law firms eager to compete in the field. This has not brought a wholesale “Americanization” of international arbitration. As in the other areas of transnational law, there is now constant competition between firms offering different models of law and practice, which in turn increasingly drives change in the world of arbitration. But U.S. firms have played an important role in using arbitration to further spread certain models of law and legal practice. In this case, the means of transmission has been almost purely a private one – the activities of U.S. lawyers is focused on an area of law-making that itself is significantly autonomous from the direct control of public institutions.

To be sure, international arbitration is not yet a purely private system of law-making (de Ly, 1992, 2001). The decisions of arbitrators ultimately rely on the enforcement power of national courts for their efficacy, and most courts outside the United States still refuse to accept the arbitration of claims or issues implicated by their state's public laws. Moreover, many of the issues for which market actors resorted to arbitration are now being codified in the proliferation of regional and multilateral treaties described above. These agreements will ultimately constrain the direction and freedom of arbitrators, though, at the same time, they often reflect the preferences of key actors in the global economy. But arbitration, along with the growth of industry codes of self-regulation, illustrates the importance of private sources of law – and private lawyers – in an increasingly liberalized global economy.

D) Conclusions

The evidence drawn from these brief case studies, combined with the broader considerations about the operation of the transnational legal field, clearly point to a growing role for private legal agents – and especially the corporate law firm – in shaping the making and application of law and regulation in the global economy. Neo-liberal globalization has provided new levels of autonomy and agency for private actors, especially corporations, providers of managerial and technical services to them, and other market institutions (such as capital markets). They have responded by taking the initiative in developing legal rules and standards to govern their own activities, and in shaping the rules promulgated by national states and regional and multilateral institutions to govern the globalizing economy. In this context, private providers of legal services have come to play an increasingly important role in developing rules, codes, and strategies that aid the attempts of private actors to design private and public regimes that protect and promote their perceived interests. We have seen, though, that lawyers are not just agents of clients, but play a crucial role in determining and changing the content of the law itself. Combined with the insight that legal rules embody and help reproduce structures of power and wealth, we can conclude that private lawyers are central actors in shaping the governance of the contemporary political economy.

In addition, I have identified three distinct paths by which private lawyers and law firms have been central in the creation and diffusion of the legal concepts, models, and practices which have helped constitute the contemporary transnational legal field. One is the primarily “private” route, exemplified by international arbitration, in which these actors reshape the ways in which autonomous forms of business dispute resolution operate and the rules that they apply. A second is a primarily public route, as shown in the case of the GATT/WTO agreements, in which private lawyers engage the power of a state or group of states (primarily the U.S. in this case) to rewrite international economic law, which then becomes the model to which other states must conform their own domestic laws, as in the area of intellectual property. The third is a more “mixed” route, in which private legal actors from the U.S. worked to transform the legal conceptions and norms in business practice in Europe, and thus helped prepare the ground for reforms in European public law adapted to these practices. We can see this kind of process operating in legal reforms in such areas as contract interpretation, regulatory policy, and competition policy. Each of these paths helps us gain a deeper understanding of the way the transnational legal field works, and through this a better sense of the evolving relationships between states and markets in the global political economy.

These findings, though supported by the theoretical models I have tried to elaborate, remain tentative suggestions as much as firm conclusions. In order to evaluate them in more detail, we need more research on the following topics:

- What is the nature of the relationship between corporate law firms and multinational corporations? How exactly do the former help shape the strategic behavior of firms, and how are do they translate corporate needs and interests into legal rules and norms? At present, the literature on these questions is just too thin. Focused and detailed case studies in particular areas of law will be required to flesh out this relationship.
- How involved are corporate lawyers and law firms in shaping the behavior of public actors on the transnational level? We know that there are close connections between these firms and those who work for states and international organizations, and there is anecdotal evidence that ideas and influence flow from law firms to public actors through these connections. Again, we need more focused case studies – such as the ones pursued by Sell – to move beyond the anecdotal level. In particular, we do not yet know much

about the role of private legal actors in the many bi-lateral processes, such as that between the U.S. and the EU, in which the processes of regulatory harmonization or mutual recognition take place (but see Shaffer, 2001)

- Do global law firms systematically promote models of law derived from the legal traditions of their home countries? There is some evidence that this is the case with U.S. and U.K. firms, and that they are often hired for precisely this expertise. Beyond the competition for business between these two legal communities, does the choice of U.S. as opposed to U.K. (or continental civil law models) really matter much for the distribution of power and wealth? Does the current power of the common law tradition in the transnational field have a distinctive impact on the governance of the global economy. In other words, how much impact do these issues of legal style and tradition have on the power of private corporate actors?

I hope that I have made the case that this kind of research is necessary for understanding the contemporary global political economy. But it is also crucial for those interested in changing current patterns of wealth and power. If transnational law and those who shape it help structure and legitimize the global political economy, we need to begin to develop ways of transforming the former if we hope to change the latter. Political actors, of course, have already recognized and acted upon this understanding. The struggles over intellectual property and investment rules surrounding the GATT/WTO treaties, and the continuing role of NGO's and other actors in attempting to incorporate concerns for human rights, worker health and safety, the rights of women, and environmental protection into the rules of the global political economy are all based on this kind of approach, and have had a significant (if not yet transformative) impact. Indeed, as in the case of states, corporations, and law firms, actors pushing these principles have learned that they need to work on both the public and private levels to have a real impact on the governance of the global economy. But this task, and the critical work necessary to support it, is only just beginning.

List of References.

- Abel, Richard L. 1994. Transnational Law Practice, *Case Western Reserve Law Review*, 44: 737-869.
- _____ and Philip S. Lewis. 1989. *Lawyers in Society, Volume Three: Comparative Theories*. Berkeley: University of California Press.
- Appelbaum, Richard P., William L.F. Felstiner, and Volkmar Gessner, eds. 2001. *Rules and Networks: The Legal Culture of Global Business Transactions*. Oxford: Hart Publishing.
- Arup, Christopher. 2000. *The New World Trade Organization Agreements: Globalizing Law Through Services and Intellectual Property*. New York: Cambridge University Press.
- Beaverstock, J.V., P.J. Taylor, and R.G. Smith. 1999. The Long Arm of the Law: London's Law Firms in a Globalizing World Economy. *Environment and Planning A*, 31: 1857-1876.
- _____. 2000. Geographies of Globalization: United States Law Firms in World Cities. *Urban Geography*, 21 (2): 95-120.
- Berger, Klaus Peter, ed. 2001. *The Practice of Transnational Law*. The Hague: Kluwer Law International.
- Berman, Harold J. and Colin Kaufman. 1978. The Law of International Commercial Transactions (*Lex Mercatoria*), *Harvard International Law Journal*, 19 (1): 221-277.
- Bermann, George A., Matthias Herdegen, and Peter L. Lindseth, eds. 2000. *Transatlantic Regulatory Cooperation*. New York: Oxford University Press.
- Braithwaite, John and Peter Drahos. 2000. *Global Business Regulation*. New York: Cambridge University Press.
- Cain, Maureen and Christine B. Harrington, eds. 1996. *Lawyers in a Postmodern World: Translation and Transgression*. New York: New York University Press.
- Clark, Ian. 1999. *Globalization and International Relations Theory*. New York: Oxford University Press.
- Cohen, Edward S. 2001. Globalization and the Boundaries of the State: A Framework For Analyzing the Changing Practice of Sovereignty. *Governance*, 14 (1): 75-97.
- Cutler, A. Claire, Virginia Haufler, and Tony Porter, eds. 1999. *Private Authority and International Affairs*. Albany, NY: State University of New York Press.

- de Lisle, Jacques. 1999. Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond. *University of Pennsylvania Journal of International Economic Law*, 20 (2): 179-309.
- De Ly, Filip. 1992. *International Business Law and Lex Mercatoria*. Amsterdam: North-Holland.
- _____. 2001. *Lex Mercatoria* (New Law Merchant): Globalisation and International Self-Regulation. in Appelbaum, et al., eds. *Rules and Networks...*, pp. 159-88.
- Dezalay, Yves. 1990. The Big Bang and the Law: The Internationalization and Restructuration of the Legal Field, *Theory, Culture & Society*, 7 (2-3): 279-93.
- _____ and Bryant G. Garth. 1996. *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order*. Chicago: University of Chicago Press.
- _____ and David Sugarman. 1995. *Professional Competition and Professional Power: Lawyers, Accountants and the Social Construction of Markets*. London: Routledge.
- Drake, William J. and Kalypso Nicolaidis. 1992. Ideas, Interests, and Internationalisation: “trade in services” and the Uruguay Round, *International Organization*, 46 (1): 37-100.
- Drolshammer, Jens and Michael Pfeifer, eds. 2001. *The Internationalization of the Practice of Law*. The Hague: Kluwer Law International.
- Fennell, Edward. 2000. Key Piece in the Global Jigsaw, *The Times (London)*, May 2, 2000.
- Finnemore, Martha and Stephen J. Toope. 2001. Alternatives to “Legalization”: Richer Views of Law and Politics, *International Organization* 55 (3): 743-58.
- Flood, John. 1991. Doing Business: The Management of Uncertainty in Lawyers’ Work, *Law and Society Review*, 25 (1): 41-71.
- _____. 1995. The Cultures of Globalization: Professional Restructuring for the International Market, in Dezalay and Sugarman (1995): 139-69.
- Fred, Sheryl. 2002. The Insider: The Sun Never Sets on the British (Global Law Firm) Market, *Corporate Legal Times*, (February): 15.
- Galanter, Marc and Thomas Palay. 1991. *Tournament of Lawyers*. Chicago: University of Chicago Press.

- Gawalt, Gerard W., ed. 1984. *The New High Priests: Lawyers in Post-Civil War America*. Westport, CT: Greenwood Press.
- Gilson, Ronald J. 1984. Value Creation by Business Lawyers: Legal Skills and Asset Pricing, *Yale Law Journal*, 94: 239-313.
- Greenwood, Justin and Henry Jacek, eds. 2000. *Organized Business and the New Global Order*. New York: St. Martin's Press.
- Higgott, Richard A., Geoffrey R. D. Underhill, and Andreas Bieler, eds. 2000. *Non-State Actors and Authority in the Global System*. London: Routledge.
- Horwitz, Morton. 1992 *The Transformation of American Law, 1870-1960*. New York: Oxford University Press.
- Hudec, Robert E. 1970. The GATT Legal System: A Diplomat's Jurisprudence, *Journal Of World Trade Law*, 4: 615-65.
- _____. 1999. The New WTO Dispute Resolution Procedure: An Overview of the First Three Years, *Minnesota Journal of Global Trade*, 8: 1-53.
- International Organization*, 54 (3), Special Issue: Legalization and World Politics, Summer, 2000.
- Jackson, John H. 2000. The Role and Effectiveness of the WTO Dispute Settlement Mechanism, *Brookings Trade Forum: 2000*: 179-236.
- Kettl, Donald F. 2000. *The Global Public Management Revolution*. Washington, D.C.: Brookings Institution Press.
- Knill, Christoph and Dirk Lehmkuhl. 2002. Private Actors and the State: Internationalization and Changing Patterns of Governance, *Governance*, 15 (1): 41-63.
- Koh, Harold Hongju. 1996. Transnational Legal Process, *Nebraska Law Review*, 75 (1): 181-207.
- _____. 1997. Why Do Nations Obey International Law?, *Yale Law Journal*, 106 (8): 2599-2659.
- Majone, Giandomenico. 1996. *Regulating Europe*. London: Routledge.
- Mattli, Walter. 2001. Private Justice in a Global Economy: From Litigation to Arbitration, *International Organization*, 55 (4): 919-47.
- McBarnet, Doreen. 1988. Law, Policy, and Legal Avoidance: Can Law Effectively

- Implement Egalitarian Policies?, *Journal of Law and Society*, 15 (1): 113-21.
- McCahery, Joseph and Sol Picciotto. 1995. Creative Lawyering and the Dynamics of Business Regulation, in Dezalay and Sugarman, 1995: 238-74.
- McConnaughay, Philip J. 2001. The Scope of Autonomy in International Contracts and Its Relation to Economic Regulation and Development, *Columbia Journal of Transnational Law*, 39: 595-656.
- Nelson, Robert L. and Laura Beth Nielsen. 2000. Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations, *Law and Society Review*, 34 (2): 457-94.
- Patchel, Kathleen. 1993. Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code, *Minnesota Law Review*, 78: 83-164.
- Picciotto, Sol. 1996/97. Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-Liberalism, *Journal of International Law and Business*, 17 (Winter/Spring): 1014-56.
- Pollack, Mark A. and Gregory C. Shaffer, eds. 2001. *Transatlantic Governance in the Global Economy*. Lanham, MD: Rowman and Littlefield Publishers, Inc.
- Powell, Michael J. 1993. Professional Innovation: Corporate Lawyers and Private Lawmaking, *Law and Social Inquiry*, 18 (3): 423-52.
- Ramsay, Iain. 2001. Commentary: The Politics of Commercial Law, *Wisconsin Law Review*, 2001: 565-75.
- Roht-Arriaza, Naomi. 1995. Shifting the Point of Regulation: The International Organization for Standardization and Global Lawmaking on Trade and the Environment, *Ecology Law Quarterly*, 22 (3): 479-539.
- Ronit, Karsten and Volker Schneider. 1999. Global Governance through Private Organizations, *Governance*, 12 (3): 243-66.
- Sassen, Saskia. 1996. *Losing Control?* New York: Columbia University Press.
- _____. 2000. The State and Economic Globalization: Any Implications for International Law?, *Chicago Journal of International Law*, 1: 109-116.
- _____. 2001 (1991). *The Global City, Second Edition*. Princeton: Princeton University Press.
- Sell, Susan K. 1999. Multinational Corporations as Agents of Change: The

- Globalization of Intellectual Property Rights, in Cutler, et al., 1999: 169-97.
- Shaffer, Gregory C. 2001. The Blurring of the Intergovernmental: Public-Private Partnerships Behind US and EC Trade Claims, in Pollack and Shaffer, 2001: 97-123.
- Shapiro, Martin. 1993. The Globalization of Law, *Indiana Journal of Global Legal Studies*, 1: 37-64.
- _____. 1998. Globalization of Freedom of Contract, in Harry N. Scheiber, ed. *The State and Freedom of Contract*. (Stanford, CA: Stanford University Press): 269-98.
- Silver, Carole. 2000. Globalization and the U.S. Market in Legal Services, *Law and Policy in International Business*, 31: 1093-1150.
- Spar, Debora L. 1997. Lawyers Abroad: The Internationalization of Legal Practice, *California Management Review*, 39 (3): 8-28.
- Stone, Diane. 2002 (forthcoming). The 'Knowledge Bank' and the Global Development Network. *Global Governance*.
- Strange, Susan. 1996. *The Retreat of the State*. New York: Cambridge University Press.
- Suchman, Mark C. and Mia L. Cahill. 1996. The Hired Gun as Facilitator: Lawyers and the Suppression of Business Disputes in Silicon Valley, *Law and Social Inquiry*, 21 (3): 679-712.
- Tagliabue, John. 2000. International Merger Wave Catches Europe's Law Firms, *The New York Times*, (August 4): C3.
- Teubner, Gunther, ed. 1997. *Global Law Without a State*. Aldershot, UK: Dartmouth.
- Trubek, David M, Yves Dezalay, Ruth Buchanan, and John R. Davis. 1994. Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas, *Case Western Reserve Law Review*, 44 (2): 407-98.
- Wiegand, Wolfgang. 1991. The Reception of American Law in Europe, *American Journal of Comparative Law*, 39: 229-48.
- _____. 1996. Americanization of Law: Reception or Convergence?, in Lawrence M. Friedman and Harry N. Scheiber, eds. *Legal Culture and the Legal Profession*, (Boulder, CO: Westview Press): 137-52.
- Wiener, Jarrod. 1999. *Globalisation and the Harmonization of Law*. London: Pinter.