Although Traders play an important role in the creation of transnational commercial norms, States remain the primary norm-making Actors

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Introduction

It is generally accepted that States are crucial norm-creators in the transnational commercial area, although opponents have a quite different opinion. Starting by giving a general definition of the term of "norm", one could say that norms are generally agreed, accepted standards, informal understandings. They are regarded as collective representations of acceptable group conduct, viewed also as cultural products (including values, customs, and traditions), which represent the individuals' knowledge of what they should do. They are conceived as a guide of appropriate behavior in a certain situation or environment. In the global economy, transnational commercial norms (social norms in a transnational commercial context) play an increasingly important role in transnational commercial transactions. In spite of the plethora of actors performing through transnational transactions on the international field, it seems that States continue to play the primordial role.

The State

Indeed, States have a double role in international agreements, being norm-creators in two ways: (a) acting by themselves, and (b) acting in collaboration with other States or entities. They exercise a dominant power in many ways. One could say that their most important influence is through legislative supervision, let alone their major contribution as members in international organizations and other forums, also exercising their power in economical operations as central banks or by participating in the trade of goods or in contractual arrangements regarding concessions. The States' sovereign rights generally offer them worldwide freedom, although international agreements restrict this independence. Admittedly though, by controlling natural resources (such as oil and gas), genetic resources and energy, States hold a royal position among international actors.

States also act in the form of governmental agencies or State enterprise imposing specific policies. The General Agreement on Tariffs and Trade (GATT), originally signed in 1947 and then in 1994, demonstrates the critical influence of States in transnational transactions, as well as other agreements such as NAFTA, ALALC, MERCOSUR, ACFTA, SAFTA. These agreements, regional or mega-regional (CETA, TPP, TTIP), bilateral or multilateral, govern gigantic trade and capital flows, cover issues concerning free trade, tariff-exemptions, investment protection, even cultural policies. Other examples of issues incorporated into such agreements include transparency, anti-corruption, competition. Some of these agreements have become crucial in the global context.

Agreements between extremely economically powerful States are criticized for their effect on protectionism, given that they usually benefit big transnational corporations negatively affecting small enterprises. On the other hand, some agreements emphasize the State's commitment to environmental protection, human rights, democracy, international security and the rule of law, thus demonstrating the State's political action. Another

similar aspect of this criticism is that States' agreements, and particularly the mega-regional ones (which include developed countries) exert pressure on other State members (e.g. WTO) for further trade liberalization. However, mega-regional agreements also include smaller States, which thus acquire a valuable position among other powerful developed States when defending their rights.

On the other hand, the States' biggest contribution as norm-creators on the global level is that States often aim at the private actors' protection when dealing, for example, with concessions and investment issues. Foreign investors are left without protection when dealing with States where a reliable protection is needed. Change in circumstances may expose private investors to undetermined risks and affect contractual commitments. For this reason, States act as the protectors of private actors. When investing in countries other than their home country, big companies run the risk of being confronted to the host State, because of the instability that may be caused as a result of the change of government, and, in general, because of the unknown field of action for the company. It looks like an unequal economic relationship; therefore, States regulate this possibility of conflict by trying to create favorable conditions for potential investors all over the world. The most noteworthy example are internationalization clauses, used in contractual agreements between States and private actors in order to ensure an international "binding" (?) power.

It may be seen from the above that States play their usual dominant role but also the role of actor/protector. An interesting interaction between States as public actors and norm-creators and private actors is when the former act/react to corporate policies against fraudulent practices which create a need for restoration and regulation, in the public interest. States consider it their obligation to adjust and impose regulations in order to restore a balance (e.g. SOX). This activity not only makes a difference in corporate governance, by imposing specific rules, but also provides for criminal sanctions in cases of non-compliance. Thus States play a regulatory role responding to inappropriate policies, while demonstrating their sovereign power.

Private Actors

As an important alternative to national legal norms, transnational commercial norms have become an indispensable part of the governance of transnational commercial transactions.[1] Trade associations that usually gather together members of their industry are among the most important private norm-producers which are trying, albeit not systematically, to codify their functions and produce the norms of the community. The development of transnational commercial norms is closely linked to the principles of party autonomy and freedom of contract.[2]

[1] *See e.g., G.P. Calliess and M. Renner, 'Between Law and Social Norms: The Evolution of Global Governance', 22 Ratio Juris260 (2009); A.S. Sweet, 'The New Lex Mercatoria and Transnational Governance', 13 Journal of European Public Policy 627 (2006).*

[2] *Cremades and S. Plehn, 'The New Lex Mercatoria and the Harmonization of the Laws of the International Commercial Transactions', 2 Boston University International Law Review 317, at 328 (1984).*

The scope of commercial norms and trade usages is quite broad and can be rather general. Examples are the principles of *pacta sunt servanda* and good faith. The procedure is quite simple. In repeated commercial transactions, certain contractual terms, such as the means of transport or the method of payment, are repeated in different contracts. Over time, these contractual terms become standardized, and the parties do not need to spend time over and over again to negotiate the details of such standardized contractual terms, because they are already admitted by a majority of merchants, usually by major corporations, and this gives them a bigger impact.

A different and interesting aspect of private actors' norms used by governments is when the latter are participating in international institutions such as the International Chamber of Commerce (ICC), whose purpose is to generalize traders' practice and issue unified trade standards for transnational merchants. Indeed, transnational commercial norms, for example, the UNIDROIT Principles of International Commercial Contracts, are designated by disputing parties as the governing rules in transnational commercial disputes.[3] The UNIDROIT Principles are regarded as a typical kind of private codification of transnational commercial norms. The drafting process of the UNIDROIT Principles is quite similar to CISG, but is a more obvious proof of the traders' real influence. A group of experts organized by UNIDROIT study transnational commercial norms and codify them into the UNIDROIT Principles, which can guide contractual terms, provided that they do not violate the mandatory rules of other States involved in the transaction (State's usual predominance). Since codified transnational commercial norms are not tied to State authority, the neutrality of these norms with regard to "nationality" can be guaranteed.

Transnational commercial norms, such as trade usages and commercial customs, are also frequently referred to by arbitrators when interpreting legal provisions and contractual terms.[4]

The power of private actors produces an increasing number of rules. Industries produce business norms through trade associations. Everyday practices become trade usages. The international Chamber of commerce (ICC) (a private organization) issues contract forms,[5] rules,[6] customs and practices[7], which are widely used. Law-making has been regarded as a product of the States. Do States have a competitor in this procedure? And if so, is this positive? Is their procedure different, slower maybe? Evaluating both procedures one could say than private actors act only for their own interest, while States mostly aim at the public interest. It has also been argued that traders do not merely produce norms and rules of conduct, but that, in doing so, they claim autonomy from

[3] *K.P. Berger, 'International Arbitral Practice and the UNIDROIT Principles of International Commercial Contracts', 46 The American Journal of Comparative Law 129, at 143-49 (1998); Drahozal (2000), above n. 3, at 128.*

[4] *C.R. Drahozal, 'Commercial Norms, Commercial Codes, and International Commercial Arbitration', 33 Vanderbilt Journal of Transnational Law 79, at 133 (2000).*

[5] *The Incoterms.*

[6] *The ICC Uniform rules for Demand Guarantees.*

[7] *The uniform Customs and practice for documentary Credits.*

States.[8] This is not exactly true, because States allow commercial parties to design normative regimes used in their contracts under the concept of free trade. Indeed, to traders, freedom of trade means freedom of contract. Thus, in their transactions, traders create business norms, presenting their preferences and ensuring their interests. So it is not exactly a question of autonomy. It is also worth noting that, although they use private norms in their contracts, traders are at the same time referring to the applicable law in the event of a dispute, which shows a commitment to the official legal system, remaining focused within the framework of the applicable law.[9] The reward for this conduct by the traders is the State's willingness to take into account private actors' needs, albeit within limits, since the most recent version of the Rome I Regulation has eliminated the possibility of choosing non-State law as the applicable law.

In recent years, scholars have started a debate on whether transnational business norms could be characterized as law (*lex mercatoria*). The most impressive list of rules of *lex mercatoria* is the Transnational Law Digest & Bibliography (TLDB), which is compiled on a continuous basis by the Center for Transnational Law (CENTRAL) at the University of Cologne (Germany), under the guidance of Prof. Klaus Peter Berger.[10] This new *lex mercatoria* is not a self-sufficient legal system independent from the State, a law without a State as some proponents like to say. Rather, market participants freely choose between State norms and non-State norms as applicable norms. It would be better to accept that the State represents the political system, public order, and that international commerce represents the economic system. Of course, this does not mean that the State ignores non-State law. It does not, but it treats it in a special way: it "reforms" these norms by transferring them into its own system, retaining control over areas that are undoubtedly globalized and play a decisive role in international trade as well. Thus transnational commercial norms and *lex mercatoria* are not interchangeable terms, though their meaning and scope are similar.[11]

This "law" created and administered by commerce itself, which is autonomous from the State, can certainly not be considered as law, but simply as private actors' norms which become crucial when incorporated in the principles of institutions as model law, although without having any binding force. That the new *lex mercatoria* is not autonomous from the State but rather contains both State and non-State norms and institutions becomes even clearer when looking at commercial contracts containing both private norms and legislative provisions from the national laws of the contracting parties.

Modern States provide transnational merchants with considerable freedom in designing their contracts according to their own specific needs. The parties rely on public mechanisms and, for example, resolve contract disputes in national courts on the basis of national legal norms, but they can also use private mechanisms and, for example,

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[8] Private international Law and Global Governance Fernandez Arroyo p. 2.

[9] Private international Law and Global Governance Fernandez Arroyo p. 3.

[10] Available at http://tldb.uni-koeln.de/

[11] For the debate on lex mercatoria, K.P. Berger, The Creeping Codification of the New Lex Mercatoria (2010). See also R. Michaels, 'The True Lex Mercatoria: Law beyond the State', 14 Indiana Journal of Global Legal Studies 447 (2007). M.L. Musttill, 'The New Lex Mercatoria: The First Twenty-Five Years', 4 Arbitration International 86 (1988).

settle contract disputes in international arbitration institutions on the basis of transnational commercial norms.[12] This is exactly what is being called Freedom of Trade.

The origins of many legal norms created by States can be found in traders' norms. During the procedure of legal norm-making, States take into consideration the existing status of usual contractual terms, their meaning, and purpose. The development of both social and legal norms in the field of transnational mercantile practice has pluralized the regulatory framework for transnational commercial transactions. Norms can be uncodified or codified, depending on whether they are created and enforced by public or private mechanisms. Nevertheless, it is crucial that States begin to take into account the role of traders' norms in the governance of transnational commercial transactions and evaluate even the uncodified norms. Moreover, international legal norms in international treaties have played the role of supranational legal norms. In a strict sense, these international legal norms are not directly legally binding as national legal norms. The relative success of CISG is evidence of this. The drafters of CISG studied, evaluated transnational mercantile practice and existing transnational commercial norms, and also found a balance between different national legal provisions. There remain transnational commercial norms unwritten or yet uncodified. These too are considered to be commercial customs and trade usages, repeated in transnational commercial transactions and followed by transnational merchants, even when they are not explicitly specified in contracts.[13]

Interaction – The game is still on

Legal norms are dependent on legislative, administrative and judicial organs. They are established by legislators in the form of statutory laws, while judges in the common law tradition produce legal norms through their decisions. Whereas traders' norms are relatively flexible, legal norms are normally more precise, explicit, and coercive. But the creation and enforcement of private actors' and State actors' norms are closely linked to each other. Many State legal norms have their roots in private sector (trader) norms, and *vice-versa*, and private actors' norms can become legal norms through the process of incorporation. In this way a common basis is created for them to complement each other in governing transnational commercial transactions. Both mechanisms can be employed by the parties in a mixed manner. Private and public mechanisms are not only competing with each other but also complementing one another in the fields of norm production, dispute resolution, and contract enforcement, and this produces a creative field for governing transnational commercial transactions.[14]

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[12] G.P. Calliess, W. Konradi, H. Nieswandt, F.P. Sosa & T. Dietz, 'Transformations of Commercial Law: New Forms of Legal Certainty for Globalized Exchange Processes?', in A. Hurrelmann, S. Leibfried, K. Martens & P. Mayer (eds.), Transforming the Golden Age Nation State (2007) 83, at 83-108.

[13] R. Goode, 'Usage and Its Reception in Transnational Commercial Law', 46 International and Comparative Law Quarterly 1, at 7 (1997).

[14] G. Teubner, 'Hybrid Laws: Constitutionalizing Private Governance Networks', in R. Kagan, M. Krygier & K. Winston (eds.), Legality and Community: On the Intellectual Legacy of Philip Selznick (2002) 311, at 311-31. See also G.P. Calliess, 'The

When dealing with transnational commercial norms in private or public mechanisms, creation and enforcement follow different procedures that provide them with different strengths and drawbacks. Their interaction creates a common basis and they can become efficient tools. The absence of any supranational government leads to difficulties in establishing supranational legal norms. But codified transnational commercial norms are being recognized and followed by more and more transnational merchants in practice.

Conclusion

The increasing usage of codified transnational commercial norms is slowly forming a basis for their further development. While States are the starting point of world politics, they are not alone on the global stage. The proliferation of actors as traders has inaugurated a new model – that of modulator in international relations. The proliferation of non-State actors has launched a global partnership/collaboration between private and public bodies. States and non-State organizations have worked together in the same field and elaborated frameworks for cooperation, succeeding in providing greater order and stability, all aimed at peaceful cohabitation in the planet. The harmonization of these new systems will require legal codification and more collaboration with intergovernmental organizations which take into account the needs and purposes of transnational traders when codifying the norms that have been used by them for a long time period.[15]

Although this debate may present a scientific interest, it does not have a substantial dimension. Traders are not interested in creating formal law, but rather in finishing their business with success and without any disputes. Traders do not actually wish to claim autonomy from laws, but rather to amend them by including in international treaties elements that may help in the smooth performance of contractual commitments, so they willingly subject themselves to State legal norms.

Maintaining a balance between States and private actors remains an ambitious target. The need for harmonization, stabilization and systematization has proven to be crucial. Although both parties may act diligently, their different interests, or maybe their lack of fully common purposes, place barriers on the road to absolute collaboration. However, this collaboration should be sought, because, after all, we are all part of the same planet and our priorities should be the welfare of people, the protection of human rights and the environment, and the repeal of any practice which may be detrimental to the valuable human existence.

Making of Transnational Contract Law', 14 Indiana Journal of Global Legal Studies 469, at 469-83 (2007); Sweet, above n. 5, at 627-46; P. Zumbansen, 'Piercing the Legal Veil: Commercial Arbitration and Transnational Law', 8 European Law Journal 400, at 400-32 (2002); F.K. Juenger, 'The Lex Mercatoria and Private International Law', 60 Louisiana Law Review 1133, at 1133-1150 (2000).

[15] *The Rise of Non-State Actors in Global Governance: Opportunities and Limitations Thomas G. Weiss D. Conor Seyle Kelsey Coolidge, + 24.*